Note from the Attorney General's Office:

1919 Op. Att'y Gen. No. 19-798 was overruled by 2019 Op. Att'y Gen. No. 2019-005.

1919 Op. Att'y Gen. No. 19-647 overruled by 1983 Op. Att'y Gen. No. 83-036.

1919 Op. Att'y Gen. No. 19-510 was overruled by 1987 Op. Att'y Gen. No. 87-070.

1919 Op. Att'y Gen. No. 19-045 was overruled in part by 1981 Op. Att'y Gen. No. 81-011.

1.

STATE MEDICAL BOARD—AUTHORITY TO INVESTIGATE PROFITEERING OF PHYSICIANS FOR SERVICES DURING INFLUENZA EPIDEMIC.

In re—Question of authority of the State Medical Board to investigate alleged profiteering practice of physicians for services during the influenza epidemic, construing sections 1262 *et seq., of the General Code.*

HELD: That the State Medical Board has no authority in law to conduct an investigation of such charges.

COLUMBUS, OHIO, January 18, 1919.

The State Medical Board, DR. H. M. PLATTER, *Secretary, Columbus, Ohio.*

GENTLEMEN:—You request my opinion as follows:

> "The State Medical Board, at its meeting on January 7, in response to a request from the Cleveland Academy of Medicine, voted to hold a special meeting in the city of Cleveland to investigate the question of profiteering practice—overcharge of physicians for services during the epidemic of influenza, meeting to be held January 21.
>
> "It was the intention of the State Medical Board to conduct the investigation and submit a report.
>
> "Is the State Medical Board under present statutes empowered to make such investigation?"

Consideration of the present State Medical Board act, former simliar acts and decisions thereunder, convinces me that the original legislative purpose did not include regulation of physicians and surgeons after they were granted certificates to practice.

The act of 1858 was entitled an act "to protect the citizens of Ohio from empiricism," etc., (65 O. L., 146).

The later enactments, significantly entitled acts "to regulate the practice of medicine," etc., have enlarged the scope and powers of the State Medical Board, although at present no specific enumeration of its powers are made.

However, the Supreme Court of Ohio has defined its purpose and duties generally as follows:

> "To prevent those from engaging in the practice of that profession who, from lack of proper knowledge or want of moral rectitude, are unfit to be entrusted with its important and responsible duties."
>
> "The powers of the board bear a close analogy to those of boards of school examiners, who are authorized to grant certificates to teach in the public schools to applicants who are found, on examination, to possess the necessary qualifications and furnish satisfactory evidence of good moral character; and to revoke any certificate granted, for intemperance, immoral conduct, or other good cause."
>
> *France* vs. *State,* 57 O. S., p. 19.

Section 1275 of the General Code gives the State Medical Board ample power to refuse licenses to persons guilty of such misconduct as therein defined, and also provides for revocation of licenses previously granted, for like causes.

Section 1275-1, General Code, provides for investigation of such matters "which the board has authority to investigate" without specifically defining those matters. and outlines the procedure therefor; provides for taking depositions, appeal, etc.

Considering the purpose of the act, as gathered from its present provisions, its antecedent legislation and the construction which the courts have placed on it, I am of the opinion that the investigation referred to in section 1275, General Code, relates to matters of individual cases, either on applications for admission or on charges of misconduct after admission to practice, and do not warrant or authorize other and more general investigations.

I have also considered the suggestion made by you in personal conference, viz.: that such profiteering may be construed as "grossly unprofessional or dishonest conduct." This position is untenable, as the statute itself defines the above quoted term in such manner as to plainly exclude the alleged profiteering.

This opinion is given with the understanding that your inquiry contemplates a general investigation and that you are not referring to or inquiring about hearings on specific charges filed against individual physicians or surgeons.

Answering your question specifically, I am, therefore, of the opinion that the State Medical Board is without authority in law to conduct the examination referred to in your inquiry.

Very truly yours,
JOHN G. PRICE,
Attorney-General.

2.

TAXES AND TAXATION—WHEN TAXPAYER NOT SUBJECT TO PENALTY—COUNTY TREASURER NOT FURNISHED WITH DUPLICATE.

A taxpayer may not be subjected to the payment of a penalty, where the treasurer can not accept taxes because he has not been furnished with the duplicate.

COLUMBUS, OHIO, January 18, 1919.

HON. ROGER D. HAY, *Prosecuting Attorney, Defiance Ohio.*

MY DEAR SIR:—You have submitted the question as to whether or not, when a county treasurer has not been furnished the tax duplicate and can not accept taxes for that reason, property owners may be subjected to a penalty for failing to pay their taxes at the time fixed by law. I answer this question in the negative.

The proposition has been well established that before any taxpayer can be held to be delinquent and subjected to a penalty, he must have had an opportunity to have paid his taxes.

See Wheeling & Lake Erie Co., vs. Stewart, 13 O. C. C. 359.
Cooley on Taxation, p. 901.

Very truly yours,
JOHN G. PRICE,
Attorney-General.

3.

PROSECUTING ATTORNEY—DUTIES IN REGARD TO ENFORCEMENT OF GAME LAWS—NO ADDITIONAL COMPENSATION.

It is the duty of prosecuting attorneys, upon proper request made and under the direction of the Attorney-General, to institute and prosecute, in justice court and elsewhere, all necessary actions for the enforcement of the game laws of Ohio; and for discharging such duties a prosecuting attorney is not entitled to demand or receive any compensation in addition to the salary fixed by law.

COLUMBUS, OHIO, January 18, 1919.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I have your letter of January 10, in which you say, in part:

> "On several occasions request has come that I should care for cases brought before justices of the peace to enforce the provisions of the game laws. I find no provision of the statute imposing that duty on the prosecuting attorneys, but a few days since communicated with the department of agriculture, asking if an allowance could be made."

In particular, you call attention to section 1460 G. C. (107 O. L. 490), which reads in part as follows:

> "Sec. 1460. All fines, penalties and forfeitures arising from prosecutions, convictions, confiscations, or otherwise under this act, unless otherwise directed by the secretary of agriculture shall be paid by the officer by whom the fine is collected to the secretary of agriculture and by him paid into the state treasury to the credit of a fund which shall be appropriated biennially for the use of the secretary of agriculture. * * *."

You raise the question whether, under the authority of said section, the board of agriculture could cause an allowance to be made prosecuting attorneys for services performed by the latter in connection with prosecutions before justices of the peace under the game laws, said allowance to be paid out of fines, penalties and forfeitures resulting from such prosecutions and to be received and retained by said prosecuting attorneys in addition to their regular salaries fixed by law. By "game laws" is meant, of course, laws pertaining to the protection, preservation and propagation of song and insectivorous birds, game birds, game animals and fish within the state and in and upon the waters thereof.

Section 2916 G. C. directs the prosecuting attorney to 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 and court of appeals. That he is under no legal duty to appear for the state in criminal cases tried before other and inferior tribunals was held in Gilliam vs. State, 7 O. N. P. (N. S.) 484. See also Railroad Co. vs. Lee, 37 O. S. 479, 480.

However, since section 2916 G. C. was passed and since the cases above cited were decided, the legislature has made great changes in the game laws. I call your attention particularly to two sections, to-wit, sections 1106 and 1390 G. C., which read as follows:

> "Sec. 1106. (107 O. L. 465). Upon the request of the secretary of agriculture, the attorney-general, or under his direction, the prosecuting

attorney of any county, shall aid in any investigation, hearing or trial had under the laws which the board of agriculture or the secretary is required to administer, and shall institute and prosecute all necessary actions or proceedings for the enforcement of such laws, and for the punishment of all violations thereof, arising within the county in which he was elected."

"Sec. 1390. (107 O. L. 486). The secretary of agriculture shall have authority and control in all matters pertaining to the protection, preservation and propagation of song and insectivorous birds, game birds, game animals and fish within the state and in and upon the waters thereof. He shall enforce by proper legal action or proceeding the laws of the state for the protection, preservation and propagation of such birds, animals and fish; shall establish fish hatcheries and propagate fish therein or in any other manner for the waters of the state, and, so far as funds are provided therefor, shall adopt and carry into effect such measures as he deems necessary in the performance of his duties."

From the foregoing statutes it clearly appears that, upon proper request made, it is the duty of the attorney-general, and under his direction likewise the duty of the prosecuting attorney of any county, to aid in the investigation, hearing or trial of prosecutions based on the game laws of Ohio; and to institute all necessary actions or proceedings for the enforcement of such laws.

It is true that section 1106, supra, does not specifically mention the court of the justice of peace, nor any other court, as the tribunal in which the attorney-general or prosecuting attorney shall appear to enforce the laws therein mentioned. In view of the fact, however, that section 1464 G. C. gives a justice of the peace, mayor or police judge, final jurisdiction within his county in a prosecution for a violation of any provision of the laws relating to the protection, preservation or propagation of birds, fish and game, it would seem that those tribunals would naturally be the place where the attorney-general and prosecuting attorney could best perform the duties which said section 1106 G. C. requires them to perform. I am therefore of the opinion that it is the duty of the prosecuting attorney, when so directed by the attorney-general, to conduct, in the court of a justice of peace, and elsewhere, all necessary actions or proceedings to enforce the laws hereinabove mentioned.

It being established that it is the duty of prosecuting attorneys to aid in the enforcement of the game laws, as above stated, the next question is whether there is any authority in law for the payment to prosecuting attorneys of special compensation for such services. By "special compensation" is meant compensation in addition to the regular salary of the prosecuting attorney fixed by law.

Section 3003 G. C. prescribes the annual salary of the prosecuting attorney. The last sentence of that section provides:

"Such salary shall be paid in equal monthly installments, from the general fund, and shall be in full payment for all services required by law to be rendered in an official capacity on behalf of the county or its officers, whether in criminal or civil matters."

This section, it will be observed, is silent upon the question of the prosecuting attorney's right to demand and receive compensation for services performed by him on behalf of state departments or state officers. Is such silence to be taken as a recognition by the legislature of such a right? I think not.

The rule is now well settled that where the salary of a county officer is fixed

by law, no additional compensation can be paid for the performance by him of official duties, unless the intention of the legislature to authorize such additional compensation is clearly evident. Mere silence does not argue such intention.

In the case of State ex rel. Enos vs. Stone, et al., 92 O. S. 63, 65, Wanamaker, J., referring to what is now section 2977 G. C., said:

> "This section, as well as the sections following, clearly indicates the settled purpose and fixed policy of the state to pay county officials a fixed lump sum, no matter what additional duties may be imposed on them from time to time, unless there is a clear purpose to add further compensation for such further duties."

See also Chapter XX of Throop on public officers, particularly section 478, where it is said:

> "* * * that where a compensation is thus given, whether by salary, or by fees, or by commissions or otherwise, it is in full of all his official services; and he is not entitled to demand or receive any additional compensation from the public or from an individual, for any service within the line of his official duty; although his duties have been increased, or entirely new duties have been added since he assumed office * * *."

Specifically answering your question, I am of the opinion that it is the duty of prosecuting attorneys, upon proper request made and under the direction of the attorney-general, to institute and prosecute, in justice court and elsewhere, all necessary actions or proceedings for the enforcement of the laws of the state pertaining to the protection, preservation and propagation of song and insectivorous birds, game birds, game animals and fish within the state and in and upon the waters thereof; and further that for discharging such duties a prosecuting attorney is not legally entitled to demand or receive any compensation in addition to the salary fixed by law.

Very truly yours,
JOHN G. PRICE,
Attorney-General.

4.

STATE TREASURY—TRANSFER OF MONEY FROM SPECIAL FUND TO ANOTHER SPECIAL FUND OR GENERAL REVENUE FUND UNAUTHORIZED BY JOINT RESOLUTION OF GENERAL ASSEMBLY—TRANSFER BY A LAW.

Authority to transfer money from a special fund provided by law in the state treasury to another special fund or to the general revenue fund cannot be conferred by joint resolution.

Such transfer may be authorized by a law, excepting possibly in the case of proceeds of a special tax, as to which Query.

COLUMBUS, OHIO, January 18, 1919.

HON. W. T. DONALDSON, *Budget Commissioner, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion upon the following question:

> "Can money be transferred from a special fund provided by law in the state treasury to another special fund or to the general revenue fund

by a joint resolution of the two houses of the General Assembly, or must such transfer be authorized in an act?"

The special funds in the state treasury owe their existence to laws. Such laws either specify the purposes to which only the moneys in the special fund shall be applied, or authorize designated state officers or departments to apply them to such particular objects as such officer or department may select, within the scope of some general activity. Typical statutes of these kinds are sections 1094, 1221 and 1261-61 of the General Code. There are, of course, several other sections besides those mentioned.

To take money from one fund and place it in another would be to violate such statute *pro tanto*. Therefore such a result could only be accomplished through the medium of a legislative act of sufficient dignity to repeal or suspend the operation of such statutes to the extent necessarily involved. Inasmuch as a joint resolution is not a law, since it is not subject to the approval of the governor nor to the exercise of the reserved power of the people to order a referendum, it is manifest that such a joint resolution cannot be efficacious to authorize such a transfer.

In connection with your request I feel bound to refer to Article XII, section 5 of the constitution, which provides, in part, that—

"Every law imposing a tax, shall state, distinctly, the object of the same, *to which only, it shall be applied.*"

If the special fund from which the transfer inquired about in your letter is to be made is one created by taxation, this section would seem to preclude its use for any other special purpose, so long at least as the purpose for which it was created remains as one of the enterprises of the state government. I do not desire, however, to pass finally upon this point, inasmuch as I am not advised as to whether or not it is desired to transfer any of the proceeds of taxation.

My conclusion is that the transfer about which you inquire can be authorized, if at all, only by law.

Very truly yours,
JOHN G. PRICE,
Attorney-General.

5.

APPROVAL OF BONDS OF DEFIANCE CITY SCHOOL DISTRICT IN THE AMOUNT OF $30,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, January, 21, 1919.

6.

ROADS AND HIGHWAYS—APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN ASHTABULA, COLUMBIANA, HIGHLAND, MIAMI AND MONROE COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, January, 21, 1919.

7.

ARTICLES OF INCORPORATION OF THE GUARDIAN CASUALTY COMPANY OF CLEVELAND, OHIO, APPROVED.

COLUMBUS, OHIO, January, 21, 1919.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The articles of incorporation of The Guardian Casualty Company, of Cleveland, Ohio, which you submitted to me today for examination and certification under section 9512 G. C. are found by me to be in accordance with the provisions of Chap. I, of Sub.-Div. II, Div. III, Title IX of the General Code, and not inconsistent with the constitution and laws of this state and of the United States.

I herewith return the articles to you with my certificate endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

8.

SYNOPSIS FOR REFERENDUM OF PROHIBITION AMENDMENT APPROVED.

COLUMBUS, OHIO, January 24, 1919.

MR. L. H. GIBSON, *Mgr., The Ohio Home Rule Association, 908 Huntington Bank Bldg., Columbus, Ohio.*

DEAR SIR:—You have submitted to me under date of January 17 for my certificate a synopsis to be embodied in a referendum petition, said synopsis in words and figures being as follows:

> "Senate joint resolution No. 4 adopted by the General Assembly of Ohio on January 7, 1919, is the action of the General Assembly ratifying an amendment to the Constitution of the United States of America proposed by the Sixty-Fifth Congress. Said amendment provides that after one year from its ratification the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation

thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is prohibited."

I, John G. Price, Attorney General of the State of Ohio, do hereby certify that the foregoing synopsis is a truthful statement regarding the purpose and contents of said Senate Joint Resolution No. 4.

Respectfully,
JOHN G. PRICE,
Attorney-General.

9.

APPROVAL OF BONDS OF CITY OF NEWARK IN THE AMOUNT OF $30,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, January 25, 1919.

10.

APPROVAL OF BONDS OF THE CITY OF NEWARK IN THE AMOUNT OF $15,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, January 25, 1919.

11.

STATE MEDICAL BOARD—REMOVAL OF TONSILS BY USE OF KNIFE OR SURGICAL INSTRUMENT—WHAT CONSTITUTES MAJOR SURGERY.

1. *Removal of tonsils by use of knife or other surgical instrument for their amputation constitutes major surgery as defined in section* 1288 *G. C.* (107 *O. L.*, 152).

2. *The granting of a license to practice medicine to a physician, under which he established a practice, prior to the enactment of new regulatory statutes, imposing reasonable additional conditions upon the right to practice medicine, conferred*

no vested right on such licensee which will exempt him from the operation of such later statutes.

(*State* vs. *Gravett*, 65 *O. S.*, 289).

COLUMBUS, OHIO, January 25, 1919.

DR. H. M. PLATTER, *Secretary State Medical Board, Columbus, Ohio.*

DEAR SIR:—You request my opinion as follows:

"I am directed by the State Medical Board to submit to you for an opinion the following case:

"N. A. U., of ————, Ohio, received a certificate from the State Medical Board to practice osteopathy under date of July 5, 1916. Some time since, complaint was received at this office to the effect that Mr. U. was engaged in the practice of major surgery, in that he was operating for the removal of tonsils.

"Mr. U. appeared before the State Medical Board at its meeting on January 7, 1919, and claimed that his certificate issued to him prior to the definition of major surgery in the amendment to the osteopathic act passed on March 21, 1917, entitled him to such practice for the reason that prior to such definition, tonsillectomy was regarded, as shown by medical text books, as a minor surgical operation.

"The State Medical Board desires your opinion—

"*First*—Is the removal of tonsils major surgery as defined by the osteopathic amendment?

"*Second*—Does the fact that Mr. U. obtained his certificate before the date of this amendment, entitle him to perform such operations?"

Considering your questions in the order in which they are stated:

From the language used in your letter, and from personal conferences with you, for the purposes of this opinion, I am considering the removal of tonsils by use of a knife or other surgical instrument for the amputation of tonsils, and any other operative procedure is not here considered.

"Major surgery" since March 21, 1917, has been defined as

"All operative procedures requiring the use of the knife or other surgical instruments for the opening of any natural cavity of the body or the amputation of any member or part of the body."

(107 O. L., 152).

From this comprehensive definition, I am of the opinion that the removal of tonsils in the manner above referred to now constitutes major surgery.

The second question challenges the general power of the state to regulate the practice of medicine and involves its power to change its regulations relative thereto, and thereby impose new conditions on previously licensed and established practitioners. The facts stated are:

1. Mr. U. was duly licensed to practice osteopathy July 5, 1916.
2. A license to practice osteopathy confers no privilege to perform major surgical operations.
3. At the time Mr. U.'s license was granted and until March 21, 1917, the removal of tonsils did not constitute major surgery. (For the purpose of this opinion, as suggested by you in personal conference, it is conceded

that prior to the amendment of March 21, 1917, the medical text books did not regard tonsillectomy as major surgery, as claimed by Mr. U.)

4. On March 31, 1917, the legislature so defined major surgery as to include the removal of tonsils by the use of a knife or other surgical instruments in their amputation.

5. Under the limitations of the osteopathic license and the statutory definition enacted in 1917, an osteopath is not now privileged to remove the tonsils in the manner above stated.

From these facts, and the pertinent provisions of law relating thereto, it is clear that Mr. U. would have no privilege to practice tonsillectomy unless it be by reason of his having received his certificate at a time when such certificate carried with it the privilege of practicing tonsillectomy.

In other words, his present claim to the rights to practice tonsillectomy may be said to depend on the proposition that the granting to him of a license, at a time when such practice of tonsillectomy was permitted, conferred upon him a vested right which the legislature may not afterwards take from him.

An examination of the authorities bearing upon the powers of the state in such matters, and the so-called right to practice medicine, shows:

"From remote times the practice of medicine has been regulated by law, to a greater or less extent."

Culbertson, Medical Jurisprudence, p. 18.
Citing: Rose vs. College of Physicians, 3 Salk., 17; 6 Mod., 44.

"The state has a right to determine under what conditions and under what circumstances its citizens shall be entitled to practice medicine."

American Digest, Century edition, volume 39, p. 918.

People vs. Fulda, 52 Hun., 65; 45 N. Y. Supp., 945.

"* * * and fully sustains the power of the states, under the national constitution, to make and enforce, for the protection of their people, all reasonable regulations and conditions calculated to insure proper qualifications of those who would engage in the practice of medicine," etc.

France vs. State, 57 O. S., 24.

From these and other authorities it is quite clear that the state has ample power to regulate the practice of medicine.

The right to practice medicine, considered as a right, has also received the attention of many courts.

While the practice of medicine is often spoken of as a right, it is not, strictly speaking, a right, but a mere privilege upon the exercise of which the state may impose conditions such as it deems advisable."

State vs. Edmunds, 127 Ia. (4th branch of syllabus) 333; 101 N. W., 431.

As to the right or power of the state to impose new conditions:

"The same reasons which control in imposing conditions, upon com-

pliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected."

Dent vs. State of West Virginia, 129 U. S., 626.

This has been regarded as one of the leading cases on this subject and has been followed and approved in a later case also decided by the United States Supreme Court in Hawker vs. People, of New York, 107 U. S., 1002.

It is also stated as a general proposition that the state may take into account the advance of medical science, new and changing conditions and impose new conditions upon the practice of medicine. 30 Cyc., 1548.

The Supreme Court of Ohio has also held:

"One who has an established practice in the healing of diseases may be required to conform to such reasonable standard respecting qualification therefor as the General Assembly may prescribe, having in view the public health and welfare."

State vs. Gravett, 65 O. S., 289 (2d branch of syllabus).

Also:

"In the enactment of legislation of this character, the General Assembly may take account of the advance of learning and provide for the public health and safety by such reasonable and proper measures as increased knowledge may suggest; and to make such legislation effective, one having an established practice, and one contemplating practicing, may be required to conform to the same standard of qualification. This conclusion seems to be justified by the considerations involved, as it is by the authority of the State vs. Gardner, supra, and Dent vs. West Virginia, 129 U. S., 114."

State vs. Gravett, 65 O. S., 309 (of opinion).

These and other authorities which I have examined lead me to the conclusion that the fact that Mr. U. obtained his certificate before the date of this amendment (107 O. L., 152) does not entitle him to perform such operations.

Respectfully

JOHN G. PRICE,

Attorney-General.

12.

SLAUGHTERED ANIMALS—NO AUTHORITY TO PAY INTEREST ON SAID CLAIMS—HOW INTEREST MAY BE AUTHORIZED.

1. *The payment of interest on claims for animals slaughtered under section* 1114 *G. C., is not authorized under sections* 1115 *et seq. G. C.*

2. *The legislature, by a two-thirds vote thereof, may authorize payment of such interest, under section* 29, *Article II, of the Constitution of Ohio.*

COLUMBUS, OHIO, January 26, 1919.

HON. C. W. KING, *Chairman Finance Committee, Columbus, Ohio.*

In re: House bill, interest on damages, destruction of animals.

Your letter to me dated January 15, 1919, is as follows:

> "Please find enclosed copy of bill which was introduced in the 82d General Assembly, and which was not allowed on account of being introduced with the sundries bill. In this bill is the contention of the finance committee as to whether they would be allowed to pay interest on same. Please give us your opinion at as early a date as possible."

While the exact question on which you desire my opinion does not seem to be clearly indicated in your letter, I learn from personal conference with you and another member of the committee that the question on which you desire my opinion is whether allowance may be made of interest on the schedule of claims referred to in your letter, the claims referred to being claims for the value of animals slaughtered under authority of section 1114 G. C. As I understand you, the only question which you raise in this matter is, whether interest may be included in allowing the claims as stated in the schedule referred to.

Section 1114 G. C. provides for the killing, disposition and appraisement of animals having an infectious malady.

Section 1115 G. C. establishes the basis of appraisement of and compensation for animals killed under authority of section 1114 G. C.

Section 1116 G. C., more particularly referring to the manner of payment of claims for such compensation, is as follows:

> "All claims of owners of animals killed under the provisions of this act, as fixed by the appraisers or as fixed upon review by the board of agriculture as herein provided *shall be paid immediately* from funds appropriated by the General Assembly for that purpose."

The purpose of the act, as stated in the first part of section 1114 G. C., is to prevent

> "the spread of any dangerously contagious or infectious disease among the live stock of the state."

It has also been held in similar legislation that the expenditure of the public funds for the payment of private claims or expenses incidental thereto, must be expressly authorized before the same may be done legally.

It would appear to be the legislative intention that as soon as claims of animals killed under this act are finally ascertained the same should be paid immediately.

I note in your letter the statement that the claims were not allowed by the 82d General Assembly on account of being included in the sundries bill. However, that does not change the fact that the claim, under authority of section 1114, and when duly certified, was an obligation against the state at that time.

It might be claimed that the individuals listed on the schedule which you enclose having presented and had their claims duly allowed, were entitled to interest upon equitable considerations or under the general statute providing that all creditors shall be entitled to receive interest on all money after the same shall become due, etc. This statute, however, in a claim against the state for interest, was before our Supreme Court in Ohio ex rel vs. Board of Public Works, 36 O. S., 409, where the court held:

> "In the absence of a statute requiring it, or a promise to pay it, interest cannot be adjudged against the state for delay in the payment of money."
> (4th branch of syllabus)
>
> "It is also insisted by the defendants, that the claim of relators, being one against the state, interest thereon cannot be allowed.
>
> "On the other hand, it is claimed that the relators are within the terms and meaning of the statute which provides 'That all creditors shall be entitled to receive interest on all money after the same shall become due, either on bond, bill, promisory note, or other instrument of writing, or contract for money or property.' That the words of this statute are broad enough to embrace the claim of relators is not disputed; but it is contended that the state is not embraced within the general words of a statute, and can be held to be within the purview of a statute only when so declared expressly or by necessary implication.
>
> "The doctrine seems to be, that a sovereign state, which can make and unmake laws, in prescribing general laws intends thereby to regulate the conduct of subjects only, and not its own conduct."
>
> * * * * * * *
>
> "In view of these principles, we must hold that the state, as a debtor, is not within the purview of the statute above quoted, and cannot be adjudged to pay interest upon any claim against her in the absence of a promise, expressed or implied, to do so; and it is not claimed that any such promise has been made to relators. Attorney General vs. Cape Fear Navigation Co., 2 Ired, Eq. 444; Auditorial Board vs. Arles, 15 Texas, 72; State vs. Thompson, 5 English, (Ark.) 61; 9 Opinions of Attorney General, 57."

Section 29 of Article II of the Constitution of Ohio is pertinent:

> "No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; *nor shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law,* unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

The Supreme Court in Fordyce vs. Godman, auditor of state, 20 O. S., p. 14, in construing this constitutional provision, and a statute similar in principle to that contemplated here, says:

> "The language of the latter part of the section of the constitution

which we have quoted seems to be plain and explicit; leaving little room for interpretation or construction. It clearly prohibits the payment of any money 'on *any* claim, the subject matter of which shall not have been provided for by pre-existing law, unless,' etc. We see no reason for interpreting this language in any other sense than that which lies upon the surface, and which the terms used naturally import. In such a sense we may assume that it was understood by the body of the people, through whose votes it became a part of the constitution."

Considered, then, as a claim, the subject matter of which has been provided for by pre-existing law, viz., section 1114 G. C., and the payment of which may be legally provided for by an appropriating statute similar to the act of 1915 (106 O. L., 466), my opinion is that the payment of these claims for interest is not authorized by said section and cannot now be acknowledged as an obligation against the state upon that theory, and that is the theory of the proposed legislation as explained to me in the personal conferences above referred to.

However, by appropriate legislation concurred in by a majority of not less than two-thirds of the members of each branch of the General Assembly, these claims may be legally acknowledged as valid obligations against the state and the constitutional requirement may thus be fulfilled.

My opinion, therefore, is that upon this theory, and in this manner, the General Assembly may legally provide for the payments of interest on these claims.

Respectfully
JOHN G. PRICE,
Attorney-General.

13.

APPROVAL OF FINAL RESOLUTION FOR IMPROVEMENT OF ROAD IN AUGLAIZE COUNTY.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, January 27, 1919.

14.

INSURANCE—DISAPPROVAL OF ARTICLES OF INCORPORATION OF HOBART INSURANCE COMPANY—A MUTUAL PROTECTIVE ASSOCIATION.

1. *The articles of incorporation of a mutual protective association organized under authority of section 9593 et seq. General Code, must disclose that all of the incorporators possess the qualifications prescribed by those sections, viz.: that they*

are "persons of lawful age," and are "residents of this state, or an adjoining state and owning insurable property in this state."

2. *The articles of incorporation of a mutual protective association organized under authority of sections* 9593 *et seq. General Code, must specify the kinds of property proposed to be insured with a reasonable degree of certainty and definiteness. A statement in the articles that the property to be insured shall be "property not classed as extra hazardous,' is too general and indefinite in meaning.*

3. *The articles of incorporation of a mutual protective association organized under authority of sections* 9593 *et seq. General Code must, by appropriate language, limit or confine the property to be insured to insurable property "in this state."*

4. *When the incorporation of a company and the contents of its articles of incorporation, such as a mutual protective association, are specially provided for by law, a statement in the articles that the company is formed under the general corporation laws of the state, is erroneous and misleading. The reference if any should be to the special provisions which authorize the incorporation.*

5. *The names of the incorporators of a corporation organized under the laws of Ohio, should appear in the notarial certificate of acknowledgment as they are subscribed to the articles of incorporation.*

COLUMBUS, OHIO, January 27, 1919.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of January 13, 1919, with which you enclosed the proposed articles of incorporation of Hobart Insurance Company for approval by me, was duly received.

Omitting the signatures of the incorporators and the notarial acknowledgments and clerks' certificates, the proposed articles read as follows:

"THESE ARTICLES OF INCORPORATION OF HOBART INSURANCE COMPANY

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, not for profit, under the general corporation laws of said state, do hereby certify:

First. The name of said corporation shall be HOBART INSURANCE COMPANY.

Second. Said corporation is to be located at Fremont, in Sandusky county, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of enabling its members to insure each other against loss or damage by fire or lightning, cyclones, tornadoes or wind storms, hail storms and explosions from gas, and to enforce any contract, not inconsistent with the insurance laws of Ohio, which may be by them entered into, by which those entering therein shall agree to be specifically assessed for incidental purposes, and for the payment of losses, which may occur to its members. Its territory for insurance shall be the State of Ohio, and the property that may be insured by this company shall be property not classed as extra hazardous.

In Witness Whereof, We have hereunto set our hands, this 26th of December, 1918."

The proposed articles disclose the intention of the incorporators to organize a mutual protective association under sections 9593 et seq. G. C.

Section 9593 G. C. (107 O. L. 696) provides, among other things, that

"Any number of persons of lawful age, not less than ten in number, residents of this state, or an adjoining state and owning insurable property in this state, may associate themselves together for the purpose of insuring each other against loss by fire and lightning, cyclones, tornadoes or wind storms, hail storms and explosions from gas, on property in this state, * * *. Such associations may only insure farm buildings, detached dwellings, schoolhouses, churches, township buildings, grange buildings, farm implements, farm products, live stock, household goods, furniture, pleasure and utility vehicles, motor vehicles; steam, gas, gasoline and oil engines; motor trucks, tractors, electric motors, electric appliances, lighting systems and other property not classed as extra hazardous and such property may be located within or without the limits of any municipality; provided that an association whose membership is restricted to persons engaged in any particular trade or occupation and its insurance confined in any particular kind or description of property may insure property classed as extra hazardous and located in any county or counties in this state; * * *."

Section 9594 G. C. provides that

"Such persons shall make and subscribe a certificate setting forth therein:

1. The name by which the association is to be known.
2. The place which shall be regarded as its center or business office.
3. The object of the association, which shall only be one or more of the objects set forth in the preceding section (9593), and to enforce any contract by them entered into whereby the parties thereto agree to be assessed specifically for incidental purposes and for the payment of losses which occur to its members. The kinds of property proposed to be insured and the casualties specified in such preceding section proposed to be insured against, also must be specified in such certificate."

I am unable to approve the proposed articles of incorporation for the following reasons:

1. The incorporation of mutual protective associations is specially provided for by sections 9593 et seq. G. C., and not by what is commonly known and referred to as the general corporation laws of the state. (Sections 8623-8743 G. C.) By section 8737 G. C., one of the general corporation statutes, it is in substance provided that the general statutes do not apply when special provision is made in subsequent chapters, but that the special provision shall govern, unless it clearly appears that the provision is cumulative. And in State vs. Live Stock Co., 38 Ohio St., 348, it was held that the general corporation laws do not apply to the organization of insurance companies, which are specially provided for in other statutes. The incorporation of mutual protective associations being especially provided for by sections 9593 et seq. G. C. as I have already stated, it necessarily follows that persons desiring to organize themselves into such an association must comply with the statutes governing the incorporation of such companies, both in form and substance.

The recitals in any proposed articles should be such as to clearly disclose that the subscribers possess the qualifications required by section 9593, namely, that they are of lawful age, residents of this state, or an adjoining state and owning insurable property in this state. 3 Op. Atty. Gen. 530; in re Mulholland Benevolent society, 10 Phila. 19; in re Enterprise Mutual Beneficial association, 10 Phila. 380; in re St. Ladislaus association 128 N. Y. S. 561. See also, Baltzel vs. Church, 110 Md. 244, 261; Boatsmen's Bank vs. Gillespie, 209 Mo. 217.

There is also judicial expression to the effect that when the statute confers authority to incorporate upon persons possessing certain qualifications, such as citizenship or residence, it is the duty of the secretary of state to inquire into the question, and that when the duty is imposed upon an officer to pass upon the sufficiency of an application for articles of incorporation, such officer should require strict compliance with these conditions as to residence, etc. of the incorporators. See 1 Thompson, Corporations, section 177.

I also suggest in this connection that if reference is desired to be made in the articles to the Ohio law or statutes under which the subscribers are associating together, the misleading or erroneous statement that they are forming a corporation "under the general corporation laws of said state," should not be used, but instead, a statement to the effect that they are associating themselves together as a mutual protective association under authority of sections 9593 et seq. G. C., should be employed.

2. The contents of the articles of incorporation of a mutual protective association, other than the introductory part, are specifically set forth in section 9594 G. C. supra. Tested by this section, the proposed articles are defective, in that paragraph "third" of the articles does not specify the "kinds of property" proposed to be insured, or confine the property to be insured to insurable property "in this state." It was perhaps intended to meet these statutory requirements by the last sentence in the paragraph referred to, reading as follows:

> "Its territory for insurance shall be the State of Ohio, and the property that may be insured by this company, shall be property not classed as extra hazardous."

It is my opinion, however, that the provision just quoted does not meet the statutory requirement that the "kinds of property * * * must be specified" in the articles. The only attempt at specification is found in the expression, "property not classed as extra hazardous," which are too general and indefinite in meaning, and are not specific. To specify, means "to mention specifically or explicitly, to state in full and explicit terms, or explicitly and in detail, name, expressly, distinctly and particularly."

See 4 Words and Phrases (2nd series) p. 656. "To point out, to particularize, or to designate by words one thing from another." See Words and Phrases, p. 6607.

My conclusion on this point also finds support in section 9593 General Code which enumerates certain insurable property, and also in a former opinion of the Attorney-General. See Op. Atty. Genl. 1910-11, p. 245.

3. As I have already indicated, the proposed articles do not clearly limit or confine the property to be insured to insurable property "in this state." It was perhaps intended to impose this limitation or restriction by the words, "Its territory for insurance shall be the State of Ohio," but in my opinion the language used is open to the possible interpretation that property outside of Ohio might be insured if the contract for insurance is made in the state. The legislature, in enacting section 9593 G. C. which confers corporate power on mutual protective associations, emphasized the limitation "in this state," by using the expression at least three times, and this section, being a grant of corporate power, must be strictly construed in favor of the state.

The proposed articles should clearly and expressly limit or confine the property to be insured to insurable property "in this state." See 1915 Op. Atty. Genl., Vol. 2, p. 1783.

4. I also direct your attention to the signature of Harcene Hobart and to the

notarial certificate of C. R. Gording. While it is probable that the first name in the fifth line of the certificate is intended for "Marcene," the names do not exactly correspond, and the conflict should be corrected by the notary.

I return to you herewith the proposed articles of incorporation without my approval, for the reasons above stated.

Respectfully
JOHN G. PRICE,
Attorney-General.

15.

MUNICIPAL CORPORATION—UNION CEMETERY—HOW EXPENSE OF APPROPRIATING ADDITIONAL LAND MUST BE PAID.

When two or more municipalities unite for the purpose of establishing a union cemetery under favor of sections 4183 *et seq., the municipality making the appropriation of the land therefor has no authority to provide for and pay the entire expense of the proceeding and damages awarded, and thereafter collect from the other its proportionate share. Each municipality must directly provide and pay its own proper portion of such expense and damages.*

COLUMBUS, OHIO, January 31, 1919.

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

GENTLEMEN:—Your letter of January 21, 1919, requesting my opinion upon the questions embodied in the following statement of facts, was duly received.

> *"Statement of Facts.*
>
> "The villages of Northfield and Macedonia, Ohio, operate a joint cemetery constituted under the laws of this state. It becoming necessary to secure additional ground bordering upon the present cemetery, a contract has been entered into, or rather consummated by condemnation proceedings in court, for additional ground. These condemnation proceedings were finished about October of 1918.
>
> In the regular semi-annual appropriation ordinance of the village of Northfield, which is the larger village of the two, for the first half of the year 1919 an amount of money was appropriated by the village council from the public service fund with which to pay for the newly acquired property. It was the intention of the village to pay this amount in full from the public service fund, as stated, of the village of Northfield, and then said village was to bill the village of Macedonia its proportionate share of the cost, and upon the collection of said claim, the amount collected would reimburse and replenish the public service fund of the village of Northfield.
>
> The question was, is such appropriation from the public service fund legal and regular?
>
> Question 2. Is it proper that the village of Northfield pay the entire amount and then collect the Macedonia portion, or should each village directly pay its proper portion?"

The establishment and management of union cemeteries by two or more municipal corporations is specially provided for by sections 4183 et seq. G. C.

By virtue of section 4183 G. C.;

"The councils of two or more municipal corporations, or of such corporation or corporations, and the trustees of a township or townships, when conveniently located for that purpose, may unite in the establishment and management of a cemetery, by the purchase or appropriation of land therefor, not exceeding in extent one hundred acres, to be paid for as hereinafter provided."

It is then provided that when an appropriation of land for such purpose becomes necessary, it must be made by the municipality having the largest number of inhabitants at the last federal census; and that "in making the appropriation" it acts for itself and the other municipality uniting with it.

The expense of the appropriation and the damages awarded are provided for by section 4188 G. C. which reads as follows:

"The expense of the purchase, or of the proceedings in the case of appropriation, and the damages awarded, or both, shall be borne by the corporations and townships in proportion to the property of each on the duplicate, for taxation. The amount of bonds issued by each in any case, for such cemetery purposes, shall be in the same proportion, and the percentage of taxation for all such cemetery purposes shall be the same in the corporations and townships, but moneys in the hands of the trustees of the cemetery, derived from any source, not needed to keep in order or embellish the grounds, by resolution of the council and trustees of the municipalities and townships interested, may be applied to the expenses of purchase, or appropriation and damages awarded, or both, in securing additional lands for the cemetery."

It is then provided in 4189 G. C. that the cemetery so owned in common shall be under the control and management of the municipal councils, and that the authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation, and authority is conferred by section 4190 G. C. to pass and enforce all ordinances necessary to carry into effect the provisions contained in the statutes relating to such cemeteries.

Provision is then made for joint meetings and the purpose thereof by sections 4192 and 4193 G. C., as follows:

"Sec. 4192. In case of a union for cemetery purposes between a municipal corporation and a township, the council of the corporation and the trustees of the township shall have a joint meeting at the council chamber of the corporation, on the day of the first regular meeting of the council in the month of May of each year, for the purpose of determining the rate of tax to be levied upon the taxable property of the corporation and the township for the purposes herein required. Upon the passage of a joint resolution by a majority of the members of the council and the trustees, fixing the rate of taxation, the clerk of the corporation shall certify such rate to the auditor of the county for assessment and collection. If there is more than one municipal corporation or township united for such purposes, the councils and trustees of the townships shall become such joint body with the same powers as if there had been one such corporation and township, and the clerk of the corporation containing the greatest number of inhabitants shall certify to the auditor as above provided, the rate of taxation."

"Sec. 4193. The trustees of such township or townships, or the council

or councils of such municipal corporation or corporations may at any time call a joint meeting of the council or councils and the trustees of the township or townships, on a reasonable notice given by either, for the purpose of making joint rules and regulations for the government of the cemetery, or changing them, and making such orders as may be found necessary for the application of moneys arising from the sale of lots, taxes, or otherwise."

At any such joint meeting provided for by sections 4192 and 4193 G. C., and under the express authority of section 4193-1 G. C., a board of cemetery trustees consisting of three members may be elected, of which one or more must be members of each of the municipal councils represented at the meeting. The board of trustees so elected is clothed with all powers and must perform all the duties exercised and performed by directors of public service of municipalities under sections 4161 to 4168 inclusive of the General Code.

The only section of the group of statutes specially applicable to union cemeteries which expressly, and in terms, makes provision for the payment of the expenses of appropriation proceedings and the damages awarded, is section 4186 G. C. quoted above.

The provisions of that section that the expense of the appropriation and the damages awarded shall be borne by the municipalities "in proportion to the property of each" on the duplicate for taxation, that the amount of bonds issued "by each" municipality shall be in the "same proportion," and that the "percentage of taxation for all such cemetery purposes shall be the same in the corporation," in my opinion, clearly indicate and impose the duty upon each municipality to raise its own proper share of the total amount. There is certainly no authority in this or any other statute specially applicable to such cemeteries empowering one of the municipalities to raise the whole amount, and then render an account to and collect from the other municipality its proportionate share, and I can find no general statute or court decision authorizing any such transaction. I am of opinion, therefore, that the village of Northfield has no authority to pay the entire amount of the expenses of the appropriation proceedings and the damages awarded, and then collect from Macedonia its proportionate share, but, on the contrary, that each village must directly provide and pay its own portion of the total amount. Northfield was only authorized to act for Macedonia in "making the appropriation" of the land, and not in providing for and paying the expenses and damages referred to. Nothing herein contained is intended to deny the right to apply money in the hands of cemetery trustees to the payment of expenses and damages in acquiring additional lands, as provided in section 4188 G. C.

Respectfully
JOHN G. PRICE,
Attorney-General.

16.

CANAL LANDS—APPROVAL OF SALE OF PORTION OF HOCKING CANAL TO FRANK E. WILSON MANUFACTURING CO. OF LANCASTER, OHIO.

COLUMBUS, OHIO, February 1, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am returning with my approval duplicate copies transmitted to me with your letter of January 25, 1919, of resolutions providing for the sale of a portion of the abandoned Hocking canal, formerly the Lancaster Lateral canal, to the Frank E. Wilson Manufacturing Company, of Lancaster, Ohio.

Respectfully
JOHN G. PRICE,
Attorney-General.

17.

APPROVAL OF BOND ISSUE OF EUCLID VILLAGE SCHOOL DISTRICT IN SUM OF $190,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 1, 1919.

18.

APPROVAL OF BOND ISSUE OF VILLAGE OF SOUTH EUCLID, OHIO, IN THE SUM OF $52,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 1, 1919.

19.

WHEN INJUNCTION WILL LIE TO PREVENT USE OF EXPLOSIVES IN EXCAVATING.

Injunction will lie to prevent the use of high-power explosives in making excavations of rock and earth, where the result of such use will be to throw dirt and

stone upon the premises of another, thereby greatly endangering the lives of persons there residing and inflicting substantial damages to buildings thereon situate.

COLUMBUS, OHIO, February 3, 1919.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge the receipt of your letter of January 16, in which you say:

> "The board is in receipt of the following letter from General W. R. Burnett, commandant of the Ohio Soldiers' and Sailors' Home, Sandusky, Ohio:
>
> 'The Ohio Board of Administration, Columbus, Ohio.
>
> Gentlemen: I respectfully call your attention to the following conditions at Wagner's stone quarries. They are now stripping the soil from the rock, and preparing to blast very close to the home hospital and power plant. If they are allowed to proceed it will greatly endanger the lives of the members while walking around the home grounds, also disturb the peace and happiness of the old men in the hospital, and will no doubt do great damage to the water tower and buildings of the home. If there is any law to prevent them from blasting so near to the home buildings, it should be attended to at once. Respectfully yours,
>
> The Ohio Soldiers' and Sailors' Home,
>
> (Signed) W. R. BURNETT, Commandant.'
>
> Will you kindly advise as soon as possible whether any steps can be taken to prevent blasting so near the home buildings?"

Speaking of the use of high-power explosives for blasting purposes, the Supreme Court of Ohio, in the case of Louden vs. City of Cincinnati, et al., 94 O. S. 144 said (syllabus):

> "The use of high-power explosives in making excavations of rock and earth is a lawful method of accomplishing that purpose, but where dirt and stone are thrown by the force of the blast upon the property of another, or where the work of blasting is done in such proximity to adjoining property that regardless of the care used the natural, necessary or probable result of the force of the explosion will be to break the surface of the ground, destroy the buildings, and produce a concussion of the atmosphere, the force of which will invade the adjoining premises, injuring the buildings thereon and making them unfit and unsafe for habitation, the person or corporation making use of such explosives will be liable for the damage proximately and naturally resulting therefrom, irrespective of the question of negligence or want of skill in the blasting operations. * * *."

The case just mentioned was in the nature of an action for damages, but authorities are also numerous on the proposition that, for the prevention of injuries of the character described in the above quoted syllabus, injunction will lie.

Assuming that the facts relative to the situation in question are precisely as stated in the commandant's letter of inquiry hereinabove set forth, I am of the opinion that recourse to the remedy of injunction would be a proper step to prevent the consequences anticipated in said letter.

Very respectfully,

JOHN G. PRICE,

Attorney-General.

20.

STATE MEDICAL BOARD—NO PROVISION FOR REHEARING OR NEW TRIAL FOR PHYSICIAN WHOSE CERTIFICATE HAS BEEN REVOKED.

There is no legal provision for a new trial or rehearing by the State Medical Board of Ohio of a charge against a physician under section 1275 et seq. G. C., after said board has finally decided said charge.

COLUMBUS, OHIO, February 4, 1919.

The State Medical Board, DR. H. M. PLATTER, *Secretary, Columbus, Ohio.*

GENTLEMEN:—This is to acknowledge the receipt of your letter of January 15, 1919, as follows:

> "The state medical board, at its meeting on January 7, after notice and hearing, revoked the certificate to practice medicine and surgery in Ohio of L. W. H., of ————, for grossly unprofessional and dishonest conduct, the specific charge being the circulation of advertising matter containing extravagantly worded statements intended or having a tendency to deceive and defraud the public.
>
> In answer to my notification of the revocation of his certificate, his attorney, Myer Geleerd, has submitted a motion for re-hearing and new trial. This is at variance with former procedure, and I beg to inquire whether there is any provision in the statutes for the consideration of such motion."

The state medical board of Ohio derives its power and exercises its authority by virtue of a delegation of some of the police powers inherent in the state. As said by the Supreme Court in France vs. The State, 57 O. S., 19:

> "The power to pass upon the qualifications required must necessarily be committed to some board or body other than the legislature, and may be, not inaptly, characterized as administrative rather than judicial within the meaning of the constitution."

While the Supreme Court has thus said that its powers may, not inaptly, be termed administrative rather than judicial, in the same case, on page 17, Judge Williams, in the opinion, says:

> "Undoubtedly, the authority conferred by the provisions referred to includes the power to examine into and decide questions requiring the exercise of judgment, such as might, not inappropriately, be conferred on a court."

Therefore, although its powers and duties were held to be non-judicial, in the sense that the act empowering the state medical board did not offend the Constitution by conferring judicial power on the state medical board, yet they are quasi judicial in effect, and may well be likened to such agencies as the board of county commissioners, in passing on compensation and damages in road cases, or, as stated in 57 O. S., 19, to the board of school examiners, and are subject to the same limitations as these boards and commissions, and in the respect that their powers are

limited have some of the attributes of courts of limited and special jurisdiction as distinguished from courts of general jurisdiction.

By analogy, the decision of the courts, as to the powers of courts of special and limited jurisdiction, are applicable. In one of these cases, Davis vs. Davis, 11 O. S., 392 (of the opinion) the court say:

> "His (probate court) duties under the statute terminate with that entry and no further action on his part is contemplated. When the entry (of judgment) is once made, in conformity with the statute, his authority in regard to it is at an end."

This was a will election case, in which the probate judge, after the final decision therein, attempted to set aside and vacate the judgment, the power to do which was denied because the probate court was held to be a court of limited and special jurisdiction and, as such, had only such authority as was expressly conferred or necessarily implied in such cases.

Again, in considering the same principle of law in Sapp vs. Sapp, 14 C. C. (n. s.) 270, in holding that the common pleas court was without authority to reopen a case (divorce) which it had finally heard and determined, the court said:

> "The judgment of the court, when so rendered, is not subject to change or modification as in other cases, *there being no time fixed for filing a motion for a new trial,* nor providing for otherwise contesting said judgment and decree," etc.

The act of the legislature, delegating to municipal corporations, commissions or officers, the police power of the state, is the source of the authority of the corporation or person to whom the police power is delegated to exercise the same.

As said by Judge Cooley, in Cooley, Constitutional Limitations, pp. 227 and 228:

> "The charter, or the general law, under which they exercise their powers, is their constitution, in which they must be able to show authority for the acts they assume to perform. They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority", and "can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant."

Concerning powers which are implied, as necessary to the exercise of those powers expressly conferred, the same author, on page 78, says:

> "The implication under this rule, however, must be a necessary, not a conjectural or argumentative one."

Therefore, unless the laws under which the state medical board exercises its power, either expressly or by necessary implication, provide for a new trial, the state medical board is not authorized to re-open and re-hear a case it has once finally determined.

Section 1275-1 G. C. defines the manner of procedure in its hearings, the issuing of process, taking of depositions, etc.

Section 1276 G. C. provides for appeal. In none of these statutes relating to the state medical board are there any provisions for a new trial. An appeal to the common pleas court, with a right to prosecute error to the court of appeals, is provided for in section 1276 G. C.

With these ample provisions for appeal and review of the state medical board's decision by the courts, it cannot be said that the power to rehear its decisions is necessarily implied from the express power to hear and decide in the first instance.

Answering your question specifically, there is no provision in the statutes for the consideration of the motion referred to in your letter.

Respectfully
JOHN G. PRICE,
Attorney-General.

21.

PROSECUTING ATTORNEY—HOW APPOINTMENT OF AN ATTORNEY TO ASSIST SAID OFFICER IN CIVIL AND CRIMINAL CASES CAN BE MADE—FORMER PROSECUTOR NOT DISQUALIFIED.

The Common Pleas Court and the Court of Appeals are authorized to appoint an attorney to assist the prosecutor in the trial of criminal cases pending in such courts, respectively, when in the opinion of the court the public interest requires it. Section 13562 *G. C.*

The predecessor of the incumbent is not disqualified for such appointment by the fact of his prior incumbency in the office.

Section 2412 *G. C. empowers the county commissioners, upon the written request of the prosecuting attorney, and if it deems it for the best interest of the county, to employ legal counsel to assist the prosecuting attorney in the prosecution or defense of a civil action to which the county commissioners or other county officers or boards is a party.*

COLUMBUS, OHIO, February 4, 1919.

HON. F. M. CUNNINGHAM, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Under date of January 16, 1919, you requested my opinion as follows:

> "I desire to inquire whether or not there is any legal objection to the appointment by the court of my predecessor in office to assist in the trial of criminal cases where the crime was committed during his incumbency in the office, and could the fact that indictment had been returned in such a case during my predecessor's term of office disqualify him from accepting such appointment.
>
> I would also like to inquire whether or not the county commissioners can legally employ my predecessor to assist in the trial of civil cases where the cause of action or where the suit was brought during his term of office.
>
> I fully appreciate the desirabilty of saving as much expense in the employment of counsel as possible, but there are one or two cases in which I have felt it might be for the best interests of the county to request the appointment of assistant counsel or employment of such counsel. And in view of the fact that my predecessor already has in mind the facts in one or two of these cases, I had thought it not improbable that he might be selected."

Authority for the appointment, by the court, of an attorney to assist the prose-

cuting attorney in the trial of cases pending is found in section 13562 G. C. which provides:

> "The common pleas court and the court of appeals, whenever it is of the opinion that the public interest requires it, may appoint an attorney to assist the prosecuting attorney in the trial of a case pending in such court, and the county commissioners shall pay such assistant such compensation for his services as such court approves and to them seems just and proper."

This action makes appropriate provision for appointment by the court of an attorney to assist in the prosecution of criminal actions pending in such court, when in the opinion of the court the public interest requires such appointment, and also governs the method of providing for the compensation of an attorney so appointed.

I know of no provision of law that would disqualify your predecessor for the appointment to assist in the prosecution of such cases in which the offense may have been committed or the indictment returned during his incumbency.

Your further inquiry as to the authority of the county commissioners to employ your predecessor to assist in the trial of civil cases invokes a consideration of section 2412 G. C. which provides:

> "If it deems it for the best interest of the county, upon the written request of the prosecuting attorney, the board of county commissioners may employ legal counsel to assist the prosecuting attorney in the prosecution or defense of any suit or action brought by or against the county commissioners or other county officers and boards in their official capacity."

From this section it appears that upon the written request of the prosecuting attorney, the board of county commissioners are authorized to employ legal counsel to assist in the prosecution or defense of suits brought by or against the county commissioners or other county officers and boards in their official capacity when it is deemed by the board of commissioners to be for the best interests of the county.

A previous enactment providing for appointment by the county commissioners of legal counsel with the functions of a public officer was held unconstitutional, but there appears to be no constitutional objection to this statute in its present form.

I therefore advise that the common pleas court and the court of appeals are authorized to appoint an attorney to assist the prosecutor in the trial of criminal cases pending before such courts respectively, in accordance with the provisions of the statute above cited, and that your predecessor would not be disqualified from accepting such appointment from the fact of his previous incumbency in the office, and further, that upon your written request, the county commissioners would be empowered, if they deem it for the best interests of the county, to employ an attorney to assist in the prosecution or defense of cases pending against them or other county officer or board, and that your predecessor would be qualified to act in that capacity under proper employment.

Respectfully,
JOHN G. PRICE,
Attorney-General.

22.

APPROVAL OF BOND ISSUE OF BELLEFONTAINE CITY SCHOOL DISTRICT IN THE SUM OF $20,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 4, 1919.

23.

DISAPPROVAL OF BOND ISSUE OF NEW CONCORD VILLAGE SCHOOL DISTRICT IN THE SUM OF $10,000.00.

COLUMBUS, OHIO, February 4, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

Re: Bonds of New Concord village school district in the sum of $10,000.00, for the purpose of repairing and furnishing a school house in said district.

GENTLEMEN:—I herewith return to you, with my disapproval, the transcript of the proceedings of the board of education and other officers of New Concord village school district, relative to the above bond issue.

This issuance of bonds was disapproved by my predecessor in office in Opinion No. 1287, dated June 17, 1918, for the reason that the resolution authorizing the issuance of said bonds provided that no installment of interest should fall due until March 5, 1920.

On January 25, 1919, the transcript of said proceedings was resubmitted for the Attorney General's approval, with the following statement of the clerk of the board of education of said district:

"As we understand it, lapse of time has automatically corrected this defect."

I am in accord with the opinion of my predecessor in office, that this bond issue was invalid, for the reason set forth in his opinion. I am also of the opinion that lapse of time has not, and can not, cure this defect. If the resolution authorizing the issuance of these bonds was invalid when passed, any lapse of time will certainly not cure this defect.

I am of the opinion further that said bond issue should not be approved because the notice required by law was not given for the holding of the election on August 17, 1917, under authority of which said bonds were issued.

For the reasons above given, I advise that you decline to accept said bonds.

Respectfully,

JOHN G. PRICE,

Attorney-General.

24.

ROADS AND HIGHWAYS—TOWNSHIP TRUSTEES WITHOUT AUTHORITY FOR COMPLETING ROAD IMPROVEMENT BY ASSESSMENT AGAINST ABUTTING PROPERTY WHERE PROCEEDINGS WERE INITIATED IN DIFFERENT MANNER.

Where township trustees, by virtue of then-existing sections 7033 *to* 7052, *which made no provision for raising by assessment any part of the necessary funds, initiate and bring to completion proceedings for a township road improvement, including the raising of funds by a bond issue authorized by vote of the township electors and redeemable through a general tax levied on taxable property of the township—after the completion of which proceedings said sections were repealed; such trustees upon discovering that the funds so raised are insufficient for the doing of the improvement work, are without authority to raise additional funds by proceedings under subsequently-effective sections* 3298-5 *to* 3298-13 *providing that the cost of a township road improvement may be paid in whole or in part—as determined by the trustees in their resolution declaring the necessity of the improvement—by assessment against real estate abutting upon or contiguous to the road to be improved.*

COLUMBUS, OHIO, February 4, 1919.

HON. H. J. THRASHER, *Prosecuting Attorney, Chardon, Ohio.*

DEAR SIR:—Replying to your communication of December 27, 1918, directed to my predecessor, submitting for opinion the following:

> "In June, 1915, the trustees of Montville township, said county, by resolution, created said township of Montville into a road district, to be known as, 'The Montville Road District'. Following this, by resolution, said trustees made provision for the improvement of a certain public road within the limits of said township road district, describing said road and further provided said improvement to be by grading, draining, curbing, culverting, bridging and paving the same with brick, cement or concrete; further a resolution by said trustees was passed, providing for the submitting to the qualified electors of said township, the question of said road improvement and the issuing and selling bonds therefor in the sum of $30,000.00 and a special election was held on the 15th day of July, 1915, regularly to determine said question of improvement and bond issue, and said proposal was carried in said election by vote of eighty-seven (87) yeas to twenty-four (24) nays in favor of such proposition.
>
> The bonds were issued and sold.
>
> By reason of the high cost of material and labor, said sum of $30,000.00, together with the $6,000.00 to be furnished by the commissioners of said county, was found inadequate, and what we are desirous to know now, is by virtue of section 3298-5 to section 3298-13 of the General Code, as enacted under the White-Mulcahy act in June, 1917, will it be possible for trustees of said township by unanimous vote, to provide for the additional cost of said road above the $36,000.00, by placing a special assessment against the abutting property or properties situated one-half (½) mile or one (1) mile on either side of said road."

Your statement shows that the proceedings heretofore had were begun in June, 1915, and completed in July of 1915; hence, I take it that such proceedings were

had under favor of sections 7033 to 7052 General Code. All of these sections were repealed as of the first Monday in September, 1915 (105-106 O. L. 574).

Said section 7033 as it was in force in June and July of 1915 read as follows (103 O. L. 475):

> "The board of trustees of a township, when in their opinion, it is expedient and necessary, and for the public convenience and welfare, to improve the public ways of the township, in whole or in part, by grading, macadamizing or graveling, paving with brick, cement or other suitable material, curbing, draining, culverting, and bridging, by resolution, may create the township into a road district for the purpose of improving the public ways therein, or any number of them. If, in the township, there is a municipal corporation or corporations, such trustees, by resolution, may erect the portion or portions of the township not included within the corporate limits of a municipal corporation, into such road district. In like manner the trustees may erect an election precinct, or part thereof, in the township, into such road district."

The sections following section 7033 up to and including section 7052 as in force in June and July, 1915, provided in general for the improvement of roads in the districts created under the terms of section 7033 by the issuing of bonds therefor after the question had been submitted to the electors; the employment of an engineer; the letting of the improvement work upon competitive bids; the sale of the bonds, and the levy of a general tax upon the taxable property of the road district for the payment of the cost and expense of the improvement. Nothing whatever is provided in the sections in question as to assessment against the real estate of abutting or contiguous owners.

Turning to sections 3298-5 General Code and following (107 O. L. 75), which in their original form became effective as of the first Monday in September, 1915 (105-106 O. L. 574), we find a plan whereby township trustees may, without the presentation of a petition, improve a public road and arrange for the payment of the cost and expense thereof by any of the methods provided in section 3298-13 General Code. Said section 3298-5 reads as follows:

> "The township trustees may, without the presentation of a petition, take the necessary steps to construct, reconstruct, resurface, or improve a public road, or part thereof, as hereinbefore provided, upon the passage of a resolution by unanimous vote declaring the necessity therefor. The cost and expense thereof may be paid in any one of the methods provided in section 3298-13 of the General Code, as may be determined by the township trustees in said resolution."

Said section 3298-13 reads as follows:

> "The compensation, damages, costs and expenses of the improvement shall be apportioned and paid in any one of the following methods, as set forth in the petition: All or any part thereof shall be assessed against the real estate abutting upon said improvement, or against the real estate situated within one-half mile of either side thereof, or against the real estate situated within one mile of either side thereof, according to the benefits accruing to such real estate; and the balance thereof, if any, shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of all the taxable property in the township, or from

any funds in the township treasury available therefor; when the board of township trustees acts by unanimous vote and without the filing of a petition, the trustees shall set forth in their resolution declaring the necessity for the improvement, the method of apportioning and paying the compensation, damages, costs and expenses of the improvement, which may be any one of the methods above provided."

Your inquiry is whether by virtue of said sections 3298-5 to 3298-13, the township trustees may, now that they find insufficient for the doing of the contemplated work, the funds originally raised by bond issue and augmented by contribution from the county treasury, proceed through the medium of special assessments against abutting and contiguous real estate, to raise additional funds required for the work.

It seems to me that the principle involved in your question has been settled adversely to your suggested action by our Supreme Court in the case of Cincinnati vs. Seasongood, 46 O. S. 296, whereof the syllabus reads:

"A municipal corporation having through its proper boards and officers passed a resolution and ordinance to improve a street, in its assessment of the cost and expense of the improvement upon the abutting property, it should be governed by the law in force at the time of the passage of its improvement ordinance, with respect to the manner of assessment and the rights and liabilities of the owners of abutting property."

Of similar import is the case of Toledo vs. Marlow, 8 O. C .C. (n. s.) 121; 18 O. C. D. 298, in which the syllabi are as follows:

"1. The several statutory steps required for the improvement of a street by pavement or sewer, constitute a 'proceeding' within the meaning of section 79, Revised Statutes.

2. The rate or amount of lawful assessment by a municipality for a street improvement, such as a pavement or sewer, upon benefited or abutting property, is governed by the statute in force at the beginning of the proceeding.

3. The adoption of the preliminary resolution declaring the necessity of a street improvement, such as a pavement or sewer is, in the absence of a petition by property owners for the improvement, the beginning of a proceeding, which is thereafter 'pending' within the meaning of section 79, Revised Statutes, and unaffected, in respect to limitation of rate of assessment, by an amendatory act not expressly retroactive."

See also Ehni vs. Columbus, 3 O. C. C. 493; 2 O. C. D. 283.

True, the cases cited relate to assessments made greater in amount under purported authority of statutes passed subsequent to the inception of improvement proceedings than was authorized by statute in force at the inception of such proceedings, whereas in the situation submitted by you no assessment whatever was provided for by statute at the inception of the proceedings, but has subsequently been authorized; and true, in the situation you submit, we have side by side the fact that there are funds in the township treasury available for the improvement and the terms of section 3298-13 providing in substance that if part of the cost of the improvement be assessed against abutting or contiguous real estate, the balance shall be paid "from any funds in the township treasury available therefor"; yet any contention based on these premises is effectively disposed of by reference to the last clause of section 3298-13:

"* * * when the board of township trustees acts by unanimous vote and without the filing of a petition, the trustees shall set forth in their resolution declaring the necessity for the improvement, the method of apportioning and paying the compensation, damages, costs and expenses of the improvement, which may be any one of the methods above provided."

When it is borne in mind that the clause quoted relates to action by the trustees in the absence of the filing of a petition, it seems to me that the provision that "the trustees shall set forth in their resolution declaring the necessity for the improvement, the method of apportioning and paying the compensation," etc., must be construed as mandatory, and that unless an assessment is provided for in such original resolution, it is entirely without legality. The language of Judge Williams at page 91 of the opinion in the case of Cincinnati vs. Connor, 55 O. S. 82, that "the rule generally prevails that, independent of any legislative requirement on the subject, statutes imposing taxes and public burdens of that nature are to be strictly construed; and where there is ambiguity which raises a doubt as to the legislative intent, the doubt must be resolved in favor of the subject or citizen on whom the burden is sought to be imposed" is pertinent. And pertinent also is the legislative policy with reference to assessments, as found in section 3911 General Code relating to assessments in municipal corporations, which section reads as follows:

"Proceedings with respect to improvements shall be liberally construed by the councils and courts, to secure a speedy completion of the work, at reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment, and merely formal objections shall be disregarded, but the proceedings shall be strictly construed in favor of the owner of the property assessed or injured, as to the limitations on assessment of private property, and compensation for damages sustained."

The proceeding contemplated in your inquiry, to-wit: the laying of an assessment by resolution of the trustees, unanimously adopted, certainly may not, for the sole purpose of giving it legal vitality as being in conformity with the last clause of section 3298-13, be treated as an original proceeding, independent of and having nothing to do with the proceedings already had; because the fact is that the improvement itself and the method of raising funds therefor have already been determined upon in conformity with a series of statutes fully covering the matter.

While perhaps unnecessary to a discussion of your inquiry, I call attention to certain "saving provisions" appearing in Chapter XIV of the Highway Act, 105-106 O. L. 574, which act, as above mentioned, repealed as of a date subsequent to the completion of the proceedings you refer to, the said sections 7033 to 7052. These saving provisions, among other things, preserve for specified and limited purposes, certain organizations, and permit the continuance of certain proceedings, authorized by the sections that were being repealed; but there is nothing to indicate an intention that the powers conferred by the new act might be used as supplementary to those conferred by and preserved from the statutes that were being repealed.

I am therefore of opinion that the trustees are without authority to take the action suggested in your inquiry.

Respectfully,
JOHN G. PRICE,
Attorney-General.

25.

ARTICLES OF INCORPORATION OF THE FIRESIDE MUTUAL AID ASSOCIATION COMPANY OF CINCINNATI APPROVED.

COLUMBUS, OHIO, February 4, 1919.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Receipt is hereby acknowledged of the proposed articles of incorporation of The Fireside Mutual Aid Association Company, of Cincinnati, which you submitted to this department for examination and approval.

While there is some doubt as to whether or not section 9512 G. C., which requires articles of incorporation of insurance companies, other than life, to be submitted to the Attorney-General for approval, because that section appears to apply only to companies organized under the provisions of Chapter I, and not to companies such as The Fireside Mutual Aid Association Company, whose organization is governed by Chapter III, of title 9, division 3, sub-division 1 of the General Code, (see 1916 Op. of Atty. Gen. Vol. 1, p. 65), nevertheless, to make sure of compliance with the requirements of section 9512 G. C., if it does apply, I have examined the proposed articles referred to.

The proposed articles, omitting the signatures of the incorporators, the notarial certificate of acknowledgment and the clerk's certificate of notarial authority, read as follows:

"THESE ARTICLES OF INCORPORATION
of
The Fireside Mutual Aid Association Company

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, not for profit, under the general corporation laws of said state, do hereby certify;

First. The name of said corporation shall be The Fireside Mutual Aid Association Company.

Second. Said corporation is to be located at Cincinnati, in Hamilton county, Ohio, and its principal business there transacted.

Third. Said corporation is formed for the purpose of insuring against accidental personal injury and loss of life, sustained while traveling by railroad, steamboat or other mode of conveyance, and against accidental loss of life and personal injury sustained by accident of any description whatever, and against expenses and loss of time occasioned by injury or sickness and on such terms and conditions and for such periods of time, and confined to such countries and localities and to such persons as may at any time be provided in the by-laws of the association under sections 9445 to 9451 both inclusive of the Genral Code of Ohio and doing all things necessary and incident thereto.

In Witness Whereof, We have hereunto set our hands, this 25th day of January, A. D. 1919."

The organization of companies for the special purpose set forth in paragraph "third" of the above articles of incorporation, is expressly authorized and provided for by sections 9445 to 9451 G. C. both inclusive. The only objection to the proposed articles is with respect to the statement therein that the company is formed "under the general corporation laws of said state." As stated in my former opinion No. 14, in re: Articles of incorporation of Hobart Insurance company, dated Jan-

uary 27, 1919, if it is desired to refer in the articles to the law under which the company is organized, the reference should be to the statutes specially applicable to such companies. However, inasmuch as paragraph "third" of the articles in question clearly discloses that the company is being organized under the special provisions of sections 9445 to 9451 G. C., both inclusive, and the articles are unobjectionable in other respects, I do not regard the reference to the general corporation laws of such a serious or prejudicial character as to require my disapproval.

I therefore return the articles of incorporation to you with my certificate of approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

26.

NET WEIGHT OF INSECTICIDE MUST BE STATED ON LABEL IN POUNDS.

The exact net weight of each package of solid insecticide must be stated on the label thereon in terms of pounds, under section 1177-29 *G. C.*

COLUMBUS, OHIO, February 4, 1919.

The Department of Agriculture, N. E. SHAW, *Secretary, Columbus, Ohio.*

GENTLEMEN:—This is to acknowledge the receipt of your letter dated January 16, 1919, as follows:

> "We enclose inquiry from Allaire Woodward & Co., Peoria, Ill., as to the necessity of stating net weight on their product 'El Vampiro' sold in the State of Ohio.
>
> The law unquestionably requires statement of net pounds. Would statement of net ounces also be necessary on a legally labeled package?"

From personal conference with Mr. James A. Smith, of your department, I am informed that the product "El Vampiro" is an insecticide, and from your inquiry as to weight, and from facts stated in the letter of Allaire, Woodward & Co., attached to your letter, I assume that their product is not manufactured and put up in liquid form, but is a solid, as defined in section 1177-29 G. C., hereinafter referred to.

Your letter correctly states that the law unquestionably requires a statement of net pounds, and the question upon which you request my opinion is, as I understand your letter, whether a package containing less than a pound must be labeled so as to show the exact or net weight in ounces.

Sections 1177-29, 1177-30, 1177-32, 1177-34 and 1177-40 G. C. are pertinent. These sections are found in the act "to regulate the manufacture and sale of insecticides and fungicides in Ohio" in 103 O. L., page 161, and amended in 107 O. L., 480.

Omitting those parts of said sections which do not apply to insecticides, and which do not affect the question of the necessity of labeling and certifying the weight, they are as follows:

Section 1177-29—"Each person, firm or corporation who manufactures,

sells or offers for sale, in this state, * * * any insecticide * * * used for the control of insects or fungus diseases within the state, shall affix to each package in a conspicuous place on the outside therof, a *plainly* printed or written certificate which shall state, *in the case of solids, the number of net pounds* * * *. The *certificate* on each package shall be considered as constituting a *guarantee* to the purchaser of the contents therein."

Section 1177-30—"Before selling or offering for sale * * * any insecticide * * * used for the control of insects or fungus diseases within the state, each person, firm or corporation shall file with the secretary of agriculture *certified copies* of the certificate required in the preceding section."

Section 1177-32—"It shall be unlawful for any person, firm or corporation to manufacture, sell or offer for sale in the state * * * any insecticide * * * used for the control of insects and fungus diseases within the state, which is adulterated or *misbranded* within the meaning of this act."

Section 1177-34—"The term *misbranded* as used herein shall *apply* to any other insecticide * * * used for the control of insects or fungus diseases or any other purpose within the state, the *package or label* of which shall bear any statement, design or device regarding such article * * * which shall be *false* or misleading in any particular. * * *

For the purpose of this act an article shall be deemed to be misbranded: In case of insecticides * * *. First * * *; second, if it be labeled or branded so as to deceive or mislead the purchaser * * *; third, if in package form, and the contents are stated in *terms* of weight or measure, they are not plainly and correctly stated on the outside of the package.

* * * * * * *"

Section 1177-40 G. C. makes it a misdemeanor for any person or corporation to sell any insecticide within the state without complying with the provisions of this chapter, and fixes a penalty for the punishment thereof.

It will be noted that the two things at which this legislation is directed are adulterating and misbranding.

The first quoted section (1177-29) requires, in the case of solids, the number of net pounds and provides that the certificate on each package shall be considered as constituting a guarantee to the purchaser of the contents therein. In other words it compels the correct labeling of such products and specifically provides that such labels constitute a guarantee to the purchaser that such products are exactly as they are labeled to be, and this, in case of solids, includes the representation and guarantee as to net weight.

In construing the language used in these statutes, we are obliged to give it, as held in Allen vs. Little, 5 Ohio, 65, "the ordinary and natural import of words, consistent with common sense of the community."

In Bouvier's Law Dictionary, page 2332, the words "net" and "net weight" are defined as follows:

"Net. Clear of all charges and deductions; that which remains after the deduction of all charges or outlay, as net profit. St. John vs. R. Co., 22 Wall. (U. S.) 148, 22 L Ed., 743.

The exact weight of an article, without the bag, box, keg, or other thing in which it may be enveloped."

Considering the purpose of the act and the language therein used, I am of the

opinion that packages of insecticide, referred to in your inquiry, must state the net weight in terms of pounds.

Respectfully,
JOHN G. PRICE,
Attorney-General.

27.

GOVERNOR SHALL EXECUTE RELEASES OF MORTGAGES CONVEYED TO STATE TO SECURE PAYMENT OF MONEY.

The Governor, and not the treasurer of state, is the proper officer to execute and deliver releases of mortgages and deeds of release covering lands or tenements mortgaged or conveyed to the state to secure the payment of money. See sections 8530 *to* 8531 *G. C.*

COLUMBUS, OHIO, February 5, 1919.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Your letter of January 24, 1919, with which you enclosed a communication from Mr. W. P. Ainsworth of Medina, Ohio, a copy of a mortgage given by Asa H. Baird to the state of Ohio on May 4, 1837, and a blank form of release of the mortgage to be signed by the treasurer of state, was duly received.

The execution and delivery of releases of mortgages and of deeds of release, covering lands or tenements mortgaged or conveyed to the state to secure the payment of money are governed by sections 8530 and 8531 G. C., as follows:

> "Sec. 8530.—When lands or tenements are mortgaged to the state to secure the payment of money due to it, and the money so secured, together with the legal interest due thereon, if any, is paid to the treasurer of state, or other officer or agent duly authorized to receive it, the governor shall make, execute, and deliver to the mortgagor, his heirs or assigns, a deed of release of the real estate so mortgaged."
>
> "Sec. 8531.—When a conveyance of lands or tenements made to the state for any purpose, contains a condition that the real estate so conveyed shall revert to the grantor on the payment of a certain sum of money, or on the performance of other conditions, and the money, with legal interest thereon, from the time it was due or payable, is paid to the treasurer of state, or other officer or agent duly authorized to receive it, or the other conditions stated in such deed are performed according to the stipulations contained therein, on receiving a certificate from the proper officer of such payment or other performance, the governor shall execute and deliver to the grantor, his heirs, or assigns, a deed of release for the property so conveyed."

The legislature having conferred the power of executing and delivering releases of mortgages and deeds of release upon the governor only, I therefore advise that you are without authority to execute and deliver the release sent you by Mr. Ainsworth.

You will observe that under section 8530 G. C., the governor is only authorized to execute and deliver a release of mortgaged property, when the money secured

thereby and interest due thereon has been paid to the treasurer of the state; and that before the governor can execute and deliver a deed of release under section 8531 G. C., he must have received a certificate of payment or performance from the treasurer of state or other officer or agent duly authorized to receive the money secured by the conveyance.

I return herewith Mr. Ainsworth's letter and the copy of the Baird mortgage and form of release above referred to.

Respectfully,
JOHN G. PRICE,
Attorney-General.

28.

APPROVAL OF BOND ISSUE OF WAYNE COUNTY IN THE SUM OF $119,500.00—TWO ISSUES.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 5, 1919.

29.

OHIO REFORMATORY FOR WOMEN—CAPACITY TAXED—COURTS NOT JUSTIFIED IN DISREGARDING SECTIONS 2148-5 AND 2148-7 G. C.

The fact that the Ohio Reformatory for women does not have the capacity at this time to care for additional prisoners, will not justify the courts in disregarding the provisions of sections 2148-5 *and* 2148-7 *G. C., which require that female offenders, except in certain cases therein specifically provided for, be sentenced to that institution.*

COLUMBUS, OHIO, February 6, 1919.

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

GENTLEMEN:—Your letter of January 29, requesting my opinion upon the following statement of facts, was duly received:

"STATEMENT OF FACTS.

We are calling your attention to section 2148-7 of the General Code, O. L., 105-106, page 131, and would say that the Marysville reformatory is refusing to accept any more women sentenced thereto for the reason that they are full and can not take care of any more. We have advised an examiner that, in view of this condition, the various judges can only sentence women to jail, or workhouses, as they did before section 2148-7 G. C., became a law, until such time as the Marysville reformatory will be in shape to receive such persons again.

Question: Are we correct in this view?"

The statutes involved in determining your question are sections 2148-1, 2148-5, 2148-6 and 2148-7 G. C. as follows:

"Section 2148-1.—The Ohio reformatory for women shall be used for the detention of all females over sixteen years of age, convicted of a felony, misdemeanor, or delinquency as hereinafter provided, and for the detention of such female prisoners as shall be transferred thereto from the Ohio penitentiary and the girls' industrial school as hereinafter provided."

"Section 2148-5.—As soon as the governor shall be satisfied that suitable buildings have been erected and are ready for use and for the reception of women convicted of felony he shall issue a proclamation to that effect, attested by the secretary of state, and the secretary of state shall furnish printed copies of such proclamation to the county clerks of courts and from the date of said proclamation all portions of this act except those relating to the commitment of misdemeanants and delinquents shall be in full force and effect. Whenever additional buildings have been completed so as to care for misdemeanants and delinquents a proclamation shall be issued and published in the same manner and copies furnished to county clerks of courts and to all judges and magistrates having authority to sentence misdemeanants and delinquents and from and after the date of this proclamation all portions of this act relating to the commitment of persons to said reformatory shall be in full force and effect.

All female persons convicted of felony, except murder in the first degree without the benefit of recommendation of mercy, shall be sentenced to the Ohio reformatory for women in the same manner as male persons are now sentenced to the Ohio state reformatory. And in so far as applicable, the laws relating to the management of the Ohio state reformatory and the control and management thereof, shall apply to the Ohio reformatory for women."

"Section 2148-6.—Female persons over sixteen years of age found guilty of a misdemeanor by any court of this state shall be sentenced to the Ohio reformatory for women and be subject to the control of the Ohio board of administration, but all such persons shall be eligible to parole under the provisions of this act."

"Section 2148-7. After the issuance of the first proclamation hereinbefore referred to, it shall be unlawful to sentence any female convicted of a felony to be confined in either the Ohio penitentiary or a jail, workhouse, house of correction or other correctional or penal institution, and after the issuance of the second proclamation it shall be unlawful to sentence any female convicted of a misdemeanor or delinquency to be confined in any such place except in both cases the reformatory herein provided for, the girls' industrial school or other institution for juvenile delinquency, unless such person is over sixteen years of age and has been sentenced for less than thirty days, or is remanded to jail in default of payment of either fine or costs or both, which will cause imprisonment for less than thirty days, provided that this section shall not apply to imprisonment for contempt of court."

The proclamations referred to in section 2148-5 G. C. have been issued by the governor as therein provided, and by reason thereof section 2148-5 and 2148-7 G. C. are in full force and effect.

By the express mandate of section 2148-5 G. C. all female persons convicted of felony, except murder in the first degree without benefit of recommendation of

mercy, must be sentenced to the Ohio reformatory for women; and under section 2148-7 G. C. it is unlawful to sentence any female convicted of a felony to be confined in either the Ohio penitentiary or a jail, workhouse, house of correction or other correctional or penal institution, or to sentence any female convicted of a misdemeanor or delinquency to be confined in any of the places of confinement mentioned, excepting only (1) those sentenced for less than thirty days, (2) those remanded to jail in default of payment of fines or costs, or both, which will cause imprisonment for less than thirty days, (3) those guilty of contempt of court, and (4) those eligible to commitment to the girls' industrial school or other institutions for juvenile delinquency.

Female offenders who are not within any of the classes specifically excepted must be sentenced to the Ohio reformatory for women, and not to the other institutions named in section 2148-8 G. C. The fact that the reformatory does not have the capacity at this time to care for additional prisoners, will not justify the courts in disregarding the provisions of the statutes above referred to, nor can it have the effect of conferring authority upon the courts to sentence offenders to the prohibited institutions.

Respectfully,
JOHN G. PRICE,
Attorney-General.

30.

APPROVAL OF BOND ISSUE OF LISBON VILLAGE SCHOOL DISTRICT IN THE SUM OF $16,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 7, 1919.

31.

COUNTY COMMISSIONERS WITHOUT AUTHORITY TO INVEST PROCEEDS OF SINKING FUND LEVIES IN INTEREST-BEARING SECURITIES FOR PURPOSE OF ACCUMULATING SINKING FUND.

COLUMBUS, OHIO, February 7, 1919.

HON. A. HARMON HOLDERNESS, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—I have your letter of January 21 requesting my opinion as follows:

"Our county commissioners would like to have the following legal questions answered from your office:

Can county commissioners as county commissioners buy their own county bonds?

Can county commissioners buy the county bonds with funds of sinking fund?

Do county commissioners have to issue serial bonds?

You understand their idea for wanting to use sinking fund is that they only get 1 per cent interest on sinking fund and if they could buy their own bonds it would be a saving of 4 per cent as they would have to pay 5 per cent interest on bonds.

The purpose of the coming bond issue is for indebtedness of children's home, judicial election, and general county indebtedness."

On June 10, 1918, my predecessor in office in opinion No. 1262, addressed to the bureau of inspection and supervision of public offices, passed upon the several questions presented by you. This opinion was rendered in answer to a question raised by the auditor of your county, which doubtless was occasioned by the same situation referred to in your letter.

I agree with the conclusion expressed by my predecessor and herewith enclose a copy of his opinion, which fully answers the three questions submitted by you.

Respectfully,
JOHN G. PRICE,
Attorney-General.

32.

BOARD OF EDUCATION—TEACHERS ENTITLED TO PAY FOR TIME LOST OWING TO EPIDEMIC.

A board of education may not avoid the effect of section 7690 G. C., by declaring a special vacation. Teachers are entitled to pay for time lost owing to epidemic, but such time is not presumed to be on holidays when schools are ordinarily closed.

COLUMBUS, OHIO, February 7, 1919.

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

GENTLEMEN:—Acknowledgment is made of your request of January 16, followed by your further supplemental statement of January 20, for the opinion of the Attorney-General on the following statements of facts, submitted by the clerk of the board of education of the city of Cambridge, Ohio, to your office in regular form through the city solicitor of said city. Such communications are as follows:

"January 7, 1919.

William H. Brown, Esq., City Solicitor, Cambridge, Ohio.

Dear Sir:—

Re: Teacher's salary—Quarantine—Vacation.

By the order of the school board of the city of Cambridge, I am directed to submit to you and through you to the Attorney-General of Ohio, the questions arising out of the action of our local board in declaring a vacation of the public schools for this city on November 29 to December 30, 1918, while the city was under a quarantine prohibiting public meetings including sessions of the schools.

Sometime prior to November 29 the board of health of the city had declared the quarantine and after this situation had been running for six weeks or more, and not knowing how long the quarantine would continue, the board of education met November 29, 1918, and declared the holiday vacation to commence at that date and to end Monday morning December

30, 1918. Notice of this action was given in the newspapers and a great many of the teachers secured employment, others left the city and went to their homes. It has been the custom here for years to have one or two weeks vacation for the holidays and this without pay to the teachers.

The minutes showing the employment of teachers are in the following form, to-wit:

'June 17, 1918.

Motion by Rigby, seconded by Stewart, following appointments heretofore made and approved, the following teachers were employed for the high school at the salaries set opposite their names, to-wit:

W. E. Arter	$250.00 month	$2,250.00 year
D. R. Frasher	172.22 month	1,550.00 year
J. O. Eagleson	161.11 month	1,450.00 year

(Here continue names of balance).'

Schools were opened for the school term on September 2, 1918, and on account of the epidemic of influenza, we only had six or seven weeks of school in the three months and one week ending November 29, and for all of which time the teachers were fully paid their salaries. We had increased the salaries of teachers around $10,000.00 over that of the last year and our appropriation by the budget commission for tuition is short more than $10,000.00. We paid out salaries for six weeks the sum of $9,500 covering the time there was no school on account of the ban on public gatherings.

With this condition confronting the school board, to-wit, shortage of funds and loss of time, a situation was created which would mean the failure of many of the pupils to be promoted and thereby lose the year's work. We therfore declared this vacation to help the situation and intending thereby to have school continue until June 20, 1919, instead of having it close on May 23, as it would have done if no vacation had been declared.

The teachers, or a great number of them, are dissatisfied with the action of the school board and are claiming and demanding their pay for at least the first three weeks of December, apparently willing to concede the regular holiday week as a proper vacation. The action of the board in declaring the vacation was not unanimous and at present it seems to be the desire of a majority of the board to reconsider and vacate or set aside its act in declaring the vacation and to allow the salaries for the first three weeks in December if that action can legally be taken now and not become liable personally for a misappropriation of the public funds.

It resolves itself to the question of the legality of the act of the board in declaring the vacation. If that was legally done and the time having expired or elapsed, the board certainly could not now set it aside and pay the salaries during that time. If it was an illegal act, it would not need to be rescinded or set aside.

We have been unable to find an exact precedent reported anywhere in the courts. The question of closing schools on account of an epidemic, the destruction of school buildings, attempt to shorten the term, act of God, and many other similar situations have been before the courts. In most of these cases, however, and especially in epidemic closings, the court comments on the closing being temporary and the teacher being required to hold himself in readiness to resume his work at any day.

It was not the intent of the board to keep the teachers from getting their full nine months salary. It simply meant that they were to have one month vacation in December, 1918, and the remaining two months

vacation in July and August, 1919. The school year commences September 1 and ends August 31 of the following year. The employment was not for any certain nine months. In the management and control of the schools authorized by the statute, the board always fixes the time for opening school and the Xmas holiday period, one or two weeks, and sometimes a week of holidays in April, and this has always been done without consulting the teachers. In this instance the board could not consult the teachers because such a public meeting of 80 or more teachers was prohibited.

A majority of the board want to rescind its action and pay the teachers for the three weeks to prevent any further feeling and to secure the better co-operation of the teachers if it can be legally done.

We would appreciate a prompt opinion in this matter and will furnish further facts that may be requested or required.

Some citations are handed herewith on a separate sheet.

Respectfully submitted,
Board of Education of Cambridge, O.
By GEO. D. DUGAN, Clerk."

"January 9, 1919.

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

Gentlemen:—I am submitting herewith a communication from the board of education of the Cambridge City school district, relative to their recent action in declaring a vacation of the schools because of quarantine order of the board of health, teachers to be without salary during such vacation.

The board are very anxious for an early opinion as to this matter and I am asking that you submit the question to the Attorney-General's office at your earliest opportunity, that I may be able to transmit an authoritative opinion without delay.

Sincerely yours,
(Signed) WILLIAM H. BROWN,
City Solicitor, Cambridge, Ohio."

"January 20, 1919.

Hon. John G. Price, Attorney-General, Columbus, Ohio.

Dear Sir:—Relative to the question submitted to you by this department originating from Mr. Wm. H. Brown, the city solicitor of Cambridge, Ohio, we would say that we have a later communication from which the following is a quotation:

'In our case, the board of education declared a vacation on the 29th day of November, commencing at that date and ending December 20, 1918. If the quarantine had been declared off on the next day after the vacation was declared, we think there could be no question but that the vacation would have continued in effect. During this time and on account of the vacation having been declared, the teachers were not required 'to hold themselves in readiness to commence again whenever ordered' as seems to be a very controlling factor in the reasoning for paying for time lost on account or owing to an epidemic. I do not know that any person has raised the question as to whether the Spanish influenza was an epidemic. We take it that goes without question that it was.

We believe that our original letter makes a complete and fair state-

ment of the facts upon which we desire an opinion. It might be put in the form of the following questions:

1. Did the board have the legal right to declare the vacation?
2. If they did not, can they now legally rescind that action and pay the teachers for that month?
3. Would the board as individuals be liable at the suit of any taxpayer for the repayment of that month's salary?
4. Suits being threatened, both by the teachers to collect and by taxpayers if the board does voluntarily pay, would it be possible to have the city solicitor or prosecutor, or both, enjoin the board temporarily, and have the matter finally determined by a court in a proper action brought for that purpose?

Yours very truly,
BUREAU OF INSPECTION AND
SUPERVISION OF PUBLIC OFFICES."

The question here is, whether the board of education performed a legal act in declaring a vacation of the schools, without pay to teachers, because of quarantine order of the board of health, such vacation running during the time of such quarantine.

Attention is invited to section 4448 G. C., which reads:

"Semi-annually, and oftener if in its judgment necessary, the board of health shall inspect the sanitary condition of all schools and school buildings within its jurisdiction, and may disinfect any school building. During an epidemic or threatened epidemic, or when a dangerous communicable disease is unusually prevalent, the board may close any school and prohibit public gatherings for such time as it deems necessary."

From the above language of the statute it will be noted that the board of health may close any school and prohibit public gatherings for such time as it deems necessary, when a dangerous communicable disease is unusually prevalent, as was the condition existing in Ohio in the latter part of the year 1918, when a contagious disease known as Spanish influenza made its appearance.

The statement of facts indicates that a number of weeks prior to November 29, 1918, the board of health of the city of Cambridge had declared a quarantine on account of the epidemic of influenza; that the board of education recognizing this official quarantine prior to their meeting of November 29, in that but six or seven weeks school was held in the three months prior thereto; that at the time of such board meeting such quarantine was in force, on account of such prevalent disease in such community and the board had full official knowledge thereof; that the board of education at such meeting, on November 29, declared a vacation of the public schools, teachers to be without salary during such vacation, the apparent reason for such vacation (starting so far ahead of the customary holiday vacation) being the epidemic of influenza.

It seems that all teachers were legally employed under the resolution of the board of education, passed June 17, 1918, such resolution of employment stipulating a certain sum per month, and there was no other contract, and that *all such teachers were paid* each month for time lost on account of the epidemic prior to November 29, when such vacation was declared, the board thereby recognizing and obeying voluntarily section 7690 G. C., which reads as follows:

"Each board of education shall have the management and control of all

of the public schools of whatever name or character in the district * * *. Each board shall fix the *salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity.*"

It will be noted that the language of the above statute regarding teacher's pay is mandatory and not discretionary with any board, that payment must be made "for all time lost when the schools in which they are employed are closed owing to an epidemic," and such time accrues at the end of each school month and not at a later period.

Further, the resolution of employment, dated June 17, 1918, mentions specifically so much salary per month as well as the gross total for nine months; seemingly, if the intent was not to pay at the end of the school month, then such insertion in the employing resolution is unnecessary and only the total would be carried.

It would seem, therefore, that the action of the board of education of Cambridge on November 29, in declaring a vacation during the period in which the board of health of such city had established a legal quarantine on account of an epidemic, and which the board of education recognized was an action unwarranted and unnecessary in the premises, and the withholding of the salaries of teachers "when the schools in which they are employed are closed owing to an epidemic," is in contravention of section 7690 G. C.

It is unfortunate that the youth of the state have lost so much time in school work during the prevalence of the epidemic in question, but it was a matter in which man had little control and the situation must be met in each community as best possible; boards of education are to be commended in their desire to conserve the finances given to their care, but they cannot violate state law in their disbursing of such funds, and failure to pay teachers in time of epidemic, established by boards of health, is such violation and the calling of such period of quarantine a vacation is a subterfuge not to be encouraged. It is unquestionably true that the public will suffer in a general way, but in the case of Salt Co. vs. Guthrie, 35 O. S., 672, the Supreme Court says:

"Courts will not inquire as to the degree of injury inflicted on the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public."

Growing out of this question, attention is invited also to the opinion of the Attorney-General, 1911-1912, page 1322, in which he held that a "contract to make up for legal holidays and for time lost in the event of epidemic, would be void because against the statute and public policy of the State of Ohio."

This opinion further quoted says:

"The board cannot compel teachers to sign up a written contract to make up for legal holidays and for time lost in the event of epidemic, for the reason that an agreement which is in contravention to statutory provisions, whose waiver would violate public policy expressed therein, or the rights of the public, which the statute was intended to protect, are involved, would to that extent be illegal and void."

It is apparent, therefore, that the time lost accrues at the end of each school month and not at a later date when such time (lost on account of epidemic) might

be made up, for section 7690 G. C. specifically takes care of teachers' salaries during epidemics.

From your statement of facts it is noted that the Cambridge schools have a regular holiday week vacation, when your schools are not in session even in years when there is no epidemic, indicating that such vacation is a custom and regularly declared by the board of education each year, the question of epidemic not entering into such customary vacation. Such being the case, your schools would be closed during the regular holiday vacation, notwithstanding the prevalence of an epidemic, and time covered by a holiday vacation that is a customary annual occurrence would not fall within the scope and intent of section 7690 G. C., which provides that such time lost must have been *"owing to an epidemic."*

It is therefore believed, and the opinion of the Attorney-General is, that a resolution passed during an epidemic by a board of education, declaring a vacation of the public schools, teachers to be without salary while the schools in which such teachers are employed are closed owing to an epidemic and legal quarantine by the board of health, is illegal and void, being in contravention of section 7690 G. C.

Such resolution being superfluous, illegal and void, it never was legally in effect and a rescission of an illegal and void action is not necessary and the teachers are entitled, by state law, to their pay for the school days lost on account of such epidemic, but not for days in a customary recognized holiday vacation that occurs annually, regardless of epidemic.

Board of education members would not be liable personally for doing what section 7690 G. C. mandatorily says they must do as a board, that is, pay the teachers for all time lost when their schools are closed owing to an epidemic.

It is the policy of the Attorney-General not to encourage groundless litigation and it is hardly probable that the board of education could be enjoined from doing what section 7690 G. C. says, by mandate, they must do, it being generally conceded that an epidemic was prevalent and the schools in question were closed outside the holidays primarily by reason thereof.

Respectfully,
JOHN G. PRICE,
Attorney-General.

33.

WHEN PERSON CHARGED WITH SALE OF UNWHOLESOME AND ADULTERATED FOOD ENTITLED TO TRIAL BY JURY—SECTION 12760 G. C. CONSTRUED.

In a criminal case before a justice of the peace, wherein the charge is the sale of unwholesome and adulterated food, contrary to section 12760 G. C., the defendant is entitled to a trial by jury.

COLUMBUS, OHIO, February 7, 1919.

HON. TOM A. JENKINS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:——Your letter of January 31, 1919, relative to the case of State of Ohio vs. Durstein, is at hand. The question contained therein may be put thus:

In a criminal case before a justice of the peace, wherein the charge is the

sale of unwholesome and adulterated food, contrary to the provisions of section 12760 G. C., is the defendant entitled to a trial by jury?

Section 12760 G. C. says:

> "Whoever sells, offers for sale, or has in possession with intent to sell, diseased, corrupted, adulterated or unwholesome provisions without making the condition thereof known to the buyer, shall be fined not more than fifty dollars or imprisoned twenty days, or both."

It will be noted that the penalty prescribed by this section may be that of imprisonment.

Under this circumstance, the right of the defendant to a trial by jury is assured by both constitutional and statutory provisions.

Sections 5 and 10 of Article I of the Constitution of Ohio say:

> "Section 5.—The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."
>
> "Section 10.—Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witness face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense."

That sections 5 and 10, supra, were intended to guarantee the right of trial by jury as it existed under the constitution of 1802 and at common law, is the interpretation many times given by our courts.

> Work vs. State, 2 O. S. 296.
> Inwood vs. State, 42 O. S. 186.
> Ames vs. State, 11 O. N. P. (n. s.) 385.
> Terry vs. State, 3 O. C. C. (n. s.) 593.

Accordingly, statutes which authorize a penalty by fine only, upon a summary

conviction under a police regulation, are not in conflict with either of said constitutional provisions, even though imprisonment, as a means of enforcing the payment of the fine, is authorized.

Inwood vs. State, cited supra.

Section 13432 G. C. says:

> "In prosecutions before a justice, police judge or mayor, when imprisonment is a part of the punishment, if a trial by jury is not waived, the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him."

In the case of Simmons vs. State, 75 O. S. 346, the court, construing section 13432 G. C., held that the waiver of a jury under said section must clearly and affirmatively appear upon the record, and such waiver can not be assumed or implied, by a reviewing court, from the silence of the defendant or from his mere failure to demand a jury.

You are therefore advised that in a criminal case before a justice of the peace, wherein the state charges a sale of unwholesome and adulterated food contrary to section 12760 G. C., the defendant is entitled, as of right, to a trial by jury.

Respectfully,

JOHN G. PRICE,

Attorney-General.

34.

WITHDRAWAL OF SECURITIES DEPOSITED WITH TREASURER OF STATE UNDER SECTION 9778 G. C. DISCUSSED—THE TRUSTEES, EXECUTORS AND SECURITIES INSURANCE CORPORATION, LONDON, ENGLAND.

COLUMBUS, OHIO, February 7, 1919.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 1 requesting my opinion as follows:

> "Under section 9778, the Trustees, Executors and Securities Insurance Corporation, Ltd., a trust company of Winchester House, Old Broad street, London, England, deposited under date of April 18, 1916, $100,000 as a deposit, in accordance with the laws governing trust companies.
>
> This company has changed its name to The Trustees Corporation, Ltd. There is on deposit in this department, to the credit of the Trustees, Executors and Securities Insurance Corporation $100,000 in U. S. Third Liberty loan bonds. This company now desires, in the change of name, to withdraw this deposit. There is nothing in the law that would permit the treasurer of state to surrender this deposit, and in order that the treasurer may have full protection in the matter, we are asking you for your opinion in the premises.
>
> We herewith beg to enclose all papers submitted through the law firm of Squire, Sanders & Dempsey of Cleveland, Ohio."

The papers referred to in your letter and which I refer to by number are as follows:

(1) Certificate showing change of name from the "Trustees Executors and Securities Insurance Corporation, Limited," to the "Trustees Corporation, Limited."

(2) Indenture between the Trustees Corporation, Limited, and The Guardian Savings and Trust Company.

(3) Assignment of deposited bonds by the Trustees Corporation, Limited, to The Otis Steel Company.

(4) Affidavit of the secretary of the Trustees Corporation, Limited.

(5) Resolution of The Guardian Savings and Trust Company assuming liability of the Trustees Corporation, Limited, under the trust deed of The Otis Steel Company.

(6) Certificate that the Trustees Corporation, Limited, has retired from business in Ohio.

(7) Copy of trust mortgage from The Otis Steel Company to The Guardian Savings and Trust Company and the Trustees Executors and Securities Insurance Corporation, Limited, as trustees.

Section 9778 G. C., under authority of which the Trustees Executors and Securities Insurance Corporation, Limited, deposited $100,000.00 with the treasurer of state, is as follows:

"No such corporation either foreign or domestic shall accept trusts which may be vested in, transferred or committed to it by an individual, or court, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash fifty thousand dollars if its capital is two hundred thousand dollars or less, and one hundred thousand dollars if its capital is more than two hundred thousand dollars, except that, the full amount of such deposit by such corporation may be in bonds of the United States, or of this state, or any municipality or county therein, or in any other state, or in the first mortgage bonds of any railroad corporation that for five years last past paid dividends of at least three per cent on its common stock."

I find no provision in the General Code of Ohio which authorizes the withdrawal of a deposit made under authority of the section just quoted. The legislature apparently did not anticipate that occasion would ever arise when the withdrawal of such deposit would be requested.

From the affidavits and certificates enclosed in your letter and above referred to it appears that the Trustees Corporation, Limited, has never at any time undertaken or engaged in any trust capacity except the single instance in connection with The Otis Steel Company, in which The Guardian Savings and Trust Company of Cleveland acted as joint trustee. If these affidavits and certificates are as a matter of fact true, and if upon investigation you are satisfied that the Trustees Corporation, Limited, has no present or possible future liabilities, I believe you would be justified in permitting the company to withdraw this deposit. This, however, is purely a question of fact for you to decide and for the correctness of which decision you must be responsible. As Attorney-General I am authorized to advise you only in respect to the existing laws governing the situation, and, as stated above, I find no provision of law covering the situation presented by you.

I might suggest further the advisability of securing the passage of a legislative

act amending or supplementing section 9778 G. C. to care for similar situations which may arise in the future.

The papers submitted with your letter are herewith returned.

Respectfully,
JOHN G. PRICE,
Attorney-General.

35.

COURT COSTS CHARGEABLE UNDER MOTHERS' PENSION ACT.

The only court costs chargeable under the mothers' pension act are those incident to the hearing of the motion provided for under section 1683-8 *G. C. Opinion of former Attorney-General on this subject approved.*

COLUMBUS, OHIO, February 8, 1919.

HON. D. W. YOUNKER, *Probate Judge, Greenville, Ohio.*

DEAR SIR:—The receipt of your letter of December 14, 1918, addressed to my predecessor in office, Hon. Joseph McGhee, and by him turned over to me for reply, is acknowledged.

Your letter reads as follows:

> "The General Code, sections 1683-2 et al., providing for mothers' pensions, makes no provision for the payment of any costs in regard to these matters.
>
> Is it right and proper to assess the costs for performing the clerical work under the general statute, applicable to the assessment of costs in the court of common pleas? That is, so much for filing each paper and so much for issuing each writ or order. Or is the clerk expected to perform all of these duties without making any charge whatever?"

The question of what costs are chargeable under the so-called mothers' pension act (sections 1683-2 to 1683-9, inc., G. C.) has already been the subject of opinion by the Attorney-General.

In Opinion No. 1063, directed to the bureau of inspection and supervision of public offices, Columbus, Ohio, and under date of July 20, 1914, the Attorney-General said:

> "* * * I am of the opinion that no fees or costs of any character whatever are to be charged or collected from any source on account of 'proceedings' under the mothers' pension act prior to the filing of a motion to set aside or vacate or modify the judgment of allowance."
>
> 1914 Atty. Gen. Rep., Vol. I, p. 1012.

Said opinion further held (p. 1013):

> "In my opinion, fees are chargeable for filing the motion provided for in section 1683-8, for issuing and serving processes, for compelling the attendance of witnesses, to witnesses for attending under subpoena and for making the 'new order' of which section 1683-8 speaks; and as already indicated, the precise fees chargeable in the given instance are to be deter-

mined by reference to the statutes regulating fee bills, in the court which happens, at the time, to be exercising juvenile jurisdiction."

With the conclusions just above quoted, I find myself in agreement. With some of the reasons adduced in said opinion in support of those conclusions, I am not, however, entirely satisfied. In particular, I am not inclined to attach as much weight as the opinion does to the contention that fees are not chargeable if and when they relate to services rendered for the public and not for private individuals. Now that all the fees and costs, collected or received by a probate judge and the other public officers mentioned in section 2977 G. C., are received and collected as public moneys for the sole use of the treasury of the county in which said officers are elected, the distinction recognized in said opinion, between fees paid by the person for whom a private service is to be rendered and fees paid out of the public treasury, is not, in my judgment, of much help in answering the question under discussion. The sole inquiry, in a case of this kind, is this: Is there a statute which authorizes the court to tax costs?

See Farrier vs. Cairns, 5 Ohio 45, 48.

Except as noted in the opinion above referred to, I find no statute bearing on this question.

With the slight difference above noted, I am in full accord with the opinion of the former Attorney-General, hereinbefore cited.

Respectfully,
JOHN G. PRICE,
Attorney-General.

36.

BLIND RELIEF—HOW TO DETERMINE RESIDENTIAL QUALIFICATIONS—REMOVAL FROM ONE COUNTY TO ANOTHER.

In order to acquire the residential qualifications essential to an award of blind relief, the applicant must have resided and supported himself within the county for twelve consecutive months without relief under the laws providing for relief of the poor.

A person removing from one county to another, but continuing to receive blind relief from the county of her former abode, does not acquire the residential qualifications entitling him to receive blind relief from the latter county.

COLUMBUS, OHIO, February 10, 1919.

HON. WALTER S. RUFF, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Under date of January 24, 1919, you requested my opinion upon the following statement of facts and inquiry:

"A totally blind person moved from Cleveland, Cuyahoga county, to Canton, Stark county, over a year ago. Prior to the time of her removal from Cleveland to Canton she was granted relief by the county commissioners of Cuyahoga county and for a period for one year after her removal from Cuyahoga county she was receiving relief from Cuyahoga county. At the expiration of one year she applied to the county commissioners of Stark county for relief.

The county commissioners have asked me for an opinion as to whether in such a case they were justified in granting her relief. I have been

unable to find any opinion from your office upon this question and have been informed that in some counties they do not grant relief to blind persons who have been receiving aid from other counties. The county commissioners feel that a person receiving blind relief is in the same class as a pauper and should not be permitted to move from one county to another.

I would be very glad to have your opinion upon this question."

The operative law governing blind relief is found in sections 2962 to 2970 G. C. inclusive, as amended in 103 O. L. 60.

The original legislation on this subject, as enacted April 25, 1904, was held unconstitutional by the Supreme Court in the case of Auditor of Lucas county vs. State, 75 O. S. 114, for the reason that it authorized the expenditure, for private purposes, of public funds raised by taxation. In 1913 the legislature amended and supplemented the provisions of the original act of 1904, effectually restricting the provisions for relief to such persons, as by reason of loss of eyesight, would become a charge upon the public, or upon those not required by law to support them, unless granted the relief provided by the act.

The curative provisions of this amendment of 1913 as found in 103 O. L. 60, were held by the Supreme Court to remove the objectionable features of the original act, and the legislation as thus amended was held constitutional. See State ex rel. vs. Edmondson, 89 O. S. 351.

In the opinion in this case, after noting the extent and character of the modification introduced by the amendment, the court says:

"It will, therefore, be seen that the statute seems to have been drawn for the purpose of carefully avoiding the defects in the statute of 1904 pointed out by the court in Lucas county vs. State, supra. The relief provided for in the latter statute is limited to those who are, or will become, charges upon the public, or upon those not required by law to support them, and is the only public relief that may be given to them."

It might be noted in this connection that an enactment of 1913 relating to the subject of blind relief, and found at page 833 of Vol. 103 O. L. was held in 89 O. S. 351, supra, to be unconstitutional and inoperative by reason of the same infirmities, among others, as were fatal to the original enactment of 1904.

Your inquiry, therefore, relative to residential qualifications for receiving blind relief invites consideration of section 2966 G. C. taken in connection with the provisions of the amendatory act in 103 O. L. 60, relating to the administration of such relief. Section 2966 G. C. provides:

"In order to receive relief under these provisions, a needy blind person must become blind while a resident of this state, and shall be a resident of the county for one year."

Section 2967 G. C. (103 O. L. 60) provides:

"At least ten days prior to action on any claim for relief hereunder, the person claiming shall file with the board of county commissioners a duly verified statement of the facts bringing him within these provisions. The list of claims shall be filed in a book kept for that purpose in the order of filing, which record shall be open to the public. No certificate of qualification of drawing money hereunder shall be granted until the board

of county commissioners shall be satisfied from the evidence of at least two reputable residents of the county, one of whom shall be a registered physician, that they knew the applicant to be blind and that he has the residential qualifications to entitle him to the relief asked. Such evidence shall be in writing, subscribed to by such witnesses, and shall be subject to the right of cross-examination by the board of county commissioners or other person. If the board of county commissioners be satisfied upon such testimony that the applicant is entitled to relief hereunder, said board shall issue an order therefor in such sum as said board finds needed, not to exceed one hundred and fifty dollars per annum, to be paid quarterly from the funds herein provided on the warrant of the county auditor, and such relief shall be in place of all other relief of a public nature."

The phrase "shall be a resident of the county for one year" in section 2966 G. C. supra, in my opinion, has the same significance as the term "legal settlement" in the statutes relating to the general administration of poor relief.

The relief provided for the needy blind was considered by the court in 89 O. S. 351, supra, as in the nature of poor relief, and at page 357 of the opinion the court said:

"The express object, and the practical provision, of the enactment is to furnish relief to the blind who are poor and needy, and to avoid the public burden.

It is not questioned that the relief of the poor is a proper public purpose."

At page 358 the court said:

"Outdoor relief of the poor, as distinct from relief in institutions, was fixed as part of the policy and practice of Ohio one hundred years ago."

In the chapter of the code providing for public relief for the poor, section 3477 G. C. provides in part:

"Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of law for the relief of poor."

In addition to the wholesome public purpose to provide for the well being of the poor, the law evidences the further proper solicitude for placing the burden of such support upon the proper county. The provisions of the statute make the residential qualifications jurisdictional, and this must be established from the evidence of at least two reputable residents of the county before any discretion as to awarding relief may be exercised by the commissioners.

Since in order to gain a legal settlement in any county of the state, a person must have resided therein continuously and supported himself or herself for twelve consecutive months without relief under the provisions of law for the relief of the poor, it therefore becomes apparent that under the facts stated in your inquiry, no legal settlement was acquired, inasmuch as the person in question has been receiving relief from Cuyahoga county during all or a portion of the year preceding her application for relief from Stark county, and I therefore hold that such person would not have the residential qualifications to entitle her to receive blind relief upon her application to the commissioners of Stark county.

I find that my predecessor has considered a similar question in an opinion found at page 1432 of Vol. 2, Reports of Attorney-General for the year 1915, and the following is quoted from said opinion:

> "It seems quite clear that the legislature in providing a different qualification as to residence for a needy blind person than that required for other needy persons, did not intend to change the existing laws as to the county which should bear the burden of the support. This conclusion follows from the provisions of the blind relief law itself, and the decision of the court in the case of State ex rel. Grant vs. Sayre, Auditor, supra, showing as they do the close relation existing between blind relief and poor relief. It follows, therefore, if this applicant is not and could not become a public charge upon Lucas county, then Lucas county, under the provisions of section 2966, supra, would have no authority to grant him blind relief. On the other hand, to be entitled to blind relief he must be a pauper, and therefore a charge upon the county in which he has a legal settlement, which said county must discharge its duty to support him by granting him blind relief. His living in Lucas county does not relieve Crawford county of the duty to support him, and that county should continue to furnish him the relief even if he may now live in another county. If Crawford county fails to furnish the relief and he thereby becomes a public charge, Lucas county can only follow the provisions of section 3482, supra, and send him back to Crawford county."

I am in accord with the conclusions of my predecessor that the change of place of abode from one county to another by a person who continues to receive blind relief from the county of his former abode, will not accomplish a change of residence within the purview of section 2966 G. C. prescribing the residential qualifications for receiving blind relief.

Answering your question specifically, therefore, it is my opinion that the person moving from Cuyahoga county to Stark county as mentioned in your inquiry, is not entitled to receive blind relief from Stark county, if during the twelve months preceding her application she has been receiving blind relief from the county of her former residence.

Respectfully,
JOHN G. PRICE,
Attorney-General.

37.

WHEN A COUNTY HOSPITAL IS EXEMPT FROM TAXATION.

A county hospital constructed and maintained under sections 3127 *et seq. of the General Code is exempt from general property taxation as an "institution of public charity only."*

COLUMBUS, OHIO, February 10, 1919.

HON. V. W. FELIATRAULT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Receipt of your letter of January 24 requesting my opinion upon the question therein stated is acknowledged. The question is as follows:

"Under authority conferred by sections 3127 to 3138-2 inclusive, Portage county purchased a hospital, elected * * * trustees * * * and are now operating it as a county institution. Bonds were issued to pay the original purchase price and additional ones have been issued to defray expenses.

Patients who are able to do so, are required to pay for services in the hospital, and those who are unable to pay, are also taken care of.

Question: Should the above institution be exempt from taxation?"

The following quotations from the statutes referred to by you are sufficient to disclose the character of the institution described in your letter:

"Section 3127.—When two hundred or more taxpayers of a county petition the county commissioners for the privilege of having submitted to a vote of the electors of such county the issue of county bonds * * * for the purchase of a site and the erection thereon of a county hospital * * *, and the support therof, such commissioners shall order a special election * * *."

"Section 3131.—At the next election of county officers * * * trustees shall be elected * * *."

"Section 3132.—Such trustees shall have charge of the purchase of the site, erection of buildings thereon for such hospital and its management and control of all its property. * * * Such trustees may receive and hold in trust for the use of the hospital any grant or devise of land, or any gift or bequest of money or other personal property that may be given for the erection or support of the hospital."

"Section 3137.—The hospital trustees may determine whether or not patients presented at the hospital for treatment either medical or surgical, are subjects for charity, and shall fix such price for compensation from patients other than those unable to assist themselves, as they deem proper. The receipts therefrom shall be paid into the county treasury to the credit of the hospital fund, and used toward the maintenance of the hospital."

"Section 3138.—On the first Monday in April of each year, * * * the trustees shall certify the amount necessary to maintain and improve the hospital for the ensuing year."

It is very clear that what is created by action under these sections is a charitable institution open to all on the same terms, one of which terms is that those unable to pay for medical or surgical service and nursing shall not be required to do so; and that the institution is owned by the county and managed and controlled by it, being supported, in so far as its operating revenues are insufficient for its maintenance, by general tax levies.

The constitution, Article XII, section 2, authorizes the general assembly by general laws to exempt "institutions used exclusively for charitable purposes" and "public property used exclusively for any public purpose." These constitutional provisions are not self-executing, being on their face merely grants of authority to the legislature to pass laws. Here we are remitted to the provisions of the General Code for the final answer to the general question, which is as to whether or not property of the kind which the foregoing discussion has disclosed the county hospital to be is exempt from taxation.

So far as county property is concerned the following provisions of the General Code may be considered:

"Section 5352.—Buildings belonging to counties and used for holding

courts, and for jails or county offices, with the ground, not exceeding ten acres in any county, on which such buildings are erected, shall be exempt from taxation."

"Section 5353.—Lands, houses and other buildings belonging to a county, township, city or village, used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision thereof for public purposes, and property belonging to institutions of public charity only, shall be exempt from taxation."

I think it is obvious that the fact of county ownership is not enough under these statutes (and there are no others applicable) to entitle the property in question to exemption. It does not consist of "buildings * * * used for holding courts, and for jails or county offices," and the lands, houses and other buildings of which it does consist are not "used exclusively for the accommodation or support of the poor."

However, it is very clear that if the hospital were not owned by the county, but was conducted by a private corporation not for profit in precisely the same manner in which the county is required by law to conduct it, such a hospital so operated would constitute "an institution of public charity only" within the meaning of section 5353 G. C. The question therefore arises as to whether or not the fact of county ownership is enough to destroy the institutional idea required by the latter portion of that section; or, in other words, whether a county may own and conduct "an institution of public charity only" or in a sense and with respect to some such activity actually be " an institution of public charity only."

On this point I find the following judicial opinions:

"The term 'institution' is sometimes used as descriptive of the establishment or place * * *; at other times it is used to designate the organized body. It is used in both senses in the third section of the tax law * * *. In the sixth clause of the section it is used in the latter sense, and the property referred to is described as belonging to the institutions named."

(White, J., in Gerke vs. Purcell, 25 O. S. 229).

"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."

(Syllabus in Humphries vs. Little Sisters of the Poor, 29 O. S. 201.)

"It seems clear to us that the word 'institutions' in this clause is used to designate the corporation or other organized body instituted to administer the charity, and that the real estate described as belonging to such institutions has reference to property owned by the institutions; and that to entitle them 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. * * *."

"The word 'belonging' is used in the same sense throughout the clause, and, as there used, means ownership.

We do not say that the legal title must be vested in the institution. If the legal title were held in trust for the sole use and benefit of the insti-

tution, the property, in such case, would be regarded as belonging to the institution."

(Id. pp. 206-207, per White, J.)

The passage last quoted was repeated with approval in the opinion of Nichols, C. J., in *Rose Institute* vs. *Myers*, 92 O. S. 252, 270, where it was characterized as expressing the settled policy of the state.

This department held in an opinion under date of June 17, 1918 (No. 1279), in which the question was as to the exemption from taxation of real estate the fee of which was in the county, but which was held by the county for the benefit of an agricultural society conducting county fairs, etc., in compliance with the statute, that the following propositions are to be taken as true:

"In order that real estate may be exempt from taxation under section 5353 General Code, two things must concur, viz.:

(1) Ownership in an institution, i. e., organization of some kind as distinguished from an individual.

(2) Exclusive use for a purpose charitable in the sense that it aims to alleviate human suffering or meet great public needs, such as the advancement of science or useful arts, and is carried on without gain to the members of the organization; and public in the sense that its benefits are available to all without distinction and upon the same reasonable terms.

But in connection with the first of these propositions it is to be observed that the place where the legal title is found is immaterial. The ownership that is requisite is the equitable or beneficial use, and not the legal title."

In the opinion just cited the Attorney-General was not confronted by precisely the same question as that which is now raised, for there he was dealing with property the beneficial use of which was in a private corporation not for profit, though such corporation was so far public as to be the recipient of subsidies from the public treasury. Here we have to deal with property the legal title of which is in the county and the beneficial use of which is in an enterprise conducted for the public by public officers. True, they are organized into a board which has the sole and exclusive management of the enterprise so that there is a form of organization; but it is to be doubted that the trustees of the hospital are even so much as a quasi corporation. Rather, it would appear that they are merely a board of public officers charged with the performance of certain public functions. On the other hand, it is true that they have the control of a fund or funds arising from the operation of the enterprise or from the making of donations (section 3132, supra), so that they conduct their activities in substantially the same manner as would the trustees of a corporation not for profit.

The question would not be so difficult were it not for the fundamental principle that exemptions from general taxation are to be strictly construed. Here it is to be observed that the general assembly has expressly designated certain classes of property belonging to counties as exempt from taxation; while if this particular class of property belonging to counties is to be held exempt it must be brought within the scope of a more general provision applicable primarily at least to charitable enterprises conducted under private auspices, though public in character. In the same connection I should refer to section 5353-1 G. C., which provides as follows:

"Property, real, personal, and mixed, the net income of which is used solely for the support of institutions used exclusively for children's homes for poor children, the real estate on which said institutions are located, and the buildings connected therewith, shall be exempt from taxation."

It might be argued that by making this express provision as to children's homes, which is certainly broad enough to include county and district children's homes, the legislature had evinced an intention to exclude from the more general exemption other types of public institutions conducted by the county and not elsewhere specifically enumerated.

On the whole, however, the opinion of this department is that property belonging to a county and used for county hospital purposes is exempt from taxation. This conclusion is reached because of the decision in *Gerke* vs. *Purcell,* supra. In that case the question passed upon by the court was as to the exemption of parochial schools belonging to and conducted under the auspices of the Roman Catholic church by the duly appointed officers or agents of that church. The legal ownership of the property in question in that case was in the archbishop of the appropriate diocese. It did not appear that any separate organization whatsoever was maintained for the conduct of the schools. In other words, unless the church itself could be regarded as an "institution of purely public charity" there was no separately organized body of persons which could be pointed out as the "corporation or other organized body instituted to administer the charity" to use the language of *Humphries* vs. *Little Sisters of the Poor, supra.*

In the subsequent case of *Watterson* vs. *Halliday,* 77 O. S. 150, it was held without in any way modifying or overruling *Gerke* vs. *Purcell* and *Humphries* vs. *Little Sisters of the Poor,* that the Rocan Catholic church was, as such, not an "institution of purely public charity."

So that we have it that parochial schools are "institutions of purely public charity" (or, as the statutory language now is, "institutions of public charity only"), though the legal title of the property used in the conduct of such schools is in some archbishop, and though the organization which he represents and which actually conducts the schools is not in its broader aspects at least an "institution of purely public charity." In other words, as pointed out by the Attorney-General who rendered the opinion which has been cited, the effect of these cases taken together compels the conclusion that "property the legal title of which is in the bishop or archbishop is to be regarded as vested in substantially different beneficial ownerships when it is managed and conducted for purely church purposes, on the one hand, and when it is managed and conducted for the purposes of schools open to the public, on the other hand."

Applying the distinctions drawn from these cases to the question now under discussion it seems rather clear that if the beneficial use to which property the legal title of which happens to be in the county is put is a publicly charitable one, and such use is conducted under organized forms, the fact that we are unable to identify the organization which is the owner of the property and by which the use is conducted as "an institution of public charity only" in its broader aspects only, does not prevent the conclusion that the particular enterprise constitutes "an institution of purely public charity." In other words, though the county is itself not an "institution of public charity only," just as the Roman Catholic church was held in *Watterson* vs. *Halliday* not to be such an institution; yet the hospital conducted by the trustees for the county is as much a separate institution of public charity only as are the parochial schools, as held in *Gerke* vs. *Purcell,* supra. In this connection I quote the following from the syllabus in *Gerke* vs. *Purcell*:

"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 provisions of the constitution, * * *.

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.

In the description of the property exempted from taxation in section 3 of the tax law, * * * the word 'public' as therein applied to school houses, * * * and other institutions of learning, is descriptive of the uses to which the property is devoted. The schools and instruction which the property is used to support must be for the benefit of the public; and when private property is thus appropriated without any view to profit, it constitutes a 'purely public charity' within the meaning of the constitutional provision."

These statements are reinforced by the following from the opinion in *Myers* vs. *Rose Institute,* 92 O. S. 238, per Johnson, J. (p. 242):

"It has been constantly recognized and held by this court that the phrase 'institutions of purely public charity' is a broad one, and that the term may be applied by the legislature to the organization which administers the charity or to the establishment where its operations are carried on."

Again, in *Rose Institute* vs. *Myers,* 92 O. S. 252, the court, per Mr. Chief Justice Nichols, used the following vigorous language (p. 266):

"We gather from * * * the several Ohio cases, these two general and controlling rules of interpretation:

1. It is the use of the property which renders it exempt or non-exempt, not the use of the income derived from it.

2. The exemption is not a release in *personam,* but a release in *rem,* and the *res* to which the release applies must be found and identified by the officer or no exemption can be recognized.

Both of these opinions cite *Gerke* vs. *Purcell* with approval.

The conclusion is therefore reached that a county hospital is "an institution of public charity only" and that the lands, buildings and personal property the title of which is in the county, but the beneficial use of which belongs in the sense above developed to the hospital, are exempt from taxation.

Respectfully,
JOHN G. PRICE,
Attorney-General.

38.

SECTION 12672-1 G. C., PROVIDING POSSESSION OF CERTAIN DRUGS, IS IN EFFECT, REGARDLESS OF LATER AMENDMENT TO SECTION 12672 G. C.

COLUMBUS, OHIO, February 10, 1919.

The Department of Agriculture, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your letter dated January 27, 1919, as follows:

> "Was section 12672-1 Ohio law, which made it a misdemeanor to have in one's possession any narcotic, unless a registered physician, dentist or veterinary surgeon or pharmacist of this state, repealed or amended with section 12672 Ohio law, or is it still operative?
>
> "In this state persons are found who have large quantities of narcotics bought from peddlers, whom, if this section is not in operation, I cannot prosecute."

Section 12672-1 G. C., first referred to in your letter, was enacted April 17, 1913 (103 O. L., 506), as a supplemental section to section 12672.

Prior to this supplemental section, section 12672 did not make it a penal offense to have such drugs or narcotics in one's possession, but limited the operation and effect of said section to the selling, bartering, furnishing or giving away of such drugs.

At the same time that section 12672-1 was enacted, section 12672 was amended to include and make criminal the possession of such drugs, and as amended in 103 O. L., supra, contained these provisions:

> "Whoever sells, barters, furnishes or gives away, directly or indirectly, or has in his possession for the purpose of selling, bartering, furnishing or giving away, directly or indirectly, any quantity of cocaine, alpha or beta eucaine or alypin, morphine, acetyl-morphine, diacetyl-morphine, di-acetyl-ester-morphine, ethyl morphine, heroin, chloral hydrate, opium, or any of their alkaloids, salts, derivatives or compounds, or any synthetic equivalent thereof either as to the physical properties or physiological action, * *."

Section 12672-1 G. C. provided that:

> "The finding in the possession of a person who is not a wholesale dealer in drugs, a registered pharmacist, physician, dentist or veterinary surgeon,"

of any quantity of such drugs as those mentioned or described in sections 12672 and 12672-1 G. C., should be prima facie evidence of the violation of said section 12672.

It is to be noted that an earlier amendment of section 12672 at the same session of the legislature (103 O. L., p. 340), did not make it a penal offense to have possession of such drugs. It is also to be noted that there are certain exceptions to said sections, such as sales upon the original written prescription of licensed physicians, etc., and that the section does not extend to sales at wholesale to registered pharmacists, etc., nor does it apply to liquid preparations sold in good faith as medicines, containing a certain minimum amount of opium, morphine, heroin, etc.

Section 12672 G. C., as amended on March 21, 1917, in 107 O. L., p. 493, and in its present form, is as follows:

"Whoever sells, barters, furnishes or gives away, directly or indirectly, or has in his possession for the purpose of selling, bartering, furnishing or giving away, directly or indirectly, any quantity of cocaine, alpha or beta eucaine or alypin, morphine, acetyl-morphien, diacetyl-morphine, diacetyl-estermorphine, thyl morphine, heroin, chloral hydrate, opium, or any of their alkaloids, salts, derivatives or compounds, or any synthetic equivalent therof either as to the physical properties or physiological action, except upon the original written prescription of a physician, dentist, or veterinary surgeon, duly licensed under the laws of this state, when prescribing for their patients for actual and necessary purposes in the proper practice of their respective professions, which prescription shall contain the name of the physician, dentist, or veterinary surgeon, issuing it, the date of issue and the name of the person for whom it is issued; or fails to keep such prescription on file for at least two years, in such manner that it is accessible at all reasonable times to the inspection of the proper officer or officers of the law and the secretary of agriculture, or fills said prescription more than once, shall be fined not less than twenty-five dollars, nor more than five hundred dollars, or imprisoned in the county jail not less than thirty days or more than six months, or both offense shall be imprisoned not less than one year or more than five years in at the discretion of the court, for the first offense, and for each subsequent the penitentiary. If it be made to apear to the court that the person so convicted is addicted to the use of any of the above mentioned drugs or substances, the court, with the consent of such person may commit such person to a hospital or other institution for the treatment of such person. This section does not extend to sales at wholesale of any quantity of the above mentioned drugs to duly registered pharmacists, physicians, dentists or veterinary surgeons; and shall not apply to liquid preparations sold in good faith as medicines containing not more than two grains of opium, or not more than one-fourth grains of morphine, or not more than one-fourth grain of heroin, or not more than one-eighth grain of alpha or beta eucaine, or not more than ten grains of chloral hydrate in one fluid ounce, or if a solid preparation, in one avoirdupois ounce."

Section 12672-1 G. C. is unaffected by the amendment in 1917, and the law governing such sale and possession is governed by section 12672, as last amended, and by section 12672-1, as enacted in 103 O. L., p. 506.

Respectfully,
JOHN G. PRICE,
Attorney-General.

39.

APPROVAL OF CERTIFICATE OF AMENDMENT TO ARTICLES OF INCORPORATION OF THE GUARDIAN CASUALTY COMPANY, OF CLEVELAND, OHIO.

COLUMBUS, OHIO, February 10, 1919.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of February 10, 1919, with which you enclosed pro-

posed certificate of amendment to the articles of incorporation of The Guardian Casualty Company, of Cleveland, Ohio, for examination and approval by me, was duly received.

The effect of the proposed amendment will be to eliminate from the original articles of incorporation of the company that portion of the purpose clause reading as follows:

> "Guaranteeing the fidelity of persons holding places of public or private trust, who are required to, or, in their trust capacity to receive, hold, control, disburse public or private moneys or property; guaranteeing the performance of contracts other than insurance policies, and executing and guaranteeing bonds and undertakings required or permitted in all actions or proceedings, or by law allowed,"

and to add thereto the following provision:

> "and indemnifying persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations."

The company was organized under paragraph 2 of section 9510 G. C., and under that section the company could have inserted in the original articles of incorporation the provision for "indemnifying persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations," and it would also have been permissible for the company to have omitted from the articles the provisions now sought to be eliminated by the proposed amendment, and quoted above.

Both the proposed elimination from and the addition to the articles of incorporation sought to be accomplished by the proposed amendment are authorized by section 8719 G. C., (107 O. L., 415, 416) which provides, among other things, that a corporation may amend its articles of incorporation "so as to modify, enlarge or diminish the objects or purposes for which it was formed;" and so as "to add to the articles anything omitted from, or which lawfully might have been provided for originally, or to take out of the articles any unnecessary provisions or provisions which might lawfully have been omitted from them originally." See Annual Report of the Attorney-General, 1911-1912, Vol. 1, p. 98.

I return herewith the proposed certificate of amendment with my certificate of approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

40.

APPROVAL OF BOND ISSUE OF EAST LIVERPOOL CITY SCHOOL DISTRICT IN THE SUM OF $12,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 11, 1919.

41.

ROADS AND HIGHWAYS—APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN VINTON, ATHENS, FULTON, LAKE AND WAYNE COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, February 11, 1919.

42.

APPROVAL OF BOND ISSUE OF KNOX COUNTY, OHIO, IN THE SUM OF $138,666.67.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 11, 1919.

43.

APPROVAL OF BOND ISSUE OF BARBERTON CITY SCHOOL DISTRICT IN THE SUM OF $36,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 11, 1919.

44.

APPROVAL OF BOND ISSUES OF CANTON CITY SCHOOL DISTRICT IN THE SUM OF $217,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 11, 1919.

45.

BOARD OF CONTROL OF CITY OF CLEVELAND—CONSTRUCTION OF RESOLUTION INCREASING COMPENSATION OF CERTAIN EMPLOYES—RETROACTIVE CLAUSE CONSTRUED.

1. *The resolution of the board of control of the city of Cleveland, adopted March* 5, 1918, *increasing compensation of certain employes, effective January* 1, 1918, *is retroactive in so far as it attempts to provide increased compensation for previously rendered services and to create a new obligation on said city and to that extent is violative of section* 28, *Article II, of the Constitution of Ohio.*

2. *Such resolution is ineffective in law to authorize payment for such previously rendered services, being within the inhibition of section* 29, *Article II, of said constitution.*

3. *Such resolution is not subject to referendum under sections* 4227-1 *et seq. G. C., or section* 61 *of the Clevland charter.*

COLUMBUS, OHIO, February 11, 1919.

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

GENTLEMEN:—This is to acknowledge the receipt of your letter dated January 6, 1919, as follows:

> "We request your written opinion upon the following matter:
>
> "We are calling attention to sections 82 and 189 of the charter of the city of Cleveland, Ohio, as contained in Vol. 1 of the Supplement of the General Code of Ohio.
>
> *Statement of Facts.*
>
> "A resolution of the board of control, advertised in the city record of the city of Cleveland, adopted and passed in March, 1918, increased the compensation of various employes and provided that such increased compensation shall become operative January 1, 1918, and the increased compensation covering the period from January 1 on has been paid to such employes.
>
> *Question* 1. Is such legislation legal and has such increased compensation been regularly paid?
>
> We are also enclosing marked copies of the city record for illustrations."

Pertinent parts of sections 82 and 189 of the charter of the city of Cleveland, Ohio, to which you call attention in your letter, are as follows:

> *Section* 82.—"The mayor and the directors of the several departments shall constitute the board of control. The mayor shall be *ex officio* president of the board. * * * A meeting of the board shall be public, a record of its proceedings shall be kept, and an abstract of its proceedings shall be printed in the city records."
>
> *Section* 189.—"The council shall fix, by ordinance, the salary or compensation of directors of departments, its own members and employes, of the members of the divisions of police and fire, under the immediate control of the chiefs thereof, and of members of boards or commissioners in the *unclassified service of the city. The board of control shall fix the number and the salaries or compensation of all other officers and employes.* * * *

> The salary of any officer, employe, member of a board or commission in the *unclassified* service of the city shall not be increased or diminished during the term for which he was elected or appointed and all fees pertaining to any office shall be paid into the city treasury."

The marked copy of the city record, referred to in your letter, purports to be a part of the abstract of the proceedings of the board of control, which, as provided in the above quoted sections of the Cleveland charter, has the power to fix the number and salary or compensation of certain employes of the city.

From supplemental information obtained by personal conferences with your department, I am informed that the specific question upon which you desire my opinion is, whether the board of control may legally make the increased compensation retroactive so that the increased salary, provided for in their meeting of March 15, 1918, could become operative on January 1, 1918, as provided in the last clause of the several resolutions in the marked paragraphs heretofore referred to, and further, if such increased compensation for the period prior to the passage of the resolution of the board of control, March 8, 1918, has been legally paid.

The facts stated in your letter, supplemented by those stated in personal conference, also raise the question of whether the prospective operation of the resolution under consideration is subject to the referendum.

Sections 28 and 29 of Article II of the Constitution of Ohio are applicable.

> *Section* 28.—"The general assembly shall have no power to pass retractive laws * * *."
>
> *Section* 29.—"No extra compensation shall be made to any officer, *public agent,* or contractor, *after services shall have been rendered* or the contract entered into; * * *"

Section 3 of Article XVIII, adopted September 3, 1912, of the Ohio Constitution, must also be considered. It provides:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such police, sanitary and other similar regulations *as are not in conflict with general laws.*"

In the construction of ordinances and by-laws of municipal corporations, we must consider the question as to what extent municipal corporations are bound by constitutional inhibitions limiting the legislative power of the state, which, under the constitutional limitations, is the source of the power of the municipality.

Judge Cooley, in Constitutional Limitations, page 2388, says:

> "The power of municipal corporations to make by-laws is limited in various ways.
>
> "It is controlled by the constitution of the United States and of the state. The restrictions imposed by those instruments which directly limit the legislative power of the state, rest equally upon all the instruments of government created by the state. If a state cannot pass an *ex post facto* law, or law impairing the obligation of contracts, neither can any agency do so which acts under the state with delegated authority. * * * and whatever the people by the state constitution have prohibited the state government from doing, it cannot do indirectly through the local governments."

True, Judge Cooley wrote the foregoing before the adoption of section 3, Aritcle XVIII of the state constitution and before the city of Cleveland obtained its charter. However, this principle, as announced by him, has been re-affirmed by the Supreme Court of Ohio.

In Fitzgerald et al vs. City of Cleveland, 88 O. S., p. 338, in the first branch of the syllabus it was held:

> "The provisions of section 7, Article XVIII of the constitution, as amended in September, 1912, authorizes any city or village to frame and adopt or amend a charter for its government and may prescribe therein the form of government and define the powers and duties of the different departments, *provided they do not exceed the powers granted in Article III, section* 18, *nor disregard the limitations imposed in that article or other provisions of the constitution.*"

And again, in the same court, in the decision of the Cleveland telephone case, which was decided in June, 1918, 98 O. S., 375, the court say:

> "A charter is merely a vehicle for the exercise of municipal power and cannot confer authority upon a municipality in excess of the power conferred by the constitution itself."

We have to consider, then, whether the resolution involved herein is within the inhibition of the constitution of Ohio. And this must be answered in the affirmative if it is retroactive or if it seeks to make "compensation" to any officer, public agent or contractor, after the services shall have been rendered.

Retroactive law, as defined by Justice Story, as quoted in Rariden vs. Holden, 15 O. S., 207, has been held to be:

> "Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, *or creates a new obligation,* imposes a new duty or exercises a new disability in respect to transactions or considerations already passed, must be deemed retrospective."

A statute which proposed to authorize the issuance of a refunding order to a township board of education treasurer, to cover an alleged error in his settlement with his successor in office, was held to create a new obligation in that the money so refunded was to be raised by special levy against the township. This was the holding in Commissioners vs. Roche Bros., 50 O. S., 103, and was followed in Board of Education vs. State, 51 O. S., 531.

A similar statute was before the court and held unconstitutional on the same ground in State vs. Brown, 8 O. C. C., 103.

So it would appear that the increased compensation proposed to be paid to employes embraced in these resolutions, would be retroactive and within the inhibition of said section 28.

Section 29 of the constitution is mandatory, that no extra compensation shall be made "to any officer, public agent or contractor after the service shall have been rendered or the contract entered into," and it only remains to inquire, first, if the service in the matter under consideration has been rendered. Assuredly it has. Second, are the employes affected by these resolutions to be included in the terms "public agent."

That the employes affected by this resolution are "public agents," as provided in said section 29, there can be no doubt.

In construing this section in State of Ohio ex rel Field, et al vs. Williams, Auditor of State, 34 O. S., 219, Judge Gilmore says:

> "The first clause of the section quoted inhibits the allowance of extra compensation to any officer, public agent, or contractor, after the services shall have been rendered or the contract entered into.
>
> This language is very broad, and was intended to embrace all persons who may have rendered services for the public in any capacity whatever, in pursuance of law, and in which the compensation for the services rendered is fixed by law, as well as persons who have performed or agreed to perform services in which the public is interested, in pursuance of contracts that may have been entered into in pursuance of law, and in which the price or consideration to be received by the contractor for the thing done, or to be done, is fixed by the terms of the contract.
>
> "In the first, compensation, in addition to that fixed by law at the time the services were rendered, and, in the second, the allowance of compensation in addition to that stipulated in the contract, is inhibited by the first clause of the section."

So it appears very clear that the services from January 1 to March 5, 1918, had been rendered at the time of the passage of the resolution by the board of control and it just as clearly appears that they are public agents in the sense used in section 29 of the constitution. It is my opinion, therefore, that in so far as the resolution of the board of control was intended to operate retrospectively, and pay for services rendered prior to its passage and adoption by the board of control, it offends that section of the constitution last quoted and is therefore ineffective and invalid.

Your inquiry also involves the question of whether the resolution referred to may become operative from and after its passage, without the delay of thirty days during which it might have been subjected to a referendum.

Sections 4227-1, et seq., G. C., and sections 49 et seq. of the Cleveland city charter, are pertinent. Section 4227-1 G. C. provides:

> "Ordinances and other measures providing for the exercise of any and all powers of government granted by the constitution * * * may be proposed by initiative petition * * *."

This section provides for initiative action and it is to be noted contains the broad provision "other measures providing for the exercise of any and all powers," etc.

Section 4227-2 G. C. provides:

> "Any ordinance or other measure *passed by the council of any municipal corporation*, shall be subject to the referendum, except as hereinafter provided. No ordinance or other measure shall go into effect until thirty days after it shall have been filed with the mayor of the city, or passed by the council in a village, except as hereinafter provided. * * *"

The pertinent part of the charter referendum sections is as follows:

> *Section* 49.—"No ordinance passed by the council, except as otherwise provided by this charter, shall go into effect until thirty days after its final passage by the council. * * *"

Sections 49 to 56, both inclusive, cover the referendum provisions in the Cleveland charter and in none of them—this is also true of the provisions of section 4227-2 G. C.—is there any provisions for a referendum on measures, except those enacted by the city council.

I am therefore of the opinion that the resolution of the board of control, referred to in your inquiry, is not subject to the referendum.

Respectfully,
JOHN G. PRICE,
Attorney-General.

46.

ARTICLES OF INCORPORATION OF HOBART INSURANCE COMPANY, OF FREMONT, OHIO, APPROVED.

COLUMBUS, OHIO, February 12, 1919.

HON. WILLIAM D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of February 10, 1919, in which you enclosed the proposed articles of incorporation of Hobart Insurance Company, of Fremont, Ohio, for my examination and approval, was duly received.

The company referred to is being incorporated under authority of section 9593, et seq. G. C. governing the incorporation and organization of mutual protective associations.

The proposed articles meet all the requirements of these statutes as construed in my former opinion No. 14, dated January 27, 1919, and I therefore return the articles to you with my certificate of approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

47.

ROADS AND HIGHWAYS—APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN PAULDING AND MUSKINGUM COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, February 12, 1919.

48.

PHYSICIANS AND SURGEONS—REQUIRED TO REPORT VENEREAL DISEASES TO OHIO STATE DEPARTMENT OF HEALTH BY REASON OF DEPARTMENT'S REGULATION—NOT A "WILFUL BETRAYAL OF PROFESSIONAL SECRET"—PHYSICIAN NOT LIABLE IN DAMAGES.

1. *Section* 11494 *G. C. will not excuse a physician from compliance with the regulation of the Ohio state department of health adopted May* 2, 1917, *requiring physicians to report venereal diseases.*

2. *Such a report does not constitute "the wilful betrayal of a professional secret" as defined in section* 1275 *G. C.*

3. *Compliance with such regulation will not thereby render a physician reporting such venereal disease liable in damages to his patient for divulgence of professional secrets.*

COLUMBUS, OHIO, February 13, 1919.

The State Department of Health, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your letter of January 29, 1919, as follows:

> "Under date of May 2, 1918, the Public Health Council of the state department of health adopted rules and regulations for the prevention of venereal diseases. These rules were filed with the secretary of state June 20, 1918, have been sent to all the health officers and boards of health in the state, and to all the physicians whose names appear in the American Medical Association directory.
>
> "In connection with the operation of the rules quite a number of questions have been raised, especially in regard to the duty of physicians to make reports to the state commissioner of health as provided in the regulations, and if there is a personal liability on a physician if reports are made. I should be glad, therfore, to have your opinion on the following points:
>
> 1. Is there any provision in the laws of the state of Ohio that would be a defense for a physician who failed to report to the state commissioner of health a case of gonorrhea, syphilis or chancroid where the person afflicted came to the physician as a patient, either for diagnosis or treatment?
>
> 2. Would a physician reporting a venereal disease under the provisions of these regulations be protected in the case of a personal damage suit for alleged 'divulging professional secrets?'
>
> For your information I enclose a copy of the regulations above referred to."

The pertinent parts of sections 1237 and 1243 G. C., which sections are applicable to the facts stated in your letter, are as follows:

> *Section* 1237.—"The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people * * *. It may make special or standing orders or regulations for preventing the spread of contagious or infectious diseases, * * *."
>
> *Section* 1243.—"Boards of health, * * * and physicians * * * shall report to the state board of health promptly upon the discovery thereof, the existence of any one of the following diseases: Asiatic cholera, * * * and such other contagious and infectious diseases as the state board specifies."

As to the making and promulgation of orders of the department of health, the amendment of section 1236 (107 O. L., 523) provides that the regulations of the public health council shall be signed by the secretary thereof, filed in the office of the secretary of state, and that copies thereof shall be sent to the local board of health, health officers, etc., and shall be published in such manner as the public health council may, from time to time, determine.

The constitutionality of this legislation, vesting such ample powers in the department of health, or board of health, as it has been variously styled in the different acts, has been repeatedly challenged and considered, and passed upon in the Supreme Court of Ohio; and, as said by Judge Donahue, in Board of Health vs. Greenville, 86 O. S., 21:

> "It is now the settled law that the legislature of the state possesses plenary power to deal with these subjects so long as it does not contravene the constitution of the United States or infringe upon any right granted or secured thereby, or is not in direct conflict with any of the provisions of the constitution of this state, and is not exercised in such an arbitrary and oppressive manner as to justify the interference of the courts to prevent wrong and oppression."

Or, as was held in the first branch of the syllabus in Toledo Disposal Co. vs. State of Ohio, 89 O. S. 230:

> "In the exercise of the police power, the state and municipal authorities may make all such provisions as are reasonable, necessary and appropriate for the protection of the public health and comfort, and when any such provision has a real and substantial relation to that object and does not interfere with the enjoyment of private rights beyond the necessities of the situation, *every intendment is to be made in favor of its lawfulness.*"

As stated by Judge Johnson, in the opinion of the above case, at page 235:

> "Nothing is more firmly established than that the state and municipal authorities, in the exercise of the police power, may make all such provisions as may be reasonable, necessary and appropriate for the protection of the public health and comfort."

In the case of State of Ohio vs. Boone, 84 O. S., 346, a former statute requiring physicians to report birth statistics was held unconstitutional because it was unreasonable in that it required the physicians to report not only the matters which came within their observation professionally, but other facts with which their professional connection with the case did not acquaint them. That the court in that case had no doubt that the state could require a physician to report professional facts in such cases, is evidenced by the language of Judge Davis, on page 352 of the opinion, where he says:

> "We need not inquire whether the state may not require a physician or midwife to report to the proper authority, for registration, the fact of a birth which has come under his or her observation, first, because it is conceded that it may do so, and, second, because it obviously has some relation to the public welfare and it can not be very burdensome to comply with such regulation."

It is also noted that a question is raised as to the liability of a physician in making such reports for damages for alleged divulgence of professional secrets. That section in law which makes certain communications privileged communications is section 11494 G. C., pertinent provisions of which are:

> "The following persons shall not *testify* in certain respects: * * *

or a physician, concerning a communication made to him by his patient in that relation or his advice to his patient," etc.

It is to be noted that the limitation here is that the physician shall not testify in the respect set forth.

It has been held in the case of Keck vs. Boda, 13 O. C. D., 413, that this section is merely declaratory of the common law, with reference to privileged communications, and it is founded on public policy for the benefit of the patient and physician.

In consideration of private rights and privileges, we are reminded by Justice Harlan, in California Reduction Co. vs. San Francisco Reduction Co., 199 U. S., 306, that they are "subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community."

That the legislature may, and in fact did, qualify some of the provisions of section 11494, supra, is evidenced by section 13659 G. C., which provides that the communications between husband and wife (which are also made privileged communications in section 11494 G. C.) may be testified to in certain kinds of criminal cases.

Sections 1237, 1243 and 1236 G. C., supra, were enacted after section 11496 G. C., and in view of the broad powers thereby vested in the health commission, said commission by a reasonable and necessary order, properly promulgated under section 1236, may require physicians to make the reports referred to in your letter, and a physician complying with such regulation of the health commission is not liable in an action for damages for divulging professional secrets, as stated in your letter.

I am not unmindful of the provisions of section 1275 G. C., as amended in 106 O. L., 178, defining gross unprofessional or dishonest conduct to be "the wilful betrayal of a professional secret." This section, however, must be construed as a part of an act to regulate the conduct of the practice of medicine, and a later valid regulation of the state health commission must be construed with this section and meaning given to both, if they are not manifestly inconsistent and repugnant.

Considering the power and authority of the state health commission to make and promulgate such regulation, and the purpose of section 1275 G. C., I am of the opinion that the compulsory compliance with the regulation of the health commission on the part of a physician would not constitute a "wilful betrayal of a professional secret," and in any event section 1275 G. C. only applies to the physician's right to practice and is not concerned with the declaration of any right or ground upon which a private action in damages could be predicated against the physician.

In this opinion it is to be borne in mind that compliance with rule 9, of the attached regulations, providing for the secrecy of such reports and the records thereof, is assumed and violations of its provisions are not herein considered.

I am therefore of the opinion, (1) that there is no provision in the laws of the state of Ohio which would be a defense for a physician failing to make the report referred to in your letter, on tht ground that he may be liable to a damage suit for alleged divulgence of professional secrets; and, (2), that a physician reporting such diseases referred to in your letter, in compliance with these regulations, would not be liable in such a damage suit.

Respectfully,
JOHN G. PRICE,
Attorney-General.

49.

TOWNSHIP TREASURERS—DISTINCTION AS TO FEES OR SALARIES WHERE CITY IS LOCATED WITHIN TOWNSHIP AND WHERE IT IS NOT—FEES EARNED PRIOR TO JULY 2, 1917, DISCUSSED.

The treasurer, in townships wherein no city is located, is entitled to receive, for the year 1917, *as his fees for receiving, safe-keeping and paying out township moneys, the sum of one hundred and fifty dollars. The treasurer, in townships wherein a city is located, is entitled, as to said year, to receive two hundred and fifty dollars. Said treasurer, is, however, entitled to all fees earned before July* 2, 1917, *even though they should exceed the said limitation. Opinion of former Attorney-General on this point approved* (1917 *A. G. R. Vol. II. p.* 1614).

COLUMBUS, OHIO, February 13, 1919.

HON. WALTER S. RUFF, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of February 3, 1918, in which you say:

> "In 1917 a law was passed by the legislature in regard to the salary of township treasurers which fixed their compensation at a maximum of one hundred fifty dollars in townships where there are no cities. There has been a great deal of controversy in this county in regard to the treasurers overdrawing their salary.
>
> The law which I refer to became effective July 2, 1917. It seems the state examiner held that treasurers could not receive more than one hundred fifty dollars for the year 1917. Some of the treasurers contend that they have legal opinions to the effect that they would be entitled to two per cent of the amount of money handled to July 2, 1917, and from July 2, 1917, to January 1, 1918, salary at the rate of one hundred fifty dollars per year.
>
> I would appreciate it if you would give me your opinion on this matter at the earliest date possible."

Section 3318 G. C., which became a law July 2, 1917, says (107 O. L. 652):

> "The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent of all moneys paid out by him upon the order of the township trustees, but in no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars, except that in a township wherein a city is located and such city is a part of such township, a township treasurer shall be entitled to receive from the township treasury not more than three hundred dollars in one year."

The question of how much the township treasurer may be paid for receiving, safe keeping and paying out moneys belonging to the township treasury, in the year 1917, has already received the attention of the Attorney-General.

In opinion No. 565, rendered by the Attorney-General on August 27, 1917, to the Bureau of Inspection and Supervision of Public Offices, Columbus, O. (1917 A. G. R., Vol. II, p. 1614), it was held that (Syll.):

"1. The sections of the statute modifying the compensation of township clerks, treasurers and trustees became effective on the same day that the acts of which they are a part became operative. Section 20 of Article II of the constitution does not apply because said officers draw compensation and not salaries.

2. Trustees will be entitled to receive not to exceed $250 for the present year; the clerk, $250; the treasurer in townships where there is no city, $150; and wherein there is a city, $250; excepting that the treasurer is entitled to all the fees earned before July 2, 1917, even though they should exceed the said limitation."

The opinion referred to goes in detail into the matter you ask about. Being satisfied with both its conclusions and its reasoning, in so far as the question raised by your letter is concerned, I approve said opinion. For your consideration a copy of same is enclosed herewith.

Respectfully,
JOHN G. PRICE,
Attorney-General.

50

TOWNSHIP TREASURER—FEES WHERE ONLY PART OF CITY IS LOCATED IN TOWNSHIP.

The township treasurer of a township, wherein only a part of a city is located, is not entitled, under the provisions of section 3318 *G. C.* (107 *O. L.* 652), *to retain, as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, more than one hundred and fifty dollars in any one year.*

COLUMBUS, OHIO, February 13, 1919.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—The receipt is hereby acknowledged of your letter of February 3, reading as follows:

"A part of the city of Tiffin is located in Hopewell township, Seneca county, Ohio, there being approximately five hundred inhabitants in said city in said township.

The township trustees of Hopewell township and myself are of the opinion that the treasurer of said township, under the provisions of section 3318 of the General Code, is entitled to receive compensation under the exception contained in said section, namely, that in a township wherein a city is located and such city is a part of such township, a township treasurer shall be entitled to receive from the township treasury not more than three hundred dollars in any one year.

However, the clerk of said township declines to issue a voucher to the treasurer under that part of said section, although two per cent, of all moneys paid out by him on the order of the township trustees amounts approximately to $300.00, and the township trustees have issued their order accordingly to the treasurer.

I would like your opinion as to whether the treasurer of that township

can draw more that the $150.00 by reason of a part of the city of Tiffin being in said Hopewell township."

The matter of the fees of the township treasurer, for receiving, safe keeping and paying out township moneys, is covered by section 3318 G. C. (107 O. L. 652). which says:

> "The treasurer shall be allowed and may retain as his fees for receiving, safe keeping and paying out moneys belonging to the township treasury, two per cent of all moneys paid out by him upon the order of the township trustees, but in no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars, except that in a township wherein a city is located and such city is a part of such township, a township treasurer shall be entitled to receive from the township treasury not more than three hundred dollars in one year."

Under the above section, it is necessary, in order to authorize the township treasurer to receive and retain as his fees more than one hundred and fifty dollars in any one year, that he come within the exception contained in said section. That is to say, his township must be one of which two things may be said: (1) That a city is located therein, and (2) that such city is a part of such township. Both conditions must obtain in order to satisfy the exception.

Under the facts stated by your letter, neither of the things above stated can be said of Hopewell township. First, said township is not one "wherein a city is located," but is one wherein only a *part* of a city is located. It would not be proper to assume that the legislature intended the section to read "wherein a city *or a part thereof* is located," for there is no evidence of any such intent. Secondly, said city of Tiffin is not "a part of such township." A part of the city of Tiffin is, indeed, a part of Hopewell township, but the statutory exception, above cited, does not include that situation.

For the reasons above given, you are advised that the treasurer of Hopewell township is not, under the facts stated in your letter, entitled to receive and retain as his fees, for receiving, safe keeping and paying out moneys belonging to the township treasury, more than one hundred and fifty dollars in any one year.

Opinion No. 1415, rendered by the Attorney-General on August 21, 1918, to the Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio, reaches a similar conclusion on this question, which opinion is hereby approved.

Respectfully,
JOHN G. PRICE,
Attorney-General.

51.

APPROVAL OF BOND ISSUE OF LAKE COUNTY IN THE SUM OF $79,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 13, 1919.

52.

APPROVAL OF BOND ISSUE OF VILLAGE OF BRYAN, OHIO, IN THE SUM OF $12,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 14, 1919.

53.

APPROVAL OF BOND ISSUE OF CITY OF LORAIN IN THE SUM OF $27,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 14, 1919.

54.

APPROVAL OF BOND ISSUE OF CITY OF LAKEWOOD, OHIO, IN THE SUM OF $75,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 15, 1919.

55.

ROADS AND HIGHWAYS—APPROVAL OF FINAL RESOLUTIONS FOR CERTAIN ROAD IMPROVEMENTS IN MAHONING AND MARION COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, February 15, 1919.

56.

APPROVAL OF ABSTRACTS OF TITLE COVERING LOTS 33, 41 AND 46, WOOD BROWN PLACE ADDITION.

COLUMBUS, OHIO, February 17, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You recently submitted to this department abstracts of title covering the following described premises, to-wit:

"Being lots Nos. thirty-three (33), forty-one (41) and forty-six (46) of the Wood-Brown Place addition, as the same are numbered and delineated on the recorded plat of said addition in plat book No. 5, pages 196, 197, Franklin county, Ohio."

I have carefully examined said abstracts, dated January 25, 1919, January 27, 1919, and February 13, 1919, respectively, and find that the title to said lots was in Alfred Anderson, Elias Harris and Joseph L. Gibson, respectively, at the dates of the several abstracts aforesaid.

I find from the abstract for lot No. 33 that the title is clear and free of encumbrances, except taxes for the last half of the year 1918, amounting to $5.72, which are unpaid and constitute a lien upon said premises.

I find from the abstract for lot No. 41 that the title is clear of incumbrances, except as follows:

A mortgage in the sum of $100.00, dated January 17, 1918, is not shown to have been satisfied and therefore constitutes a cloud upon the title; a mortgage in the sum of $125.00, dated January 2, 1915, is not shown to have been satisfied and therefore constitutes a cloud upon the title; also I call attention to what appears to be a typographical error, in that the abstract shows a mortgage executed by Elias Harris and wife, dated December 13, 1913, and in the amount of $65.00, while a notation of a release of mortgage given by the same parties and shown to be recorded as stipulated in the case of the aforesaid mortgage, but which release is set forth to be of a mortgage in the amount of $6,500.00, which obviously is erroneous and may be accepted as evidencing a release of the $65.00 mortgage, inasmuch as the volume and page of the record of the two are identical.

It appears that the taxes for the year 1918 have been paid in full, but there is a special assessment for road improvement accrued as a lien upon said premises, amounting to 30 cents, with a current installment of 10 cents to fall due in December, 1919.

I find from the abstract for lot No. 46 that the title is clear of encumbrances, except as follows:

A mortgage in the sum of $140.00, dated November 5, 1914, is not shown to have been satisfied and therefore constitutes a cloud upon the title.

Also, the taxes for the year 1918, which amount to the sum of $10.34, are unpaid and constitute a lien upon said premises.

I further call attention to the fact that a mortgage recorded in said abstract as executed by Edward R. James to Charles G. Lakin, dated October 24, 1898, and in the amount of $100.00, not canceled of record, is released by an instrument of release executed by Clara L. Rei, Frank Rei, and Charles W. Rei as heirs of Charles G. Lakin, which instrument has been submitted in connection with the abstracts.

As to the heirs executing said release, the same is effective as a cancellation of said mortgage and is absolute, if those executing same comprise all the heirs of said Charles G. Lakin.

No deeds of conveyance to the state have been submitted for my consideration, and therefore I advise that, subject to the qualifications herein pointed out, the persons above named as owners of said premises are vested with good title thereto and upon the execution of proper deeds to the state and their acceptance the same would convey good title, subject to the aforesaid liens.

Respectfully,
JOHN G. PRICE,
Attorney-General.

57.

APPROVAL OF ARTICLES OF INCORPORATION OF THE GUARDIAN CASUALTY COMPANY, OF CLEVELAND, OHIO.

COLUMBUS, OHIO, February 18, 1919.

HON. WM. D. FULTON, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of February 18, 1919, with which you submitted the articles of incorporation of The Guardian Casualty Company, of Cleveland, Ohio, for examination and approval by me, was duly received.

The articles disclose that the company is being incorporated under section 9510 et seq. G. C., and are found by me to be in accordance with the provisions of the chapter of the General Code of which those statutes are a part, and not inconsistent with the constitution and laws of the state or of the United States.

I therefore herewith return the articles to you with my cerificate of approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

58.

APPROVAL OF BOND ISSUE OF VILLAGE OF COAL GROVE, OHIO, IN THE SUM OF $5,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 18, 1919.

59.

ROADS AND HIGHWAYS—APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN LAKE AND KNOX COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, February 19, 1919.

60.

OHIO STATE UNIVERSITY—APPROVAL OF DEED FROM CHARLES M. LUDMAN TO STATE OF OHIO.

COLUMBUS, OHIO, February 19, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees of Ohio State University, Columbus, Ohio.*

DEAR SIR:—J. L. Porter, Esq., attorney for Mr. Charles M. Ludman, has handed me, by your direction, the deed of Mr. Ludman, bearing even date herewith, conveying to the state of Ohio a parcel of land twenty feet by one hundred and

forty feet, part of the tract marked "Reserve" on the plat of Elizabeth J. McMillen's Homestead addition to the city of Columbus, Ohio, with the request that I advise you as to whether the deed is correct in form and description.

An examination of the deed discloses that it is legally executed and that the description is correct. The title to the property is covered by an abstract referred to in an opinion of this department dated September 28, 1917, No. 667, and a further opinion dated October 4, 1917, No. 689.

I am returning the deed herewith.

Respectfully,
JOHN G. PRICE,
Attorney-General.

61.

APPROVAL OF BOND ISSUE OF CITY OF ATHENS IN THE SUM OF $10,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 20, 1919.

62.

EXPENSES OF SHERIFF FOR MAINTAINING HORSES IN DISCHARGE OF HIS DUTIES—COUNTY COMMISSIONERS MAY ALLOW SAID EXPENSES ALTHO NOT INCLUDED IN QUARTERLY REPORT OF SHERIFF.

The mere fact that a sheriff fails to include in quarterly reports rendered by him during his term of office, actual and necessary expenses of maintaining horses necessary to the proper administration of the duties of his office, does not legally prevent the county commissioners from allowing such expenses when a bill for same in proper form is filed by said sheriff after the conclusion of his term of office.

COLUMBUS, OHIO, February 20, 1919.

HON. CHARLES R. SARGENT, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Receipt is hereby acknowledged of your letter of January 30, 1919, in which you say:

> "After the conclusion of his term, the sheriff of Ashtabula county, Ohio, who retired from office on the 6th day of January, presented a bill to the commissioners of Ashtabula county, for the years 1915, 1916, 1917 and 1918, commencing on February 1, 1915, and concluding on October 28, 1918, consisting of divers items for oats, straw, and hay, presumably for maintaining a horse or horses owned by the sheriff and used by him during that period in assisting him to perform his duties as such sheriff. During his term of office, in none of his quarterly reports were any such items included and no claim previously made for maintenance of any horse or horses."

You state your question thus:

"Assuming that the expense account is correct as to the amount and that the amount was actually expended in the maintenance of horse or horses necessary to the proper administration of the duties of his office, can such a bill be allowed at this time by the county commissioners?"

You call special attention to sections 2997 and 2999 G. C., which read as follows:

"Section 2997.—In addition to the compensation and salary herein provided, the county commissioners shall make allowance quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferrring persons to and from any state hospital for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

"Section 2999.—Nothing in this chapter shall be construed to make a county, or an officer thereof, liable to any of the officers named herein or his deputies, assistants, clerks, bookkeepers, or other employes, for the payment of compensation in excess of the amount herein authorized, or except in the manner herein provided."

Both of these sections were a part of the same act, namely, the County Officers' Salary Act, passed in 1906 and found in 98 Ohio Laws, 89. They should therefore be construed together and both read in the light of the other unrepealed sections of the same act.

Whether section 2999 G. C. prevents your county commissioners from making the allowance in question, depends upon the construction to be given to the phrase "for the payment of compensation," contained in said section. If that phrase means something different from, and does not include, the allowance for expenses of horse maintenance authorized by section 2997, then section 2999 is not applicable, and if it is not applicable, there would be no occasion for considering the other and subsequent phrase therein contained and which your letter cites, namely, the phrase "except in the manner herein provided." This last cited phrase refers grammatically to the phrase "for the payment of compensation."

I am of the opinion that the phrase "for the payment of compensation" means something different from, and does not include, the allowance for expenses of horse maintenance authorized by section 2997 G. C. To hold otherwise would do violence to the plain, ordinary meaning of the first nine words which occur at the outset of that section and which read thus:

"*In addition to* the compensation and salary herein provided, * *."

With section 2999 G. C. disposed of, the next question for consideration is whether the proposed allowance by your county commissioners to the retiring sheriff is prohibited by reason of anything contained in section 2997 G. C. itself. Said section provides that an expense of the kind mentioned shall be allowed by the county commissioners *quarterly;* and further that—

> "Each sheriff shall file under oath with the *quarterly report* herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

It may be plausibly argued it was the intention of the legislature that the sheriff should be paid the expenses mentioned in section 2997 G. C. at regular intervals, to-wit, quarterly, and that each report by the sheriff should list all of the expenses incurred during the quarter reported upon. Such is the general practice over the state, and wisely so since it enables the county commissioners to pass upon, and, if necessary, to investigate, such expense account, while the facts pertaining thereto are easily ascertainable.

The practice just referred to seems very commendable, but it is quite another thing to say that section 2997 G. C. makes it indispensable.

> "Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally *directory.* Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards."

Sutherland on Stat. Const., section 448.

It is not even clear in this case that the statute directs the thing to be done "at a particular time." The language is:

> "Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, * * *."

It is apparent from the foregoing that the sheriff's expenses must be filed with the quarterly report, but there is no requirement that those expenses relate in point of time to any particular interval. In other words, there is nothing to prevent expenses incurred during the first quarter of the year from being filed with the report for the second or any subsequent quarter. The result of holding otherwise would be to penalize a sheriff for a mere slip of memory, and deny him the right to be made whole for moneys actually and necessarily expended by him in administering his official duties. Said section evinces no such intent.

While section 2997 G. C. does not expressly provide for the filing by the sheriff of an expense report at the end of his term of office (but only quarterly), it seems to me that it would be proper for him to do so, in view of the fact that the amount of said expenses are due and payable to him personally.

Assuming that the expense account referred to in your letter is a full, accurate and itemized account, filed under oath, and exhibits actual and necessary expenses for maintaining horses necessary to the proper administration of the sheriff's office,

I am of the opinion that such account can legally be allowed at this time by your county commissioners.

Respectfully,
JOHN G. PRICE,
Attorney-General.

63.

APPROVAL OF BOND ISSUE OF CITY OF LAKEWOOD IN SUMS OF $5,350.00; $18,000.00; $12,450.00; $12,340.00 and $29,400.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 21, 1919.

64.

APPROVAL OF BOND ISSUE OF ASHTABULA COUNTY IN THE SUM OF $313,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, February 24, 1919.

65.

MUNICIPAL CORPORATIONS—DIRECTOR OF PUBLIC SAFETY HAS AUTHORITY TO MAKE RULES FOR DAYS OFF OF POLICEMEN—COUNCIL HAS SAME AUTHORITY FOR FIREMEN.

Under the laws of Ohio now in force, the power to make rules regarding the days off to be allowed members of the police department is vested in the director of public safety; and the power to make similar rules governing members of the fire department is vested in the council.

COLUMBUS, OHIO, February 24, 1919.

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

GENTLEMEN:—Your letter of January 23, 1919, requesting my opinion upon questions submitted to you by the director of public safety of the city of Coshocton, was duly received.

The letter from the director of public safety referred to, is quoted in your letter as follows:

> "Members of our police force are asking for one day off duty in seven days and members of our fire department are asking for every third day off. Will you kindly inform me whether the safety director has full discretion to decide this matter or whether it is necessary to have council

take action by the passage of an ordinance, in case it should be deemed advisable to grant either of the above requests.

We will appreciate it very much if you will give us some light upon this question."

And the questions which you have propounded to me are as follows:

"Question 1. Has council any power relative to the rules and regulations of the fire and police departments in regard to days off in addition to the power to fix compensation in general?

Question 2. Has the director of public safety the exclusive power to fix the rules and regulations of the police and fire departments relative to days to be allowed off?"

By virtue of section 4368 G. C. the director of public service, under the direction of the mayor, is made the executive head of police and fire departments, and has all the powers and duties connected with and incident to the appointment, regulation and government of these departments "except as otherwise provided by law."

Section 4374 G. C. confers upon council the power to determine by ordinance or resolution the number of patrolmen, and section 4377 G. C. also confers upon council the power to determine in the same manner the number of firemen.

Sections 4374 and 4377 G. C. read as follows:

"Section 4374.—The police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen, and other police court officers, station house keepers, drivers, and substitutes, as are provided by ordinance or resolution of council."

"Section 4377.—The fire department of each city shall be composed of a chief of the fire department and such marshals, assistant marshals, firemen, telephone and telegraph operators as are provided by resolution or ordinance of council. The director of public safety shall have the exclusive management and control of such other officers, surgeons, secretaries, clerks, and employes as are provided by ordinance or resolution of council."

After the number of patrolmen and firemen has been determined by council, as above provided, the director of public safety, under authority of section 4382 G. C., is required to classify the service in both departments in conformity with the ordinance, and to make all rules for the regulation and discipline of said departments, except as otherwise provided in the subdivision in which that section is found.

Section 4382 G. C. reads as follows:

"Section 4382.—The director of public safety shall classify the service in the police and fire department in conformity with the ordinance of council determining the number of persons to be employed therein, and shall make all rules for the regulation and discipline of such departments, except as otherwise provided."

It will thus be seen that the director of public safety has the power under both sections 4368 and 4382 G. C., to prescribe the rules for both the police and fire departments, except as otherwise provided by law. The question therefore becomes pertinent whether or not the power conferred upon the director of public safety has been taken away and placed in other hands.

No statute has been found taking away from the director of public safety the power conferred upon him by sections 4368 and 4382 G. C. to make rules regarding the police department; but section 4393 G. C. has provided, with respect to the fire department, that council may "establish the hours of labor of the members of its fire department," and that after January 1, 1911, "council shall not require any firemen to be on duty continuously more than six days in every seven." See 1912 Op. Atty Gen., Vol. 2, p. 1726. The latter section also confers upon council the power to provide such by-laws and regulations for the government of firemen as is deemed necessary and proper.

Section 4393 G. C. reads as follows:

> "The council may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents resulting therefrom and for such purpose may establish and maintain a fire department, provide for the establishment and organization of fire engine and hose companies, establish the hours of labor of the members of its fire department, but after the first day of January, nineteen hundred and eleven, council shall not require any fireman to be on duty continuously more than six days in every seven, and provide such by-laws and regulations for their government as is deemed necessary and proper."

It would seem, therefore, that it is within the power of the director of public safety to make the rules regarding the police department, and that the power to make the rules regarding the fire department is conferred upon the city council.

Respectfully,
JOHN G. PRICE,
Attorney-General.

66.

SCHOOLS—WHEN BOARD OF EDUCATION IS LIABLE FOR TUITION—ATTENDANCE ONE DAY IN MONTH CREATES LIABILITY.

1. *Liability for tuition rests upon attendance. A board of education cannot collect tuition from a foreign board of education for time in which no school sessions were held.*
2. *But attendance on one day creates a liability for the whole school month.*
3. *Tuition due grows out of attendance and without an agreement under section 7735 G. C.*

COLUMBUS, OHIO, February 24, 1919.

HON. PAUL M. ASHBAUGH, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—Receipt is acknowledged of your inquiry of January 14, 1919, reading as follows:

> "The Mt. Vernon, Ohio, public schools were shut down for a period of three months on account of the Spanish influenza. Can the board of education of Mt. Vernon, Ohio, collect tuition from foreign pupils for the period of time during which there was no school?"

In your further statement of fact, under date of January 28, 1919, you say:

"1. The tuition in question is sought to be collected by the board of education of Mt. Vernon, Ohio, from the township school board.

"2. The Mt. Vernon board of education has never entered into a written contract with a township board of education for tuition for township pupils. The practice has been for the pupils to notify the clerk of the township board upon entry into the Mt. Vernon schools. A statement is then furnished by the Mt. Vernon board of education to the township board, and upon presentation of the statement the bills would then be paid."

Attention is invited to section 7689 G. C., which provides as follows:

"The school year shall begin on the first day of September of each year, and close on the thirty-first day of August of the succeeding year. A school week shall consist of five days and a school month of four school weeks."

Section 7747 G. C. further provides:

"The tuition of pupils who are eligible for admission to high school and who reside in village or rural districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month. An attendance any part of the month shall create a liability for the entire month. No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school of the district attended, which may include charges not exceeding five per cent per annum and depreciation charges not exceeding five per cent per annum, based upon the actual value of all property used in conducting said high school by the average monthly enrollment in the high school of the district. The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to any high school. Such certificates shall be furnished by the superintendent of public instruction."

It will be noted that section 7689 G. C. clearly states what shall constitute a school month, that is, four school weeks of five days each, and the first school month of the school year, for purposes of computation, would be complete with the end of the fourth school week following the opening of the school term.

It is assumed that the attendance of foreign pupils, as indicated in your inquiry, is that of high school pupils under section 7747 G. C., above quoted. In the matter of liability for tuition, this section provides "such amount to be computed by the month," and it must be inferred that the school month, as established by law, is the month that is meant, that is, four school weeks, properly computed from the date of the beginning of the school term. Your statement of facts does not make clear as to whether the "period of three months" indicated by you was continuous or intermittent, making an aggregate of three months lost in school work, which might have been the case where schools were closed for a time, then started and then closed again, thus running the liability into the fourth school month.

Section 7747 G. C., quoted again, in part says:

"An attendance any part of a month will create a liability for the whole month,"

hence attendance of a pupil for but one day in a designated school month of your term would create liability for the whole month in the case of that pupil. The language of the quoted sentence of section 7747 G. C. carries with it the clear idea that *liability rests upon attendance,* else such language would be superfluous; in other words, liability would not lie if there were no attendance. So, if a public school, receiving the pupils of another district under contract for tuition, was not in operation for the whole of a particular school month of your term, then no liability would lie for that particular school month, there having been no attendance within the meaning of section 7747 G. C.

But, if such school receiving pupils under contract for tuition from another district was closed temporarily after an established school month had begun, and during such month, and there had been attendance by a foreign pupil during such part of the month in question, then would accrue liability for tuition of that pupil for the whole school month, though such pupil had attended but one school day.

Further, while your statement of facts does not say whether such foreign pupils were elementary or high school pupils, the tuition of each being treated under separate sections of the statutes, it is pointed out that the language in section 7747 G. C., covering tuition of high school pupils, is practically the same as section 7736 G. C., covering elementary pupils, which reads as follows:

"Such tuition shall be paid from either the tuition or the contingent funds and the amount per capita must be ascertained by dividing the total expense of conducting the elementary schools of the district attended, which shall include interest charges not to exceed five per cent per annum and depreciation charges not to exceed five per cent per annum, based upon the actual value of all property used in conducting said elementary school, by the total enrollment in the elementary schools of the district, such amount to be computed by the month. An attendance any part of a month shall create a liability for a whole month."

So the rule would be the same for either kind of pupils, though treated in separate sections of the statutes.

Answering the question, then, "Can the board of education of Mt. Vernon, Ohio, collect tuition from foreign pupils for the *period of time during which there was no school?*" the Attorney-General is of the opinion that liability for tuition rests upon attendance in the light of sections 7736 and 7747 G. C., and if there was no school during a particular school month, there could be no attendance; but if there was school during part of a particular school month, and there was attendance during any part of such month on the part of a foreign pupil, even for a day, there becomes due the tuition of that pupil for that entire school month, and such tuition actually due under sections 7736 and 7747 G. C. can be collected by the board of education of Mt. Vernon, Ohio, for the school months in which attendance of foreign pupils took place, bearing in mind the provisions of section 7735 G. C., that "in such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement" *when same is legally due,* and "a board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside."

Respectfully,
JOHN G. PRICE,
Attorney-General.

67.

ROADS AND HIGHWAYS—WHERE CONTRACT MAKES NO PROVISION FOR ADDITION TO OR OMISSION FROM STIPULATED WORK—BY AGREEMENT OR OTHERWISE PART OF WORK OMITTED—COST OF OMITTED WORK DEDUCTED FROM CONTRACT PRICE.

Where, under a construction contract providing for the payment of a given sum for the doing as a whole of stipulated work and making no provision for the contingency of addition to or omission from such stipulated work, a definite parcel of such work is omitted either by express agreement of parties or upon the owner's request to which the contractor takes no exception at the time or afterwards, the owner has the right to deduct from the contract price a sum equal to what it would have cost to perform the omitted work.

COLUMBUS, OHIO, February 24, 1919.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I have your communication of January 18, 1919, submitting to me for opinion the following:

> "On the 28th day of April, 1916, the state of Ohio, through this department, entered into contract with the firm of Smith, Krabill & Siffert for the improvement of Section 'I' of I. C. H. No. 66, Stark county.
>
> The work under this contract proceeded in an unsatisfactory manner until some time in September, 1917.
>
> Due to the fact that the work under this contract was not satisfactory and that the contractors became financially involved, the contract of Smith, Krabill & Siffert was forfeited on October 5, 1917, and on the 16th day of October, 1917, an agreement was entered into between the state of Ohio and the New Amsterdam Casualty Company of New York, surety for Smith, Krabill & Siffert, for the completion of the remainder of the improvement in accordance with the original contract and the plans and specifications accompanying same.
>
> The New Amsterdam Casualty Company proceeded with the work and same was finally accepted by this department with a deduction for non-performance in amount of $395.55 covering some pipe culverts which it was found were unnecessary in the improvement of the road and were therefore not placed by either the original contractors, Smith, Krabill & Siffert, nor the New Amsterdam Casualty Company.
>
> The New Amsterdam Casualty Company is now disputing our right to deduct the above amount on account of non-performance of the contract in this particular and are asking for payment to them of the entire amount of the contract price over and above that paid to Smith, Krabill & Siffert prior to forfeiture.
>
> I am respectfully asking for your opinion as to whether we have a legal right to make payment to the New Amsterdam Casualty Company of the full amount of the contract price less the amount paid Smith, Krabill & Siffert under the above stated facts."

It further appears, in response to the inquiry made verbally of Mr. Bruning, chief engineer, that the pipe culverts mentioned were omitted either because an express understanding was had to that effect between the original contractor and

the engineer in charge, or upon request of the engineer to which no exception was taken by the contractor at the time or afterwards—the engineer having found the insertion of the culverts, as called for in the plans, unnecessary for, though not inconsistent with, a proper execution of the work.

It further appears from an examination made at your office of the contract in question that it is a so-called "lump sum" contract calling for the payment of a certain sum in full of the improvement work as a whole—as distinguished from the so-called "unit basis" contract, and that it contains no express provision for adjustment of price in case of addition to or omission from the work provided for; nor, so far as I can discern, does it contain any implied provision for such a contingency, unless the language of the contract hereinafter quoted is broad enough to include such an implication. Assuming, then, for the moment, that there is nothing in the contract relating, directly or indirectly, to addition to or omission from the stipulated work, what is the result in the light of your inquiry?

To begin with, it may be stated both upon reason and authority that neither party is at liberty without the consent of the other to add to or take from the amount of work stipulated. In the case of *Griffith* vs. *The Sanitary District of Chicago,* 174 Ill. App. 100, the court holds as set forth in the fourth branch of the syllabus:

> "Where a contract is made for a gross sum for the construction of a piece of work and changes are afterwards made in the material used, as to size or quality, the contractor may refuse to make the changes unless by the contract he is in terms required to do so, and may acquiesce in the forfeiture of the contract and recover upon a *quantum meruit* for the material furnished and his labor."

And to like effect is the case of *Fontano* vs. *Robbins,* 22 Appeal Cases Dist. of Columbia, 253, wherein the court say at page 266 of the opinion:

> "But, apart from an agreement to that effect, an architect is not the general agent of the owner, and has no power to change plans of the work, and especially not to the detriment of the contractor. He cannot change the terms of the contract, and either omit or insert provisions that the parties have not agreed to, unless expressly authorized by the parties."

And again, the case of *Roettinger, Adm.* vs. *United States,* 26 Court of Claims Reports, 391, from which it appears by the ninth section of the syllabus:

> "Where a contractor's bids are unbalanced, so that his profits come from one kind of work and not from another, the defendants can not deprive him of his profits by increasing the latter work and abandoning the former, if there be a departure from the plans upon which he made his bids."

Hence, upon the assumption that in the contract now being considered, there is no provision for addition to or omission from the stipulated work, the contractor was in nowise legally bound to honor the engineer's request that part of the work be omitted, nor to enter into an agreement providing for such omission. But, the contractor having assented to the omission, either by express agreement, or by voluntary and unprotecting compliance with the request of the engineer, what follows?

> "A builder, under a contract to erect a house in accordance with plans

and specifications for a certain sum, to be paid on the completion of the building, can recover the contract price, although there are certain immaterial omissions or deviations from the contract, if the building has been substantially completed; *but the defendant will be entitled to such a deduction from the contract price as will enable him to complete the work in exact accordance with the contract.*"

Emden on building contracts, etc. (4th ed. London, 1907) p. 126.

And that the text just quoted from Judge Emden states the law as applicable in Ohio, see the case of *Goldsmith* vs. *Hand Assignee,* 26 O. S. 101, in which the syllabus reads:

"Where a contractor, under a written agreement between them, constructed a house for and on the lands of the owner, substantially in accordance with the terms of the contract, as verbally changed in some respects as to size, form, and material of some parts of the work, by consent of parties during the progress of the work, and leaving little only to be done to complete it; and the owner, during the progress of the work, had without objection made payments in pursuance of his agreement, as designated portions of the work were done, and had taken possession and was using the house for the purpose intended; in an action brought to recover a balance due on the contract: *Held,* first, that the plaintiff might recover without proving that the contractor had strictly performed the contract. *Second, that as to unfinished work, the plaintiff was entitled to recover the balance due at the contract price, less such sum as it would require to construct or complete the unfinished parts.* Third, that as to those parts, which by consent of both parties, during the progress of the work, had been constructed of materials and of size and form different from that required by the agreement, the plaintiff was entitled to recover the balance due at the contract price, less the difference in the value of those parts as constructed, and their value as the contract required them to be constructed."

Other authorities may be mentioned, such as:

White vs. Oliver, 36 Maine, 92. Hayward vs. Leonard, 7 Pick. (Mass.) 181. Smith vs. The Proprietors, etc., 8 Pick. (Mass.) 178.

I am not losing sight of the fact that the opinions I have referred to grew out of adversary proceedings wherein the owner was disclaiming any liability under the contract upon the ground of the alleged non-performance thereof by the builder; whereas with the contract under consideration you are, by accepting the work, admitting substantial performance. But, certainly, technical contentions along these lines are not admissible to make inapplicable the principles of the authorities cited. Indeed, as it seems to me, these principles are so much the more in point when the builder is in the position of assenting to the withdrawal of certain minor requirements of the contract, thus making manifest the fairness and equity of a corresponding reduction in contract price.

In view of the foregoing, it is not necessary to inquire whether under the terms of the contract itself, the state highway commissioner is vested with authority to decrease the contract price if part of the work be omitted by agreement of parties, since, as we have seen, the owner may under the law make the reduction even though no authority therefor is provided in the contract. It is,

however, material to determine whether the contract, expressly or by implication, forbids the making of such reduction.

The following which I quote from pages 7 and 8 of the contract, appearing in the section entitled "General Provisions" are seemingly the only portions of the instrument which have a bearing on the question:

> *"Plans and Specifications and Interpretations.*
>
> The specifications and accompanying plans are intended to describe and provide for the complete work. They are to be co-operative and what is called for by either is as binding as if called for by both. The work herein provided for is to be complete in every detail, notwithstanding that every item necessarily involved is not particularly mentioned.
>
> The right is reserved to the commissioner to correct any errors or omissions in said plans or specifications whenever such correction is necessary for the proper fulfillment of the intentions of the plans or specifications.
>
> Should any misunderstanding arise as to the intent or meaning of said plans or specifications, or any discrepancy appear in either, the decision of the commissioner in such case shall be final and conclusive.
>
> *Estimated Quantities*
>
> The estimated quantities of the work herein contemplated are only approximate, although the result of calculations, and the bidder must be responsible for his own data on which to base his bid. He shall not be entitled to any claim for damages in case the quantities actually obtained in the work be greater or less than said estimated quantities."

It might be contended that these provisions evince an intention of making the contract self-sufficient, final and unchangeable as to scope of improvement to be accomplished and price to be paid, leaving open only the matters of correction of errors, supplying of omissions and harmonizing of discrepancies, each party, so to speak, "taking his chance" on an increase or decrease in quantity as developed in the workmanlike execution of the improvement as compared with advance plans and estimates; and that in these circumstances the sentence "He shall not be entitled to any claim for damage in case the quantities actually obtained in the work be greater or less than said estimated quantities" implies the converse proposition that he (the contractor) shall not be subject to reduction of contract price if the quantities obtained in the work be less than the estimated quantities. However, is there not a broad distinction to be observed between a change in quantity obtained in accomplishing the precise result called for in the plans as compared with advance estimates based on such plans, and a like change accruing because of the agreed addition or omission of a definite parcel of work to or from that called for in the plans? To illustrate: The approximate estimate of roadway excavation in connection with contract in question is 55,500 cubic yards; approximate length of proposed highway improvement, 30,523 feet. If in the doing of the work to the approximate length of 30,523 feet, there were obtained a substantial increase or decrease in the 55,500 cubic yards, neither party would be in position to complain; but if, by agreement of parties 10,000 feet or other definite amount, whether large or small, were added to or deducted from the *length* of the improvement, there would be ground for a re-adjustment of price consequent upon the greater or less amount of excavation required.

So evident, so much in accord with simple justice and so vital to a proper understanding of the contract does this distinction seem to me, that I can only conclude that it negatives completely any claim that the contract inherently prohibits

a reduction of price if a parcel of the improvement work be omitted by agreement.

Assuming, then, that the deduction of $395.55 accurately measures what it would cost to do the omitted work, I give it as my opinion that you are without right to pay the amount to or on account of the contractors or their successor.

Respectfully,
JOHN G. PRICE,
Attorney-General.

68.

SCHOOLS—DRIVER OF VEHICLE ENGAGED IN TRANSPORTATION OF PUPILS—CONSTRUCTION OF CONTRACT PROVIDING FOR PAY OF DRIVER—CANNOT RECOVER FOR DAYS NO SERVICE PERFORMED.

A driver of a vehicle engaged in the transportation of pupils, under contract to perform such transportation on each "school day," said contract providing for payment of a stipulated amount per school month, can not recover for days on which no service was performed, there being no school on account of a recognized epidemic and such schools being closed under authority of law.

COLUMBUS, OHIO, February 25, 1919.

HON. FRANK CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—In your request for an opinion of the Attorney-General you say:

> "The boards of education throughout Huron county for the present school year have entered into contracts with various persons who have agreed to haul children to school.
>
> A copy of the form used by the school boards is enclosed herewith. During the recent epidemic, several of the school boards have been at a loss to know whether or not the driver should be paid for the time when he was not on duty, because of the school being closed by an order of the board of health.
>
> In Wakeman rural school district the school began on the second day of September, 1918, and continued until about the tenth of October, and from the tenth day of October to the tenth day of November school was closed by an order of the board of health. The question now arises as to whether or not the drivers in this school district were entitled to pay while school was closed, the form used being of the same kind as the one enclosed herewith with the exception that the blanks were filled out."

The contract is in the form following:

> "CONTRACT FOR THE TRANSPORTATION OF SCHOOL CHILDREN
>
> (1) This agreement made and entered into at ---------- by and between ---------- of the township of ----------, county of Huron and state of Ohio, who will hereinafter be designated as driver, and the board of education of ---------- township, Huron county, Ohio, which will hereinafter be called the board, Witnesseth:
>
> (2) That said driver in consideration of the promises and agreements hereinafter contained, upon the part of the said board to be performed hereby promises and agrees to furnish the necessary horses, harness and

all other necessary equipment, except wagon and lap robes or other lap covering, and to perform all necessary labor and services in transporting all the children of school age, residing along the following route:

(3) located _____, each morning, and from said school building to their respective homes or residences along said route at the close of each school day, for a period of not less than nine school months.

(4) Said driver agrees to transport said children over said route as specified above and to do and perform all work, labor and services necessary in connection therewith, in a proper, safe and careful manner; to at all times refrain from the use of tobacco and (or) intoxicating liquors while transporting said children to or from said school and if he shall be found guilty by the board of wilfuly having intoxicating liquors on his person or wagon or under its influence, this contract shall be null and void and his bondsmen held for the completion of this contract; to keep his wagon in a clean and sanitary condition; to preserve order therein; not to permit, commit, palliate or allow any immoral conduct or the use of vile or profane language in or about his wagon; to stop his wagon at convenient places for the children to enter the same, and on the side of the road on which the residence of any such child or children entitled to be so transported shall be located, and for sufficient time, not to exceed three minutes for such child or children to enter or leave said wagon and not to allow, permit or suffer any person who is not acceptable to said board to drive said wagon; not to unload or leave any child or children at any place along said route, without first providing them with comfortable quarters, and then only in case of accident or other extreme necessity. Said driver agrees not to sub-let the work herein provided without the consent of the board first obtained in writing; to make all trips over said route as expeditiously as possible, taking into consideration the distance to be traveled and the condition of the roads, and not to arrive at said school earlier than _____ o'clock a. m., Standard time, and not later than _____ a. m. Said driver agrees to use the wagon furnished by said board for no other purpose than that specified above, and to keep said wagon housed at all times when not in actual use, and at the end of the school year to carefully store said wagon in the shed provided for same by said board. Said driver agrees to begin the return trip from said school house with said children not later than _____ o'clock p. m. Said driver will transport any teachers living on his route and the teacher shall pay the said driver $____ per month for said service. Drivers shall take wagons to repair shop and return them to the school sheds free of charge.

(5) In consideration of the performance of all and singular of the aforementioned covenants, promises and agreements on the part of said driver, to be performed and kept, the said board agrees to provide said driver with a suitable wagon for the transportation of said children to and from said school, and to make good all repairs for same unless it shall be shown that said wagon was broken or damaged through the fault, neglect or carelessness of said driver, and to pay said driver the sum of $75.00 per school month, during the continuance of this contract. It is mutually agreed between the parties hereto that the work under and in pursuance of this contract shall begin on September 2, 1918, and that the route specified above may be altered or changed by said board as circumstances may require without in any way affecting, changing, altering or impairing any other provision hereof or in any way changing the legal status of this instrument.

(6) In witness whereof the said driver and said board have hereunto set their respective hands and seals, this _____ day of _____ A. D. 19____.

Signed in the presence of

_____ _____ Driver."

The question here is the construction of the contract made between the board of education and the driver in question, and in construing the same, the law will recognize the manifest intent of the parties to the contract, if it is possible to ascertain such intent.

The contract in question here, while containing a number of detail provisions regarding equipment, rules and regulations, contains the leading point as to whether under such contract a driver, transporting children to and from school for the board of education, is entitled to pay for those days on which the school was not in session, being closed under order of the board of health on account of a prevalent epidemic of influenza, such disease being pronounced an epidemic in Ohio by Opinion No. 1549, rendered by the Attorney-General on November 13, 1918.

It seems, therefore, that no question is raised as to the right to close the public schools during the time in question and that such closing was made by the board of health under authority of law; that such closing was ordered by a governmental authority over whom neither the board of education nor the driver had control and under such circumstances there is no fault in either party, for the board of education could not hold school on the days in question, had it desired, while the driver, in assembling children of school age in van or vehicle, would in a sense be violating the intent of the board of health, that there should be no assembling of school children, and it must follow that the gathering of children in a vehicle covering a route in time of epidemic is equally as dangerous in communicating disease as the session in the building.

With the inaugurating of the transporting of pupils to school, such transportation becomes a part of the school system and its proper administration; that transportation of pupils on days when there is no school session is not to be presumed and such would seem to be the intent of both parties to a contract, where they had neglected to so stipulate in direct terms.

Coming, therefore, to a closer analysis of the contract here given, it is found in paragraph (3) that the language reads:

"* * * and from said school building to their respective homes or residences along said route at the close of *each school day* * * *",

and it follows that if such payment was due for "each day," then the qualifying and descriptive words, "each school day," would not have been used; and the contract in question, using the qualifying words, "each school day," might fall within the view of the recent opinion of the attorney-general, No. 1642, rendered December 26, 1918, wherein it is held that, in a contract wherein the words, *"school day"* occurs, "that the drivers should be paid for only those days upon which the services were actually rendered and for only each school day that the schools were in session."

Supporting in further degree the manifest intent of the parties to the contract attention is invited to the further language:

"Said driver *will transport* any teachers living on his route and the teacher shall pay the said driver $____ per month for *said service.*"

Clearly no one can say that the transporting of the teacher herein intended, was

to any other place than the school, and the only occasion for the teacher to be at the school was on the days when school was held. The above clause is a part of the contract; the driver is *to transport;* the teacher is *to pay* so much "per month for *said service,*" that is, the transporting. If there was no transporting of the teacher then there was no service in the language of this part of the contract, for the words go together.

Having discussed the manifest intent of the parties to the contract, that service should precede pay, and that pay rests on service to be rendered, it is appropriate, however, to examine contracts of this kind further, and in the wider view as to whether a contract runs during the time that schools are closed by process of law on account of epidemic.

A school month is provided by section 7689 G. C. to be "four school weeks" and a school week "shall consist of five days." The driver entered into the performance of his services and, while he was in the act of performing same, the schools were closed by the act of a governmental authority known as the board of health. The general rule is, that where performance becomes impossible subsequent to the making of the contract, the promisor is not therefore discharged, because it was within his power at the time of entering into the contract to provide against any such contingency and if he does not do so, the law will not do it for him. Performance, however, will be excused where, without fault of the promisor, the law prevents such performance.

It is said in an old case, Paradine vs. Jane, Aleyn 26, that:

> "Where the law creates a duty or charge and the party is disabled to perform it without fault in him, there the law will excuse him. * * * The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason for this distinction is obvious. The law never creates or imposes upon any one a duty to perform which God forbids or what He renders impossible of performance. * * * It is further said that the books declare that where the condition of a bond becomes impossible by the act of God, *or is prohibited by the law, the condition becomes void and the bond is absolute.* * * * If one covenants to serve another for seven years and he dies before the expiration of the seven years, the covenant is discharged because the act of God defeats the possibility of performance."

In our case it was not especially the act of God, although an epidemic is in many cases so considered in relation to the construction of contracts, but it was the act of a department of government over which neither the driver nor the board of education had any control. If the driver had refused to perform his conditions because in his judgment the welfare of the community would better be served by the pupils not being transported during the time the epidemic lasted, then and in that case the driver could not recover. So, likewise, if the board of education had closed the school because in its judgment the welfare of the community would require the schools to be closed, in such case the driver could recover, because the police powers to close schools during epidemics are not lodged by our laws in boards of education, but in boards of health, and so, when the board of health ordered the schools closed on account of the epidemic, the same was done, not through any act of the board of education or of the driver, but by due process of law, and the driver would thereby be relieved from the transportation and the board of education would be relieved from paying, for that time.

There are no Ohio cases directly in point, but the case of Board of Education vs. Townsend, 63 O. S. 514, may be considered as throwing some light upon what

will excuse the performance of a contract. In that case Townsend contracted to remove a school building and while he was in the act of removing the same, the building was destroyed by a storm. The court held that the contractor was not excused in that particular case because the contract did not require the same to be removed as a whole and the contractor could be compelled to remove the same even after it had been blown down. On page 524 the court say:

> "The act of God, so-called, which excuses the performance of a contract because that has become impossible, does not necessarily discharge the party from the obligations arising from the contract, except, it may be, when the contract is wholly executory on both sides. If an artist contracts to paint a picture for ten thousand dollars received from his patron, and thereafter becomes incapacitated from blindness to fulfill his promise, by what right is he justified in claiming the money? We are not aware of any principle, and have not been referred to any adjudicated case, that would give absolution from the obligations of a contract to a party who has received from the other full consideration for a promise *which the former has become unable to fulfill,* and at the same time protect him in the enjoyment of the consideration paid. The act of God may properly lift from his shoulders the burden of performance, but has not yet been extended so as to enable him to keep the other man's property for nothing."

It is held in Jamieson vs. Indiana Natural Gas and Oil Co., 12 L. R. A., 652, that:

> "A contract is invalidated by the subsequent enactment of police regulations which render its performance illegal as to one of the parties."

The action of the board of health in the closing of the schools was in the nature of a police regulation, and while the same would not discharge the contract entirely, it would have the effect of suspending the same during the continuance of the order of the board of health.

In Hadley vs. Clarke, 8 T. R., 259, and Baylies vs. Fettyplace, 7 Mass., 324, it was held that an embargo for an indefinite time will not dissolve but only suspend the contract.

In University of Pennsylvania Law Review, 1917, page 28, is reviewed many cases of the American and English courts upon the question of an intervening subsequent event upon a contract. I quote the conclusion as follows:

> "The result of the decision in both America and England is that unless a contrary intention clearly appears from the contract of the parties, the court will employ an exception to the contract to govern an intervening subsequent event, which makes the performance of the contract impossible in effect and *excuses the contracting parties from liability for non-performance, and this is in accord with the dictates of sound business and sound sense.*"

In Parker vs. Macomber, 16 L. R. A., 858, the general rule of law seems to be set forth. The first branch of the syllabus reads:

> "1. A person prevented from continuing his contract by the arbitrary act of the other party, may disregard it and recover the value of his services rendered in partial performance of it."

While the last above quotation does not apply in our case, it would apply if the board of education had closed the school or if the driver had refused to act. The third and fourth branches of the syllabus in the last mentioned case read:

> "3. The prevention by the act of God of full performance of an entire contract will permit a recovery upon an implied *assumpsit for personal services already rendered in part performance of the contract.*"
>
> "4. A count in quantum meruit is not necessary to permit a recovery for personal services in part performance of a contract which it has become impossible to complete where the declaration contains the common count in *indebitatus* for work and labor."

It is entirely within the province of the contracting parties to arrange the details growing out of contingencies such as where a school is closed by process of law on account of epidemic, but where such stipulations have been neglected in the agreement, it becomes necessary to construe the contract in question, and this from more than one angle, for the rights of the driver in the premises must not be overlooked. It will be said he was ready to perform and that his failure to do so was no fault of his, and this is true, but on the other hand it was no fault of the board of education that he could not perform. Briefly stated, the driver agrees to furnish horses, etc., and transport the children of school age to the schools of the district, *"each school day,"* for a period of *not less than nine school months,* and the board in consideration of such services agrees to *pay the driver the sum of* $75.00 *per school month during the continuance of the contract.* From this language it will be seen that the contract is for nine months and that is the continuance of the contract as meant in such language and both the board and the driver are bound for that entire time in their respective obligations; seemingly, only two leading things could occur that would operate against all the school days running in the nine months, and one or both were prevalent in this case; neither party can restrain the act of God or the act of governmental authority by process of law, the health officials not being subservient to either of the parties in question, but above the board of education and the driver in questions of epidemic and the physical well-being of a community where their power is absolute in these matters.

The board of health is a legal governmental authority and their acts in closing schools during the recent epidemic of influenza was an act of officials under the law. The authorities seem to be agreed that this relieves parties from the obligations of contracts, the subject being fully discussed by a recent law text-writer:

Elliott on Contracts, section 1901.

This section is headed "Impossibility Caused by Subsequent Law." An examination of it, however, and of authorities cited, shows that impossibility created by law includes administrative acts of officers in pursuance of law.

Among the cases on the subject is one by the Supreme Court of New Hampshire.

Theobald vs. Burleigh, 66 N. H., 574.

The syllabus is:

> "Where the plaintiff's failure completely to perform his contract is due to the fault of the defendant, or to the act of the law without fault of either party, he can recover what his services were reasonably worth, and the defandant is not entitled to damages for the plaintiff's non-performance."

It was a contract to move a building, and after part performance, completion

was prevented by an injunction on behalf of a city restraining the location of the building on the lot to which it was moving until permission received as required by an ordinance.

Out of many similar cases, one more will be selected by the Court of Appeals of New York,

Heine vs. Meyer, 61 N. Y., 171-176.

In this case the contract was for the alteration of a building. After it had begun, completion was prevented by an order of the superintendent of buildings, under authority given him by law. The chief justice in the opinion quotes from another opinion in a former case of the same court, as follows:

> "Judge Gardiner, giving the opinion of the court, after stating that the plaintiffs were prevented, by the authority of the state, from completing their contract, said they were entitled to recover for the work performed by them at the contract price; that the performance of the required condition, entitling them to payment under the contract, 'became impossible by the act of the law, and of course the plaintiffs were entitled to recover without showing a compliance with the agreement in this particular.' That decision was in accordance with a well recognized exception to the general rule or principle of law that a contracting party who absolutely engages to do an act must perform it notwithstanding any accident or other contingency not foreseen by him or within his control, yet if the performance is rendered impossible by the act of the law, then he is excused."

These cases both hold that the contractor in such circumstances may recover at the contract price, or at least recover the value of service done by him under the contract. This is equivalent to limiting his pay to that amount, and is in strict accordance with the principle that where the carrying out of a contract is prevented *by authority of law,* both parties are absolved from its obligations.

It follows therefore that this driver cannot recover for the days that school was not held because of the order of the board of health closing the same.

The rule seems to be unanimous that unless there is some statutory provision to the contrary, recovery may be had on a *quantum meruit* basis for services performed where part performance is excused on account of sickness or otherwise. So that in this case the board of education was compelled to close the schools by the order of the board of health. The driver was prevented from performing his services by the order of the board of health and neither is at fault. The driver is excused from performing and the board is excused from paying. It was within the power of the driver to contract in relation to this emergency. As far as teachers are concerned, the law makes the contract for them by declaring that "teachers shall be paid during the time the schools are closed on account of an epidemic." No such provision is contained in our laws in relation to drivers.

It is therefore the opinion of the Attorney-General that under this contract, the driver is entitled to the full nine months except for such days as school was prevented from opening by the order of the health authorities.

This opinion is confined to the contract submitted, and is not intended to apply to any other case, *except in so far as the principles above announced have proper application thereto.*

Respectfully,
JOHN G. PRICE,
Attorney-General.

69.

SCHOOLS—WHEN PUPIL WHO IS RESIDENT OF RURAL DISTRICT, IS ELIGIBLE TO HAVE HIGH SCHOOL TUITION PAID BY RURAL DISTRICT.

1. *A pupil, resident in a rural district, completing the elementary school work in a city or village district, is eligible to have his high school tuition paid by the rural district where he holds school residence, such school district not maintaining a high school.*

2. *Such resident pupil is entitled to the certification by the county superintendent, indicated in section 7747 G. C.*

COLUMBUS, OHIO, February 25, 1919.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Your request for an opinion on the following statement of facts is duly acknowledged. Such statement reads:

> "A pupil residing in a rural school district adjoining the city of Greenville has been attending the city schools here and has heretofore completed the work in the grades and has been promoted by the city schools to the high school.
>
> The question has arisen as to whether or not the board of education of the rural school district in which the pupil resides is required to pay the tuition of this pupil in the high school by reason of his not having been promoted from the rural school to the high school."

You further say that the board of education of the rural school district, in which the pupil resides, does not maintain a high school, thus coming within the view of section 7747 G. C., which reads:

> "The tuition of pupils who are eligible for admission to high school and who reside in village or rural districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal residence, such tuition to be computed by the month. * * * The district superintendent shall certify to the county superintendent each year the names of all pupils in his supervision district who have completed the elementary school work, and are eligible for admission to high school. The county superintendent shall thereupon issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to any high school. Such certificates shall be furnished by the superintendent of public instruction."

From the above language it will be seen that the law contemplates the providing of means for a high school education to all pupils who are *eligible* for it. Primarily, and in practical use, this means the completion of the eight grades of common school work as the first requisite. In the case in question you say that the pupil residing in the rural school district has completed the grades in the Greenville city schools and has been promoted by the city schools as being eligible for the high school. The pupil received such statement of completion of the elementary school work in the city schools of Greenville and the board of education of the rural school district in which the pupil resides can hardly say that the pupil is not one of those "who have completed the elementary school work, and are eligible for admission to high school," this being the language of the statute.

A further reading of the statute, above quoted, shows that "the district superintendent shall certify to the county superintendent each year the names of *all pupils in his supervision district* who have completed the elementary work and are eligible to the high school." This does not say in his "supervision," but in his "supervision district," and the law contemplates that he shall have knowledge of just where every pupil of school age in his district is going to school, or whether they are going at all, and if not, to act in conjunction with the truant officer and see that they do. It is good school administration that one district should recognize the school work and promotions of another district and this seems to be the general rule and district superintendents should certify to the county superintendent "the names of all pupils in his district who have completed the elementary school work," if he is satisfied they have completed it, and thereupon "the county superintendent shall issue to each pupil so certified a certificate of promotion which shall entitle the holder to admission to *any* high school." This language clearly carries with it the idea that every district in the state must recognize such certificate of promotion to high school, and boards of education cannot pass against the eligibility of one holding such certificate, and in the case in question it would seem that the pupil has "completed the elementary school work" in the eye of the law, and is entitled to such certifying of his name by the superintendent of the supervision district in which such pupil lives.

Here the pupil seems to have been a resident of the rural district for some time and not one who removed from the city district to the rural district upon completing the elementary school work in the city. The law has wisely taken care of the rights of even the pupils who are newcomers in the district, for section 7748 G. C. says:

> "* * * A pupil *living* in a village or city district who has completed the elementary school course and whose legal residence *has been transferred to a rural district* in this state before he *begins or completes* a high school course, shall be entitled *to all the rights and privileges* of a resident pupil of such district."

The statute clearly says that if this pupil had lived in the city district while completing the elementary school work, and then moved to the rural district, and desired to either *enter* or *complete* high school work, he would be "entitled to all the rights and privileges of a resident pupil of such district" and these rights and privileges are those named in section 7747 G. C., first quoted, viz.:

(1) Certification by the district superintendent.
(2) Certificate by county superintendent.
(3) The payment of his high school tuition by the board of education where the pupil resides.

So if these rights indicated accrue to a pupil who has just moved into a rural district from a city or village district, and having completed the elementary school work outside the rural district, it must follow that a pupil whose residence has been in the district has lost none of these rights.

Based upon the statement of facts furnished, and after the analysis of the law here given, it is the opinion of the Attorney-General that the pupil residing in a rural school district, who has satisfactorily completed the elementary school course in a village or city school, is entitled to all the rights and privileges of the other resident pupils of the rural district and the high school tuition of such

pupil must be paid by the board of education of the district in which the pupil lives, there being no high school maintained in such district.

Respectfully,
JOHN G. PRICE,
Attorney-General.

70.

ROADS AND HIGHWAYS—STATE HIGHWAY COMMISSIONER NOT AUTHORIZED TO APPOINT POLICEMEN TO ARREST HIGHWAY LAW OFFENDERS—SECTION 6309 G. C. CONSTRUED.

Section 6309, General Code, does not authorize the appointment by the State Highway Commissioner of policemen with power to arrest offenders against the highway laws.

COLUMBUS, OHIO, February 25, 1919.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—The receipt is acknowledged of your communication of January 22, 1919, wherein you call attention to the growing tendency to abuse the highways by hauling excessive loads thereon and quote certain correspondence between Mr. W. A. Stinchcomb, county engineer, Cuyahoga county, and yourself, on the subject. You refer to section 6309 G. C. and in conclusion say:

> "I would, therefore, ask you to furnish me with an opinion as to whether or not I have the power to appoint a man with power to arrest and assist in the prosecution of such offenders."

The only provision of the statutes which it may be claimed confers such authority as your inquiry relates to, is found in said section 6309 G. C., reading as follows:

> "The revenues derived by registration fees provided for in this chapter shall be paid by the secretary of state weekly into the state treasury. Any surplus of such revenues which may remain after the payment of the expenses incident to carrying out and enforcing the provisions of this chapter shall be used for the repair, maintenance, protection, policing and patroling (patrolling) of the public roads and highways of this state, under the direction, supervision and control of the state highway department."

In the act of the General Assembly passed March 21, 1917, "To make general appropriations," there is included an appropriation for the fiscal year July 1, 1917, June 30, 1918, "To police, patrol and maintain highways as provided in section 6309 of the General Code" (107 O. L. 187; 217); and a like appropriation for the fiscal year July 1, 1918-June 30, 1919 (107 O. L. 187; 293).

Two views as to the scope and effect of section 6309 naturally suggest themselves: The broad view that the general terms used in the statute, taken in connection with the appropriation by the legislature of funds as above noted, import the conferring of power on the highway department to use the funds for the purposes designated in the statute; and the narrower view that the statute is designed primarily to declare the object of raising revenue from the registration of motor vehicles and hence is not to be taken as granting power to expend such revenue.

In determining which of these views is the better supported, three considerations arise:

First, the statute is found, not among those relating to the highway department, but in the chapter relating to motor vehicles and the fixing of fees for the registration thereof. The importance of considering the context and subject matter in ascertaining the meaning of a statute is recognized by our courts. In the case of Aultman vs. Seiberling, 31 O. S. 201, the Supreme Court says in the course of the opinion (p. 204):

> "The language of the statute authorizing appeals from the probate court is very general and comprehensive; but it must be construed with reference to the nature of the remedy and the subject-matter. Courts, in order to effect the intention of the statute, often restrain, qualify, or enlarge the meaning of the words employed."

And again, in Brigel vs. Starbuck, 34 O. S. 280, the court said, at p. 285:

> "There can be no doubt that general words in a statute will sometimes be limited in their application."

And see also, Goodall vs. Gerke Brewing Co., 56 O. S. 257, 260, where the court say, referring to a statute whose meaning was being sought:

> "The general language is restrained to the sense in which it was used by the legislature in adopting the law."

An interesting application of this rule of statutory construction is referred to in an opinion (No. 590) found at page 1587, Report of Attorney-General for 1913. After referring to certain decisions of the Supreme Court, bearing on the question whether the auditor's certificate under section 3806 G. C. was necessary to the expenditure of funds arising otherwise than by taxation, my predecessor used this language:

> "The doctrine of these decisions, and others like them, is that despite the general language of section 3806, which was originally section 45 of the municipal code, and had its prototype in old section 2702, revised statutes, because these sections have always been found among the sections relating to the exercise by a municipality of the delegated power of taxation, and the expenditure of the proceeds of taxation, their operation should be by interpretation limited to cases in which the expenditure involved is that of moneys raised by taxation."

Second, it is by no means clear that section 6309, even when considered alone and apart from the context and subject matter, imports any authority in the highway department for expending funds. Of course such authority is imported, if the last clause of the section, "under the direction, supervision and control of the state highway department," be taken as referring to expenditure of funds. But in view of the fact that if said last clause be so taken the result would be to confer power on the highway department to expend the funds on *any* public roads of the state, whether a district, township, county or state road, is it not the more reasonable construction that said last clause was intended to refer to the class of roads on which the funds are to be expended—namely, those under the direction, supervision and control of the state highway department—especially when reference is had to subsequently enacted section 1221 G. C., hereinafter referred to?

Third. Said section 6309 in its present form was enacted February 2, 1914 (104 O. L. 6). Subsequently, on March 20, 1917, the legislature enacted section 1221, the third branch of which is in point here. Said section 1221 reads as follows (107 O. L. 131):

> "The state highway improvement fund produced by the levy hereinafter provided for, shall be applied to the construction, improvement, maintenance and repair of the inter-county and main market road systems as follows:
>
> 1. Seventy-five per cent of all the money paid into the treasury by reason of the levy for the state highway improvement fund shall be used for the construction, improvement, maintenance and repair of the inter-county highways as the same have been heretofore designated or as they may hereafter be established or located by the state highway commissioner in the manner provided by law, and for the maintenance of the state highway department, including the state's portion of the salaries of the county surveyors. Money appropriated or available for inter-county highways shall be equally divided among the counties of the state.
>
> 2. Twenty-five per cent of all the money paid into the treasury of the state by reason of the levy for the state highway improvement fund shall be used for the construction, improvement, maintenance and repair of the main market roads of the state as the same have been heretofore designated or as they may hereafter be established by the state highway commissioner in the manner provided by law. The money to the credit of the state highway improvement fund for use on the main market roads of the state as herein provided shall be so expended as to distribute equitably, as far as practicable, the benefits from such expenditure to the different sections and counties of the state.
>
> 3. The funds derived from the registration of automobiles shall be used for the maintenance and repair of the inter-county highways and main market roads of the state. The state highway commissioner may use part of said funds as may be necessary in establishing a system of patrol or gang maintenance on the inter-county highways and main market roads, and for that purpose may employ such patrolmen, laborers and other persons and teams and purchase or lease such oilers, trucks, machinery, tools, material and other equipment and supplies as may be necessary."

It would seem that in enacting section 1221, the legislature has itself interpreted section 6309 as not conferring power on the highway department to appoint and compensate policemen with power of arrest. So far as section 6309 is concerned, the words "policing" and "patrolling" are both used, and, as above indicated, the expression, "under the direction, supervision and control of the state highway department," appears; and yet the legislature has subsequently seen fit, in definite terms, to confine the expenditures to inter-county highways and main market roads, and to authorize the employment of patrolmen, thus indicating that the expression, "under the direction, supervision and control of the state highway department," as used in section 6309, refers to the class of roads on which the funds should be expended, rather than to the conferring of power on the department to expend such funds and further, by implication, finding that section 6309 does not authorize the appointment of patrolmen. And if section 6309 does not give authority to appoint patrolmen, it necessarily does not confer power to appoint policemen with power of arrest; nor does section 1221 confer such power.

While it is the general rule that the courts are not concluded by a legislative

interpretation, the authorities make plain that such interpretation is entitled to great weight.

In Erie Railroad Co. vs. Steinberg, 94 O. S. 189, the following appears at p. 203 of the opinion:

> "In construing a statute it is the duty of the court to give effect to the legislative intent. True, the intent of the legislature is to be determined from the language employed, and when that language clearly expresses the intent of the law-making body, it should be given its plain, ordinary meaning, for it is not a question what the law-making body intended to enact, but rather the meaning of that which it did enact. Where, however, the meaning is doubtful, the history of legislation on the subject may be considered in connection with the object, purpose and language of the law, in order to arrive at its true meaning. *Slingluff et al.* vs. *Weaver et al.*, 66 Ohio St., 621.
>
> The passage by congress of the Cummins amendment immediately following the decision in the case of the *Boston & Maine Rd.* vs. *Hooker, supra,* would seem to indicate the meaning and intent of congress when it passed the Carmack amendment, and this Cummins amendment was made necessary by the fact that the language employed in the Carmack amendment, as construed by the court, did not clearly express the intent of the law-making body."

And see also:

Industrial Com. vs. Brown, 92 O. S. 309, wherein the court say at p. 313 of the opinion:

> "As against all this the court feels impelled to follow both the executive and legislative construction of the word 'injury' as employed in this act and to limit recovery of compensation to such as may have suffered injury otherwise than through disease, thereby giving to the legislative and executive construction the added force of judicial construction."

See further:

> Salen vs. State ex rel., 18 C. C. (n. s.) 538. McArthur vs. Kelley, 5 Ohio 139.

The Supreme Court of the United States, in the case of United States vs. Freeman, 3 Howard 556 (11 Law. Ed. 724), holds as follows, as shown by first and second paragraphs of the syllabus:

> "Statutes *in pari materia* should be taken into consideration in construing a law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute.
>
> And if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, *this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.*"

In the course of the opinion in Swigert vs. Baker, 229 U. S. 187 (57 Law. Ed. 1143), the Supreme Court of the United States uses this language at p. 197:

"If there could be any doubt as to the meaning of the statute, it disappears in the light of congressional construction which may properly be examined as an aid in its interpretation."

In the New York case of The People vs. Cricuoli, 157 App. Div. 201; 141 N. Y. S. 855, the court quotes with approval the following from Endlich on Interpretation of Statutes (sec. 366):

"Earlier Cognate Acts.—Where it is gathered from a later act, that the legislature attached a certain meaning to an earlier cognate one, this would be taken as a legislative declaration of its meaning there."

In Crohn, Adm. vs. Kansas City Home Telephone Co., 131 No. App. Rep. 313 (109 S. W. 1068), the first syllabus reads:

"While a legislative interpretation of a statute is not conclusive upon the courts, it should be given weight in ascertaining the intention of the legislature and the application of amendments to existing statutes."

In State vs. Clausen, 63 Wash. 535 (116 Pac. 7), the third paragraph of the syllabus reads:

"The courts will not speculate upon legislative intent when that body has subsequently put its own construction on prior enactments."

In the case of State vs. Board of Commissioners, 83 Kans. 199 (110 Pac. 92), the Supreme Court say in the course of the opinion, at p. 203:

"It is a fundamental principle of constitutional law that the legislature has power to indicate by a later act what its intention was in passing an earlier one. In such event, whatever lawyer and layman may have understood or courts may have decided, the legislature's interpretation is binding in all cases after it has been made manifest."

From the foregoing, the conclusion results that you are without authority to appoint policemen with power of arresting offenders against the highway laws.

Respectfully,
JOHN G. PRICE,
Attorney-General.

71.

MUNICIPAL CORPORATION—BOARD OF HEALTH HAS AUTHORITY TO MAKE PER DIEM ALLOWANCE TO HEALTH OFFICER FOR QUARANTINE WORK IN ADDITION TO ANNUAL COMPENSATION—HEALTH OFFICER NOT AUTHORIZED TO COLLECT FROM PERSON QUARANTINED—COMPENSATION FOR VACCINATIONS.

1. *Under section* 4411-1 *G. C., a municipal board of health may make a per diem allowance to a health officer for quarantine work in addition to his annual compensation previously fixed by the board of health.*

2. *A health officer is not authorized to collect, in quarantine cases, for usual and ordinary services performed strictly for the protection of the public, from the person quarantined.*

3. *A health officer is entitled to such compensation for vaccinations under section 4449 G. C. as may be fixed and allowed by the board of health under section 4411-1 G. C.*

COLUMBUS, OHIO, February 25, 1919.

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

GENTLEMEN:—This is to acknowledge receipt of your letter dated February 4, 1919, as follows:

> "We are referring you to an opinion of the Attorney-General under date of June 10, 1915, recorded in the Annual Reports for 1915, page 981, and respectfully request your written opinion upon the following matter:
>
> *Statement of Facts*
>
> The board of health of a municipality has fixed the compensation of the health officer at $1,020.00 per annum. The board has also passed a resolution allowing him $8.00 per day for work in quarantine cases.
>
> 1. Is such compensation in both instances legal?
> 2. Should the health officer not charge for his services in quarantine cases according to the services rendered, and should he not first attempt to collect from the persons quarantined, and then attempt to collect from the city, if such persons were unable to pay?
> 3. Is the fixing of an arbitrary per diem for such services in quarantine cases legally payable in addition to his regular compensation?
> 4. Can such health officer legally charge the city seventy-five cents for each vaccination?"

From your statement of facts it is observed that the municipal board of health has fixed an annual compensation for its health officer and in addition thereto has passed a resolution allowing him $8.00 per day for work in quarantine cases, and your first question is whether or not such compensation is legal.

Sections 4408, 4411-1 and 4431 G. C. are applicable. In part section 4408 is as follows:

> "The board of health shall appoint a health officer who shall be the executive officer. He shall furnish his name and address, and other information required by the state board of health."

Section 4411-1, as amended in 103 O. L., p. 436, is as follows:

> "The board shall determine the duties and fix the salaries of its employees; but no member of the board of health shall be appointed as health officer or ward physician."

Section 4431 G. C., applicable to quarantine cases, in part is as follows:

> "The board of health may employ as many persons as it deems necessary to execute its orders and properly guard any house or place containing any person or persons affected with any of the diseases named herein."

In considering these provisions as to the salary and duties of the health officer, it must be borne in mind that he is not affected by Article II, section 20 of the Constitution of Ohio, prohibiting the increase of an officer's salary during his term, nor by section 4213 G. C., which provides:

"The salary of any officer, clerk or employe shall not be increased during the term for which he is elected or appointed."

It has been held in State vs. Massillon, 2 O. C. C. (n. s.) 169, and in other cases, that the health officer is not an "officer" nor has he any "term" as these words are used and understood in the constitutional and legislative provisions above mentioned. As stated in the case above cited,

"he is the servant of the board of health that makes the appointment. He is under their absolute control and direction; and in addition to that, they fix his salary. His salary is at the will of the board of health. His term of office is at their will. They may terminate it at their pleasure. * * * Now, that being the nature of the employment, perhaps it is a misnomer to call him an officer at all. He is more like an employe or *servant* of the board of health."

Section 4411-1 G. C., supra, vests the power of fixing the salary of its employes in the board of health, and in view of the terms of this statute as construed by the courts, the health officer is an employe in the sense that the board has full authority to determine his duties and fix his compensation. It will also be noted that section 4412 G. C., prior to 1913, contained a provision similar to what is now section 4411-1, giving the board exclusive control of its employes both as to their duties and as to their salaries. It also provided for the suspension or removal of the health officer and for the certification of such suspension or removal to the civil service commission, etc.

In 1915 (Vol. 103 O. L., 698), in the civil service act, this statute was repealed, and with the obvious intention of vesting this particular power and discretion in the same board wherein it was lodged before the repeal of said section 4412, at the same session section 4411-1, supra, was enacted as a supplement to section 4411, the intention being to place said health officer and other employes of the board within the operation of the civil service act so far as their suspension or removal was concerned, but to revest the power of defining the duties and fixing the salaries of said employes in the board of health; and, in the exercise of their authority they may provide an annual salary, and in addition thereto they may fix his compensation per diem for such unusual and irregular services in cases of contagious diseases as they may deem proper, and my answer to your first question is, therefore, in the affirmative.

Your second question relates to services performed by the health officer in quarantine cases, and you inquire (a) should not the health officer charge for such services according to the service rendered, and (b) should he not first attempt to collect from the persons quarantined and then attempt to collect from the city, if such persons were unable to pay?

Section 4436 G. C. is pertinent and is as follows:

"When a house or other place is quarantined on account of contagious diseases, the *board of health* having jurisdiction *shall provide* for all persons confined in such house or place, food, fuel, *and all other* necessaries of life, *including medical attendance,* medicine and nurses, when necessary. The expenses so incurred, *except* those for *disinfection, quarantine, or other measures strictly for the protection of the public,* when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be *paid* by the *person* or persons *quarantined, when able* to make such payment, and *when not by the municipality* in which quarantined."

You inquire if the health officer should not charge according to the service rendered. The manner and amount of the health officer's charge in quarantine cases would be regulated and limited by the action of the board of health appointing him, and if the resolution provides for per diem allowance, his charge should be made in accordance therewith.

You also inquire in question 2 of your letter if he should not first attempt to collect from the persons quarantined and then from the city, if the persons for whom the services were rendered were unable to pay. It is to be remembered that the pehsons quarantined, even though able financially, are not obliged to pay all of the quarantine expenses.

The first part of section 4436 G. C. provides that when a house is quarantined, "the board of health having jurisdiction shall provide for all persons confined in such house or place * * * and all other necessaries of life, including medical attendance, medicine and nurses when necessary." It is to be noted that the board of health shall make the provisions above indicated.

The latter part of the section goes on to define what and in what manner the things furnished or provided by the board of health shall be paid for. It is to be noted that not all of the expense so incurred shall be paid by the person quarantined, the statute providing:

> "The expenses so incurred, *except those for disinfection, quarantine and other measures strictly for the protection of the public, when properly certified by the president and clerk of the board of health,* * * * shall be paid by the person or persons quarantined, when able * * *, and when not by the municipality in which quarantined."

What services does the health officer render in such cases of quarantine? Your statement of facts throws no light on these facts and in the absence of any statement to the contrary, it may be fairly assumed that the health officer discharges the duties with which he is charged by law, and it is also clear that the services which he performs and furnishes are not included in the things which the board of health shall provide, viz., food, fuel, other necessities of life, etc.

In the conclusion herein reached, it is considered that the $8.00 per diem does not include compensation for services rendered to the person quarantined for services as a physician or nurse, but only covers those services which are rendered strictly for the protection of the public, as stated in the statute. Where, in case of quarantine, the health officer acted as a physician or nurse by virtue of a special or general order from the board of health, his services would be properly chargeable against the person quarantined and, to the extent that such person is able financially to pay, are collectible from said person quarantined, and the amount thereof, so far as the quarantined person may be concerned, would be fixed by agreement or would be for their reasonable value.

But, if his services were of such a character as to be concerned only with the protection of the public, as stated in the exceptions to section 4436 G. C., then it is evident that such services should not be charged to the person quarantined.

From the language used in this section, it would appear that unless directed by the board of health to do so, and acting as its agent in such matter, the health officer would have nothing to do with the collection of the account for things or services provided for a person quarantined, as the section provides that the president and clerk of the board of health shall certify an account to the person quarantined.

Answering question 2 more specifically, I am of the opinion (a) that the health officer is not required to charge for his services in quarantine case, except as provided in the resolution of the board of health in such quarantine cases, and (b)

that for his services generally, and unless employed or instructed to perform special duties, such as those of a physician or nurse, he is not expected or obliged to collect for his services from the person quarantined.

It appears that the answer to question 1 disposes of and answers question 3 of your letter, and it follows that question 3 may also be answered in the affirmative.

Your fourth question inquires whether the health officer may legally charge the city seventy-five cents for each vaccination. Vaccination is the subject of a special section, 4449 G. C., which is as follows:

> "The board of health may take measures and supply agents and afford inducements and facilities for gratuitous vaccination."

Under this section and under section 4411-1, I can answer your question generally by saying the board of health has ample authority to allow the health officer this fee for each vaccination.

What has been said in the consideration of your first question is applicable here so far as it is stated that the matter of defining the duties and fixing the salaries is exclusively in the discretion of the board of health.

If in fixing the annual compensation the board of health provided that said compensation should include the vaccination services, then no additional compensation would be allowed. Your statement of facts is indefinite as to this, but for the purposes of your inquiry an answer in this manner may be responsive to your needs.

It is to be borne in mind that the legislature here did not definitely outline what measures the board of health should take, nor indicate what agents it would supply, but it is clear that it did not state or enumerate any additional duties for the health officer.

My predecessor (in 1913, Vol. 1, p. 294, Attorney-General's Reports), rendered an opinion wherein, on a similar question, he held that making vaccinations was not a part of the duty of the health officer and that a health officer of a city could be appointed as special agent for vaccination and proper compensation paid therefor. So I can answer your question in this manner. That unless the matter of services in vaccinations is provided for in the act of the board fixing the annual compensation of the health officer, he would be entitled to receive such amount as the board of health would deem proper to allow him.

The opinion of the Attorney-General dated June 10, 1915, and recorded in Opinions of the Attorney-General for 1915, page 981, referred to in your letter, as well as the opinion of the Attorney-General heretofore cited, have been noted and, in so far as they are applicable to the questions herein involved, are approved.

Respectfully,

JOHN G. PRICE,

Attorney-General.

72.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS MAY PURCHASE MACHINERY, TOOLS AND EQUIPMENT WITHOUT COMPETITIVE BIDDING—NO AUTHORITY FOR BOND ISSUE FOR THE ABOVE PURPOSE—SECTIONS 7200 AND 7214 G. C. CONSTRUED.

1. *County commissioners may, under authority of section 7200 G. C. (107 O. L. 115), purchase machinery, tools or equipment for the purposes specified in said section, without resorting to advertising or competitive bidding.*

2. *No authority exists for the issuing of bonds for the purpose of purchasing machinery, tools or equipment for the purposes named in said section 7200.*

3. *County commissioners may, under authority of section 7214 G. C. (106 O. L. 645), purchase materials for the purposes specified in said sections, without resorting to advertising or competitive bidding.*

COLUMBUS, OHIO, February 25, 1919.

HON. G. B. FINDLEY, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—This department has had under consideration your letter of January 27, 1919, wherein you submit for opinion the following three inquiries:

> "1. Can the county commissioners go into the market and purchase such equipment as they feel suitable to their needs without advertising?
> 2. Can bonds be issued to raise funds to pay for such equipment?
> 3. After equipment is purchased have the county commissioners authority to purchase material such as slag, asphalt, etc., in the open market without advertising?"

In connection with the first of these inquiries, reference is had to section 7200 G. C., which in its original form as enacted May 17, 1915 (105-106 O. L. 617) read as follows:

> "Sec. 7200.—The county commissioners may purchase such machinery or other equipment for construction, improvement, maintenance or repair of the highways, bridges and culverts under their jurisdiction, as they may deem necessary, which shall be paid for out of any taxes levied and collected for construction, improvement, maintenance and repair of roads, as provided in this chapter. All road machinery, tools or other equipment owned by the township when this chapter takes effect may be taken over by the county at a price to be agreed upon between the county commissioners and the township trustees. All such machinery, tools and equipment belonging to the county shall be under the care and custody of the county highway superintendent at the expense of the county. The county highway superintendent shall annually on the fifteenth day of November make or cause to be made a written inventory of all such machinery, tools and equipment indicating each article and stating the value thereof and the estimated cost of all necessary repairs thereto, and deliver the same to the county commissioners who shall cause the same to be placed on file. At the same time, he shall file with the county commissioners his written recommendations as to what machinery, tools and equipment should be purchased for the use of the county and townships during the ensuing year, and the probable cost therof. The county commissioners shall provide suitable places for housing and storing machinery, tools and equipment owned by the county.

Nothing herein shall prevent any township or two or more townships from purchasing for the exclusive use of the township or townships such machinery, tools and equipment as may be deemed necessary by the trustees thereof, but before such purchase the suggestions of the county highway superintendent shall be considered. Such machinery, tools and equipment shall be paid for by the trustees of the township or by the trustees of two or more townships, if for the joint use of two or more townships, out of any funds available for road maintenance and repair. Such township or townships may join with an incorporated village for the purchase of machinery, tools and equipment for their joint use. All machinery, tools and implements, whether owned by the county or township, shall be plainly marked, in such way as to indicate the ownership of such property."

As it thus read, said section was the subject of an opinion from this department under date March 21, 1916, Opinions of Attorney-General, 1916, Vol. I, p. 523, from which the following is quoted:

"I, therefore, advise you that there is no statutory provision which requires county commissioners or township trustees, in purchasing culvert pipe and road machinery, to let the contracts for the same by competitive bidding. While there is no legal requirement as to letting contracts for material and machinery by competitive bidding, it is my view that under ordinary circumstances the interests of the public will be best served by inviting bids and awarding the contracts to the lowest responsible bidder, in making the purchases referred to by you in your communication."

The same view was expressed in a further opinion of this department, Opinions of the Attorney-General, 1916, Vol. I, pp. 882, 886, which last mentioned opinion was referred to with approval by my immediate predecessor in an opinion found at p. 2332, Vol. III, Opinions, 1917.

Said section 7200 G. C., as amended March 20, 1917 (107 O. L. 115) reads as folllows:

"Sec. 7200.—The county commissioners may purchase such machinery, tools or other equipment for the construction, improvement, maintenance or repair of the highway, bridges and culverts under their jurisdiction as they may deem necessary, which shall be paid for out of the road funds of the county. The county commissioners may also at their discretion purchase, hire or lease automobiles, motorcycles or other conveyances and maintain the same for the use of the county surveyor and his assistants when on official business. All such machinery, tools, equipment and conveyances belonging to the county shall be under the care and custody of the county surveyor. All such machinery, tools, equipment and conveyances owned by the county shall be plainly and conspicuously marked as the property of the county. The county surveyor shall annually on the fifteenth day of November make, or cause to be made, a written inventory of all such machinery, tools, equipment and conveyances indicating each article and stating the value thereof and the estimated cost of all necessary repairs thereto and deliver the same to the county commissioners, who shall cause the same to be placed on file. At the same time he shall file with the county commissioners his written recommendations as to what machinery, tools, equipment and conveyances should be purchased for the use of the county during the ensuing year and the probable cost thereof.

> The county commissioners shall provide suitable places for housing and storing machinery, tools, equipment and conveyances owned by the county."

Inasmuch as the statute in its present form is not substantially different, so far as concerns the purchase of equipment, from its form as enacted 105-106 O. L. 617, and passed upon by this department, the opinions above quoted are now in point and no reason is perceived why they should not be adhered to.

Coming to your second inquiry, whether bonds may be issued to pay for such equipment: Section 7200 itself provides that the equipment "shall be paid for out of the road funds of the county." This language imports the idea of payment from tax funds, especially when consideration is given to the provisions of section 6956-1, making it the duty of the board of county commissioners to provide annually a fund for the *repair and maintenance* of bridges and county highways. This last named section is found in 105-106 O. L. 647, in the chapter entitled "General Provisions," and is here quoted in full, as follows:

> "Sec. 6956-1.—After the annual estimate for the county has been filed with the county commissioners by the county highway superintendent, and the county commissioners have made such changes and modifications in said estimate, as they deem proper, they shall then make their levy, for the purposes set forth in said estimate, upon all the taxable property of the county not exceeding in the aggregate two mills upon each dollar of the taxable property of said county. The board of county commissioners shall provide annually a fund for the repair and maintenance of bridges and county highways. The repair and maintenance fund so provided shall not be less than twenty dollars for each mile of county highways in said county. Such levies shall be in addition to all other levies authorized by law for said purposes, but subject, however, to the limitation upon the combined maximum rate for all taxes now in force. The provisions of this section shall not, however, prevent the commissioners from using any surplus in the general funds of the county for the purposes set forth in said estimate, or in the repair or maintenance of roads."

Furthermore, no statute has been found providing for the issuing of bonds for the purpose of purchasing road machinery or equipment. It is therefore to be concluded that the view expressed by yourself is correct, namely, that the county commissioners have no authority to issue bonds for the purpose of making purchase of road machinery, tools and equipment.

Your third inquiry is as to whether the commissioners may, after purchasing equipment, go into the open market and, without advertising, purchase such materials as slag, asphalt, etc., for use in road repairs, and may be answered to a great extent along the same lines as your first inquiry.

Section 7214 G. C. (106 O. L. 645) reads as follows:

> "The county commissioners or township trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county, and also appropriate additional land necessary for cuts and fills together with a right of way to or from the same for the removal of material. If the county commissioners or township trustees, and the owner of such material or land, cannot agree on the price therefor, the county commissioners or township trustees may apply to the probate court

or common pleas court of the county in which the same is located, and on receipt of such application, the court shall proceed to assess the value of the material or right to be appropriated in the manner hereinafter provided."

In the three opinions which have been above referred to in giving answer to your first inquiry, it is held that the county commissioners may, under authority of section 7214, without advertising or competitive bidding, purchase material for road construction, improvement and repairs. Insofar as they relate to your third inquiry, these opinions are adhered to.

No doubt you are keeping in mind certain restrictions imposed on county commissioners in the matter of expenditures, such as contained in section 2414 G. C., providing in substance that only by unanimous consent of all members present, etc., may a proposition involving an expenditure of one thousand dollars or more be agreed to, unless twenty days have elapsed since the introduction of the proposition; and as contained in section 5660 G. C., providing in substance that auditor's certificate of funds required must first be made as a condition precedent to the validity of a proposed expenditure, or proposed contract involving expenditures. Furthermore, it is well that there should be borne in mind the suggestion of my predecessor as set forth in the quotation above from his opinion, that, under ordinary circumstances, the interests of the public will be best served by making purchases under the competitive bidding plan. Expressing this thought in another way, the rule should be that whenever practicable the competitive bidding plan should be used.

Respectfully,
JOHN G. PRICE,
Attorney-General.

73.

APPROVAL OF BOND ISSUE OF VILLAGE OF WEST PARK, OHIO, IN SUM OF $9,200.00.

COLUMBUS, OHIO, February 25, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

Re: Bonds of the village of West Park, O., in the amount of $9,200.00, for West 140th street water main assessment, being 9 bonds of $1,000.00 each and one bond of $200.00.

GENTLEMEN:—I have examined the transcript of the proceedings of council and other officers of the village of West Park, submitted to me in connection with the above bond issue, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the bond form submitted, and executed by the proper village officers, will, upon delivery, constitute valid and binding obligations of the village of West Park.

Respectfully,
JOHN G. PRICE,
Attorney-General.

74.

APPROVAL OF BOND ISSUE OF VILLAGE OF WEST PARK, OHIO, IN THE SUM OF $30,000.00.

COLUMBUS, OHIO, February 25, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

Re: General sewer bonds of the village of West Park, O., in the amount of $30,000.00, being 30 bonds of $1,000.00 each.

GENTLEMEN:—I have examined the transcript of the proceedings of council and other officers of the village of West Park, submitted to me in connection with the above bond issue, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the bond form submitted, and executed by the proper village officers, will, upon delivery, constitute valid and binding obligations of the village of West Park.

Respectfully,
JOHN G. PRICE,
Attorney-General.

75.

COUNTY SURVEYOR—CONSTRUCTION OF STATUTE REQUIRING FILING OF STATEMENT WITH COUNTY COMMISSIONERS AS TO ASSISTANTS, COMPENSATION, ETC.—DIRECTORY AS TO TIME—WHEN JUDGE OF COMMON PLEAS COURT IS AUTHORIZED TO FIX SALARIES OF COUNTY SURVEYOR'S ASSISTANTS.

1. *The provision in section 2787 G. C. (107 O. L. 70) to the effect that the county surveyor shall file with the county commissioners "on or before the first Monday of June of each year" a statement as to necessary assistants, deputies, etc., and their aggregate compensation, is, as to the time of the filing of said statement, directory only and not mandatory; and such statement may be subsequently filed and the allowance made by the county commissioners at such later time.*

2. *The right of a judge of the Common Pleas Court to make an allowance to pay the salaries of the county surveyor's assistants, deputies, etc., arises only after the county commissioners have had an opportunity to "fix the aggregate compensation" provided for by section 2787 G. C. (107 O. L. 70).*

COLUMBUS, OHIO, February 25, 1919.

HON. MELL G. UNDERWOOD, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of February 5, 1919, reading as follows:

"I desire your opinion upon the following proposition: Section 2787 of the General Code of Ohio provides in part, that on or before the first Monday of June of each year the county surveyor shall file with the commissioners of such county a statement of the number of all necessary assistants, deputies, draftsmen, inspectors, clerks or employees in his

office for the year beginning on the first Monday of September next preceding and their aggregate compensation.

Section 2768.—That the county surveyor shall appoint such deputies, draftsmen, inspectors, clerks or employees as he deems necessary for the proper performance of the duties of his office and fix their compensation.

Section 7188-1 and section 7188-2 of the General Code of Ohio stipulate certain duties incumbent upon the county surveyor of each county to be performed under the direction and supervision of the state highway commissioner in reference to the numbering of all public roads of the county other than inter-county highways and main market roads, the bridges and culverts or such roads and the making of a map which shall show and identify by number, location and length each such road and section thereof and all bridges and culverts.

Provision is also made that the duties under these sections shall be fully complied with in all the counties and townships of the state not later than the first day of January, 1919.

The surveyor of this county did not file with the commissioners under the provisions of section 2787 of the General Code a statement as required, of the number of all assistants, deputies, etc., for the year beginning on the first Monday of September next succeeding and their aggregate compensation. No specifications were furnished in reference to the performance of the duties by the county surveyor under the provisions of sections 7188-1 and 7188-2 of the General Code until after January 1, 1919.

Since no statement was filed as required by section 2787, the surveyor at that time being able to do all the work himself, and since he is now ordered by the state highway commissioner to make a new road map of the county and will need the assistance of a draftsman in order to carry out the provisions of section 7188-1 and 7188-2 of the General Code, would it be legal for the Common Pleas Court to make an allowance in order to employ the necessary assistants for the performance of said duty?

If not, is there any way by which the county surveyor could employ such assistants with the consent of the county commissioners and at the end of each month submit his bills to the county commissioners for payment?

If your answer to the last question should be in the negative, is there any way by which the county surveyor can employ the necessary help, it being necessary for him, as stated, to have additional help at this time?"

Section 2787 G. C., as amended in 107 O. L., 70, says:

"On or before the first Monday of June of each year, the county surveyor shall file with the commissioners of such county a statement of the number of all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office for the year beginning on the first Monday of September next succeeding and their aggregate compensation. The county commissioners shall examine such statement and, after making such alterations therein as are just and reasonable, fix an aggregate compensation to be expended therefor for such year. Provided, however, that if at any time any county surveyor requires an additional allowance in order to carry on the business of his office, such county surveyor may make application to a judge of the court of common pleas of the county wherein such county surveyor was elected; and thereupon such judge shall hear said application, and if upon hearing the same said judge shall find that such

necessity exists he may allow such a sum of money as he deems necessary to pay the salaries of such assistants, deputies, draughtsman, inspectors, clerks or other employes as may be required. Notice in writing of such application and the time fixed by such judge for the hearing thereof shall be served by the county surveyor five days before said hearing upon the board of county commissioners of such county; and said board shall have the right to appear at such hearing and be heard upon said application and evidence may be offered both by the county surveyor and the county commissioners."

Section 2788 G. C., as amended in 107 O. L., 70, says:

"The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office, and fix their compensation, but compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners or allowed by a judge of the court of common pleas of the county. After being so fixed such compensation shall be paid to such persons in monthly installments from the general fund of the county upon the warrant of the county auditor. The county surveyor may require such of his assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems proper to give bond to the state in an amount to be fixed by the county surveyor with sureties approved by him, conditioned for the faithful performance of their official duties. Such bond with the approval of the county surveyor, indorsed thereon, shall be deposited with the county treasurer and kept in his office."

Section 7188-1 G. C., as amended in 107 O. L., 113, says:

"The county surveyor of each county, under the direction and supervision of the state highway commissioner, shall name and number all the public roads of his county, other than inter-county highways and main market roads, and shall number all the bridges and culverts on such roads. All such roads shall be divided into sections where they are of sufficient length to warrant the same. Such sections shall not exceed three miles in length and shall be numbered consecutively. The provisions of this section shall extend to all roads on the north and east lines of each county. A map of such roads shall be made by the surveyor which shall show and identify by number, location and length each such road and section thereof and all bridges and culverts. Such map shall show the location of municipal corporations, school houses, churches, lakes and rivers and shall be made into township units. As rapidly as the roads, bridges and culverts of each township are thus located and numbered, the county surveyor shall enter in a book in his office to be kept for that purpose, a description or identification thereof. A copy of such map shall be submitted to the state highway commissioner, together with a report showing plainly and definitely the exact location of such numbered roads, and sections thereof and such bridges and culverts, and such other and further information as the state highway commissioner may require. All the duties required by this section shall be performed in accordance with the instructions of the state highway commissioner, who shall prescribe such forms and issue such instructions as he deems proper. Upon the approval by the state highway commissioner of each map and report, copies of the same shall be filed by the county surveyor in his office and in the office of the county com-

missioners, and a copy of the map of each township shall be filed with the township trustees of such township; and thereafter the road names, numbers and section designations and the bridge and culvert numbers shall be the official terms by which all such roads, and sections thereof and such bridges and culverts shall be known. When a new road is established it shall be assigned by the county surveyor a name and number and if necessary divided into sections, or it may be added to an existing road, and it shall be the duty of the county surveyor to note such new road together with its official designation on the copy of the map on file in his office and to report the same to the state highway commissioner and county commissioners."

Section 7188-2 G. C., as amended in 107 O. L., 113, says:

"It shall be the duty of the county auditor before he issues his warrant for any moneys expended by the county on any highways, other than inter-county highways or main market roads, or on any bridges or culverts on such highways, to require of the county surveyor the assignment of such expense to the road and section thereof, or bridge or culvert in connection with which such expense was incurred. The county auditor shall keep such records as are necessary to show clearly at the close of each year the amount of money expended from the county treasury on each section of road, other than inter-county highways or main market roads, and on each bridge and culvert on such roads.

It shall be the duty of the township clerk before he issues any warrant on the township treasurer for any money expended upon any road within the township, other than an inter-county highway or main market road, or on bridges or culverts on such roads, to require of the county surveyor or township trustees the assignment of such expense to the road and section thereof, or bridge or culvert in connection with which the expense was incurred. The township clerk shall keep such records as are necessary to show clearly at the close of each year the amount of money expended from the township funds on each section of road, other than inter-county highways or main market roads, within the township and on each bridge and culvert thereon.

When general equipment for use in the entire county or township is purchased, the expense thereof need not be assigned to any section or sections of road or to any bridge or culvert, but so far as practicable all items of expense shall be assigned to the specific section of road or to the particular bridge or culvert in connection with which they were incurred. The provisions of this and the preceding section shall be fully complied with in all the counties and townships of the state not later than the first day of January, 1919. For the purpose of securing a uniform system of accounting and a uniform preservation of cost data throughout the state, the state highway commissioner is hereby authorized to prescribe all necessary and proper forms for maps and reports, and the auditor of state is hereby authorized to prescribe all necessary and proper forms for the keeping of the cost records by county surveyors, township trustees, county auditors and township clerks. All county auditors and township clerks may at any time be required by the state highway commissioner to transmit to him in such form as he may prescribe the cost records pertaining to roads, bridges and culverts within their counties or townships."

If the provision contained in section 2787 G. C. relative to the time when the

county surveyor shall file his statement as to the number of necessary assistants, etc., and their aggregate compensation, is mandatory, then the county surveyor not having filed such statement "on or before the first Monday in June," could not legally file the same at this time.

> "Mandatory statutes are imperative; they must be strictly pursued; otherwise the proceeding which is taken ostensibly by virtue thereof will be void."
>
> Suth. on Stat. Construction, p. 586.

If, however, said provision is directory merely, then the statement may be filed and the allowance may be made by the county commissioners at the present time.

In opinion number 370, 1913 Attorney-General's Report, Vol. II, p. 1322, the Attorney-General regarded as mandatory the provision in section 2980 G. C. which says that:

> "* * * Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies * * *."

One of the reasons assigned for such holding was that "the direction of the statute as to the time within which the commissioners are to make the allowance is stated in *negative* terms."

Without either approving or disapproving the holding of that opinion, this much may properly be said here, that under the test suggested by said opinion, the time provision which your letter refers to, would appear to be directory, not being stated negatively. The manner of statement, whether negative or affirmative is, however, only a subsidiary rule of construction. Whether a particular statute is mandatory or directory depends not so much upon any form of expression, but upon the intention of the legislature, as ascertained from a consideration of the whole act, its object, and the consequences that would result from construing it one way or the other. See opinion of Kinkead, J., in the recent case of In re Bostwick, reported in the Ohio Law Reporter for February 10, 1919, holding that the above quoted provision in section 2980 G. C. is directory only.

There are no doubt many good reasons why a county surveyor should comply strictly with section 2787 G. C. in the matter of filing the statement at the time therein provided. For instance, the information contained in such statement, if filed at the time provided, might be available to the county commissioners when the latter submit to the county auditor the annual budget of estimated moneys needed for county purposes for the incoming year, which budget the commissioners are directed by section 5649-3a G. C. to file on or before the first Monday in June.

However, regard should be had here to the undoubted principle that

> "Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards."
>
> Suth. on Stat. Construction, 575.

I see no evidence of a legislative intention that the designation of time contained in section 2787 G. C., viz., "on or before the first Monday in June," is in the nature of a limitation of the power of the surveyor to file said statement at a later time. Neither am I able to see why such statement, when so filed, cannot be acted upon at this time by the county commissioners and an aggregate compensa-

tion be fixed by them for the year beginning on the first Monday of September, 1918.

In reaching the conclusion above dated, I have not overlooked the provision contained in section 7188-2 G. C., above set forth, to the effect that

> "The provisions of this and the preceding section shall be fully complied with in all the counties and townships of the state not later than the first day of January, 1919."

Must this sentence be taken to mean that if the road map work is not undertaken and completed by January 1, 1919, payments thereafter made for such purpose would be illegal? Or is such sentence a mere direction, showing the legislature's desire for prompt discharge of the duties imposed by said section and the section immediately preceding? The latter seems to me to be the proper view.

In your letter you ask whether it would be legal for the judge of the Common Pleas Court to make the allowance in question. Such question must be answered in the negative. This for the reason that the phrase "additional allowance" contained in section 2787 G. C. clearly presupposes an allowance already to have been made by the county commissioners, and while no opinion is herein expressed as to the proper procedure where the county commissioners refuse to make *any allowance whatever* after the surveyor's statement is filed, I do hold that the right of the judge of the court of common pleas to hear an application under section 2787 G. C. arises only after the county commissioners have had an opportunity to "fix the aggregate compensation" provided by said section.

Respectfully,
JOHN G. PRICE,
Attorney-General.

76.

SCHOOLS—VALIDITY OF PROPOSED SECTION 7621-1 OF HOUSE BILL NUMBER 5—SAID SECTION WILL MAKE LAW MORE EFFECTIVE.

Section 7621-1 of H. B. No. 5, conferring special duties upon county superintendent of schools and prosecuting attorney to enforce the provisions of section 7621 of said bill, is not violative of the constitution of Ohio or within any of its inhibitions.

COLUMBUS, OHIO, February 25, 1919.

HON. W. R. COMINGS, *Chairman, Schools Committee, House of Representatives, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your letter dated February 19, 1919, as follows:

> "Will you kindly render an opinion as to the constitutionality of section 7621-1, as provided in the proposed amended H. B. No. 5. If this bill is enacted into law, will section 7621-1, in your opinion, cause the same to be more effective?"

It is noted that you request my opinion, first, as to the constitutionality of section 7621-1 in the proposed amended House Bill No. 5, and second, whether the enactment of said section 7621-1 will cause said bill to be more effective.

Section 7621-1 G. C., above referred to, is as follows:

"It shall be the special duty of the county superintendent of schools to see that the provisions of section 7621 of the General Code are enforced, and he shall promptly report all violations thereof to the prosecuting attorney of the county, whose duty it shall be to institute prosecutions against *all persons violating the provisions of such section.*"

It is noted that the effect of this section is to confer additional special duties upon the county superintendents of schools and the prosecuting attorneys of the state. It is noted that no extra or additional compensation is provided for the performance of the additional duties defined in said section.

The General Assembly has authority to fix the duties of county officers and in addition to those already provided for, may enlarge their duties and unless the legislature expressly provides for additional compensation, none may be paid.

As stated in State vs. Groom, 91 O. S., page 2, in the fourth branch of the syllabus:

"The General Assembly has the authority to create new duties and require such duties to be performed by the incumbents of an existing office."

Evidently what was intended is that the prosecuting attorney should prosecute all violations occurring within the county for which he is elected as prosecuting attorney, and to eliminate any confusion or question on this point, it is suggested that this meaning be more clearly expressed.

Except as above noted, I am of the opinion that said section 7621-1 is not violative of the constitution, nor within any of its inhibitions.

As to the second question contained in your letter, I am of the opinion that the provisions of section 7621-1, supra, will add to the efficacy of the bill. While it does not attempt to provide that such manner of enforcement shall be exclusive in that a prosecution for the violation of section 7621 may not be instituted by other persons as other violations of law generally, yet by making it the special duty of the county superintendent of schools and of the prosecuting attorney to secure its enforcement, cumulative provision is thus made to insure its enforcement and for that purpose, as above indicated, I am of the opinion said section would cause said bill to be more effective.

Respectfully,
JOHN G. PRICE,
Attorney-General.

77.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS MAY ORDER CHANGES IN GRANTING PETITION FOR PROPOSED CHANGES—HOW LIMITED—IT IS DUTY OF PROSECUTING ATTORNEY TO REPRESENT TOWNSHIP BOARD OF EDUCATION IN MANDAMUS PROCEEDINGS AGAINS STATE AUDITOR FOR DISTRIBUTION OF SCHOOL FUNDS.

1. *Section 6867 G. C. (105-106 O. L. 576) does not contemplate that county commissioners, in granting a petition for a proposed road, are to confine themselves to ordering minor changes only, in the proposed road as described in the petition, nor does it contemplate that the commissioners, as a condition to ordering changes*

other than minor changes, shall first secure the approval of the road petitioners. The test is, what changes, if any, are in the judgment of the commissioners, made necessary by the public convenience and welfare and a consideration of the expense involved?

2. *Under sections* 2917, 2918 *and* 4761 *G. C., the prosecuting attorney is charged with the duty of representing a township board of education in mandamus proceedings against the state auditor for distribution of a school fund provided by the state.*

COLUMBUS, OHIO, February 26, 1919.

HON. JOHN E. BLAKE, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—Under date January 27, 1919, you submit for the opinion of this department two inquiries, of which the first is as follows:

> "Will you kindly advise as to the construction of section 6867 of the road law of 1917? Do the changes referred to—to be made by county commissioners—have reference to minor changes only in route, location, etc.; or does the statute mean that the county commissioners, without the approval of the road petitioners, may make radical changes in the route and direction of the proposed road? How far does the expression 'with such modification and changes as in their judgment the public convenience and welfare may require' go?"

Said section 6867 G. C. reads as follows:

> "The county commissioners acting in the manner aforesaid, may grant the improvement prayed for in the petition, or may grant said improvement with such modification and changes as in their judgment the public convenience and welfare may require, and in making such modification or changes the commissioners may consider the expense which will result to individuals as well as the public."

The section in its present form was enacted (106 O. L. 574, 576), as part of Chapter I of the so-called Cass highway law. This chapter is headed:

> "Locating, establishing, altering, widening, straightening, vacating or changing the direction of the road",

and the first section of the chapter reads (section 6860 G. C.):

> "The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except the inter-county and main market roads."

Section 6861 provides for width of roads; and section 6862, as amended (107 O. L. 71) reads:

> "Sec. 6862.—Applications to locate, establish, alter, widen, straighten, vacate or change the direction of a public road shall be made by petition to the county commissioners signed by at least twelve freeholders of the county residing in the vicinity of the proposed improvement, which petition shall set forth the route and termini of the road, or part thereof, to be

located, established, or vacated, or the particular manner in which such road is to be altered, widened, straightened, or the direction thereof changed. When such road or proposed road lies wholly within any school district and is necessary for the convenience and welfare of the pupils in such district, the board of education of such district may, by resolution, petition for such road. The word 'improvement' used in sections 6862 to 6878 inclusive of the General Code signifies any location, establishment, alteration, widening, straightening, vacation or change in the direction of a public road, or part thereof, as requested in a petition filed under the authority of such sections, or determined upon by a board of county commissioners or joint board by resolution adopted by unanimous vote."

Section 6863 provides in substance that the commissioners shall fix a date for view of "proposed improvement" and a date for final hearing; also that they shall require bond of the petitioners, conditioned for payment of costs and expenses in case the prayer of the petition be not granted.

Section 6864 provides for notice of view and of final hearing, through insertion in newspaper published and having general circulation in the county where the "proposed improvement" is located (or, if there be no such newspaper published, then in a newspaper having general circulation in such county).

Section 6865 provides for survey and plat to be made by county surveyor in case he is so instructed by the commissioners after the view, and contains this clause in relation to surveyor's report:

"The report shall also recommend any changes in the improvement petitioned for, which in the judgment of the surveyor should be made."

Section 6866, as amended (107 O. L. 71), reads as follows:

"The commissioners shall at the date of the final hearing on said improvement as hereinbefore fixed cause the report of the surveyor to be read, and they shall hear any testimony bearing upon the public utility of the improvement and offered either by the petitioners or by any interested persons opposing the granting of the improvement. If the commissioners find said improvement will serve the public convenience and welfare, they shall grant said improvement, if not, they shall refuse the improvement and dismiss the petition."

Then follow sections 6867 (first above quoted), and 6868 which reads as follows (106 O. L. 576):

"Sec. 6868.—If in the opinion of the county commissioners the improvement is of sufficient importance to the public to cause the compensation and damages on account thereof to be paid to the person or persons entitled thereto out of the county treasury they may so order. If in the opinion of the commissioners the improvement is not of sufficient importance to cause the compensation and damages to be paid from the county treasury, they may order the compensation and damages or such part thereof as they may deem reasonable and just to be paid by the petitioners and the balance, if any, to be paid out of the county treasury. When a portion of the compensation and damages is ordered paid by the petitioners, in case of failure to pay the same by the time fixed by the county commissioners, such petitioners shall be liable for all the costs of said proceedings and the commissioners may, at their option, abandon said

improvement on failure of such petitioners to pay such compensation and damages as may be adjudged against them by the time fixed therefor. In case of failure by the petitioners to pay the costs adjudged against them, the same may be recovered in an action against them, by the prosecuting attorney of the county."

Giving consideration for the moment to the terms of section 6867 alone, the conclusion certainly is not to be drawn that a distinction is sought to be made therein between "minor changes" and "radical changes" If the word "modification" only had been used, there might be ground for saying that "minor changes" were meant; but the statute reads "with such modification *and changes* as in *their judgment* the public convenience and welfare may require." Furthermore, the last clause in the statute is "and in making such modifications or changes the commissioners may consider the expense which will result to individuals as well as the public." Assuredly, if the public welfare is to be the guiding star of the commissioners, and if they may take into account the expense which will result to individuals and the public, they are not to be limited in the exercise of their judgment by considerations of "minor changes" and "radical changes."

What has just been stated as to section 6867 is emphasized by reference to the other sections noted. By the terms of section 6866, the commissioners may either allow the petition or dismiss it, in accordance with their findings as to whether the improvement will serve the public convenience and welfare, or not; and by the terms of section 6868 they may order the expense of the proposed improvement to be paid wholly out of the county treasury, or wholly by the petitioners, or partly out of the county treasury and partly by the petitioners, as in their opinion the public importance of the proposed improvement justifies. Again, section 6865 enjoins upon the county surveyor the duty of recommending any changes in the improvement petitioned for, which in his judgment should be made. And finally, in the series of statutes now under consideration, the words "proposed improvement" are used, to the practical exclusion of the words "proposed road," the plain implication being that the proceedings are provided for by the legislature from the comprehensive standpoint of public utility rather than as a means of serving limited private convenience. In fact, the several statutory provisions noted all go to the point that the commissioners are vested with a wide discretion to the end of doing justice to the interests of all concerned.

The conclusion therefore follows that by the terms of section 6867 the commissioners have authority, in granting the improvement, to order changes in the route and direction of the proposed road, to such extent as in their judgment the public convenience and welfare, and the expense involved, may require, and this without reference to the approval of the petitioners.

Your second inquiry reads:

"Is the prosecuting attorney supposed to represent the township in a mandamus proceeding against the state auditor for distribution of a certain school fund by statute?"

Since you mention school funds, it is assumed that your inquiry relates to the duty of the prosecuting attorney relative to representing the township board of education. Attention is therefore called to sections 2917, 2918 and 4761, which read as follows:

"Sec. 2917.—The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters

connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

"Sec. 2918.——Nothing in the preceding two sections shall prevent a school board from employing counsel to represent it, but such counsel, when so employed, shall be paid by such school board from the school fund. Nothing in such sections shall prevent the appointment and employment of assistants, clerks and stenographers to the prosecuting attorney as provided in this chapter, or the appointment by the court of common pleas or circuit court of an attorney to assist the prosecuting attorney in the trial of a criminal cause pending in such court, or the county commissioners paying for such services as provided by law."

"Sec. 4761.—Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them. In city school districts, the city solicitor shall be the legal adviser and attorney for the board of education thereof, and shall perform the same services for such board as herein required of the prosecuting attorney for other boards of education of the county."

It will be noted that the provisions of section 4761 are very specific in casting upon the prosecuting attorney the duty of acting as attorney to boards of education other than those in city school districts; for not only does the statute use the term "legal adviser," but goes on and states that the prosecuting attorney *shall be* the legal counsel in *all* civil actions and *shall conduct* such actions in his official capacity. No exception is made of suits against state officers.

Section 2917, while it does not go into such detail as section 4761, provides in terms that the prosecuting attorney "shall be the legal adviser for *all* township officers." And coming to section 2918, whatever may be said of the authority granted therein to township boards of education to employ counsel to represent them, said section is not to be taken as in the least weakening the mandatory terms of section 4761, making it the duty of the prosecuting attorney to represent such boards in civil actions.

Hence, it is concluded that the duties of the prosecuting attorney embrace that of representing a township school board in a mandamus proceeding against the state auditor for distribution of a school fund provided by statute.

Respectfully,

JOHN G. PRICE,

Attorney-General.

78.

COUNTY AUDITOR—EXPENSES OF MAILING TAX LISTING BLANKS ARE PAYABLE AS CLAIMS AGAINST COUNTY—CANNOT EMPLOY OUTSIDE AGENCY TO PERFORM SUCH WORK.

The proper expenses of the county auditor incurred in the mailing of tax listing blanks are payable as claims against the county.

The auditor may not lawfully let out the work of mailing such blanks to an outside agency, and treat such services as an expense of his office to be allowed as a claim against the county.

COLUMBUS, OHIO, February 26, 1919.

HON. T. F. HUDSON, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of February 7, 1919, requesting my opinion as follows:

> "Section 5366 G. C. provides that the county auditor shall mail the tax blanks before the second Monday in April to the persons required to list such property, but this section makes no provision for the costs of mailing the blanks. I therefore desire your opinion on the following question:
>
> Would it be legal for the county auditor to employ a multigraph letter-addressing company to address the envelopes, fold and insert the tax blanks and affix the postage thereto, the bill for the entire expense of this work to be paid upon allowance by the county commissioners out of the general fund of the county?"

I refer you to section 5585 G. C. (107 O. L. 40), which provides, in part, as follows:

> "* * * The contingent expenses of the county auditor * * * including postage, and express charges, * * * shall be allowed and paid as other claims against the county."

Section 5366, referred to by you, provides that the blanks for listing personal property shall be supplied by the auditor "at his office for use of persons required to list such property of any character." The section goes on to provide that:

> "The county auditor may mail such blanks prior to the second Monday in April to the persons required to list such property, or may place listing blanks at convenient places in each taxing subdivision, and give notice thereof in one newspaper of general circulation in the county."

It is probably true that as a general proposition the term "contingent expenses" includes only such expenses as are irregular or may be said to be unforeseen, so that they cannot be provided for in advance. This is the meaning of the phrase as used in section 5585, excepting that by the inclusion therein of "postage" the term is enlarged so as to embrace that item of expense, which perhaps otherwise it would not embrace. In this instance you inquire whether the expenses incident to mailing the blanks are to be incurred by the county auditor and treated as claims against the county. In my opinion they are. The postage itself—i. e., the stamps required—is an item which is treated as a contingent expense, and I can see no reason for drawing the line between the purchase of stamps

themselves and the necessary expense, as by purchase of envelopes, etc., incident to the mailing.

However, the more important question is as to whether or not the work of addressing, sealing and stamping the envelopes, which is of a clerical character, can be done in the manner described by you. Ordinarily, such work would be performed by the auditor through his deputies and clerks. It is proposed now to let it out to a mailing service—in short, to convert into a supply, as it were, something that heretofore has been treated as a clerical service and performed by the office force of the auditor. It is obvious that the line must be drawn somewhere. The auditor could not, for example, let out to a firm of certified public accountants his work in keeping the fiscal books of the county; and the county commissioners would have no authority to allow a bill so incurred as a claim against the county.

On the whole, I am of the opinion that the thing inquired about cannot lawfully be done. The work performed by an addressing and mailing concern is essentially clerical service. All clerical work to be done by the county auditor must be performed by his assistants, whose compensation is to be fixed by him and payable from the allowances properly made. These allowances come primarily from the fee fund; so that the effect of permitting the auditor to have the work described by you done in the manner referred to and paid for as a claim against the county would be to make the general county fund bear an expense which the law clearly requires to be a charge upon the fee fund, so long as that fund is sufficient. (See sections 2980 et seq. G. C.).

It is the opinion of this department, therefore, that the proper expenses for supplies and postage, etc., incurred by the auditor in the mailing of tax listing blanks are payable as claims against the county by virtue of section 5585 G. C., above quoted, but that the auditor is without authority to have this work done by an addressing agency or concern, because it is essentially work of a clerical character which must be done in his office.

Respectfully,
JOHN G. PRICE,
Attorney-General.

79.

COLLATERAL INHERITANCE TAX—AN ESTATE TO A NEPHEW BY DEED MADE IN CONSIDERATION OF ONE DOLLAR AND "LOVE AND AFFECTION" WITH LIFE ESTATE RESERVED TO GRANTOR AND POSSESSION AND ENJOYMENT POSTPONED UNTIL GRANTOR'S DEATH SUBJECT TO TAX.

An estate passing to a nephew under a deed made in consideration of one dollar and "love and affection," with a life estate reserved to the grantor and possession and enjoyment postponed until his death, is subject to the collateral inheritance tax.

COLUMBUS, OHIO, February 26, 1919.

HON. B. O. BISTLINE, *Probate Judge, Bowling Green, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of February 7, 1919, requesting my opinion, as follows:

> "Will you kindly give us an opinion on the following:
> J. K. M. made a deed of his farm to his nephew, the consideration

being $100 and "Love and Affection," the grantor, however, reserving a life estate in the farm. J. K. M. is now deceased and the nephew desires to know as to whether he must pay a collateral inheritance tax."

Section 5331 G. C. imposes the collateral inheritance tax, *inter alia,* upon "all property * * * and any interests therein--* * * which pass * * * by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor" to persons beyond certain degrees of relationship to the grantor.

I presume that the possession and enjoyment of the estate described in your letter remained in J. K. M. until his decease. Quite evidently the conveyance was a "deed, grant or sale" within the meaning of the statute, whether it was a "gift" or not. I do not know of any more effectual way in which the possession and enjoyment of an estate might be postponed until the death of the donor than the one chosen in the case described by you.

The statute which has been quoted has never been interpreted in this state. In other states, however, under laws containing the same or substantially identical language, devices like the one which you describe have been held to give rise to the imposition of the inheritance tax.

See Blakemore & Bancroft on Inheritance Taxes, section 119; citing New York and Illinois cases.

For the foregoing reasons, the opinion of this department is that the collateral inheritance tax is payable under the circumstances stated by you.

Respectfully,
JOHN G. PRICE,
Attorney-General.

80.

MUNICIPAL CORPORATIONS—MERGING OF DEPARTMENTS OF PUBLIC SERVICE AND PUBLIC SAFETY IN CITIES UNDER FIFTY THOUSAND—SECTION 4250 G. C.—ADDITIONAL LAWS ONLY SUBMITTED TO ELECTORS.

1. *Additional laws only, and not general laws, for the government of municipalities are required to be submitted to the municipal electors for adoption under section 2 of Article XVIII of the Ohio Constitution.*

2. *It is only the adoption of additional laws as enacted by the General Assembly, and not the manner of their execution after adoption, that is submitted to the municipal electors under section 2 of Article XVIII of the Ohio Constitution.*

COLUMBUS, OHIO, February 26, 1919.

HON. H. ROSS AKE, *Member, Ohio Senate, Columbus, Ohio.*

DEAR SIR:—Your letter of February 11, 1919, with which you submitted H. B. No. 17, entitled "A bill to amend section 4250 of the General Code permitting the merging of the departments of public service and public safety in cities under fifty thousand," and inquiring whether the merger of the two officers referred to should

be made by the action of the city council or by a vote of the municipal electors, was duly received.

The proposed amendment reads as follows:

> "Sec. 4250.—The mayor shall be the chief conservator of peace within the corporation. He shall have power to appoint, and have power to remove, the director of public service, the director of public safety, and the heads of the sub-departments of public service and public safety, and shall have such other powers and shall perform such other duties as are conferred and required by law. In cities having a population of less than * * * *fifty* thousand, the council may by a majority vote merge the office of director of public safety with that of public service, one director to be appointed for the merged department."

Section 2 of Article XVIII of the Ohio Constitution, adopted September 3, 1912, provides that:

> "General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law."

You will observe that general laws for the government of cities are not required to be submitted to the municipal electors for adoption, but that such requirement applies only to "additional laws," which latter are described in *State* vs. *Lynch,* 88 Ohio St., 71, at pp. 93, 94, to be "laws additional to the general laws which the legislature is required to pass."

It is only the adoption of additional laws, and not the manner of their execution after adoption, that must be submitted to the municipal electors. Hence, if an additional law be submitted to the municipal electors and adopted by a majority of those voting thereon, it becomes operative in the municipality so adopting it. After such adoption the agency through which it is to be executed or carried into effect will be the agency provided by law, which in this case is the city council. In other words, municipal electors have nothing to do with the execution of an "additional law" after its adoption by them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

81.

COUNTY BOARD OF EDUCATION—POWER OF LEGISLATURE TO END TERMS OF OFFICE OF PRESENT MEMBERS—HOW SUCCESSOR ELECTED.

The General Assembly may end the terms of office of the present members of county boards of education at any time, and provide for the election of their successors.

COLUMBUS, OHIO, February 26, 1919.

HON. W. R. COMINGS, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—Your letter as to the right of the General Assembly to end the

terms of office of the present members of county boards of education, and to provide for the election of their successors, was duly received.

Your letter, insofar as it is pertinent to the inquiry, reads as follows:

> "The application is to the elimination of members of the county school board by providing for an election of members by a vote by the people instead of by the presidents of the township boards."

The power of the legislature, except when restricted by the constitution, to abolish a public office, even during the term for which an existing incumbent may have been elected, was established at an early day. Whoever accepts a public office does so with this principle of law in view. Tenure of office does not rest on contract, and it is not controlled by constitutional provisions prohibiting the impairment of contracts. Accordingly, it is a well settled principle of American law that an office of legislative creation may be abolished by the power which created it. See Ruling Case Law, 579, 580.

While it is conceded by all courts that the legislature may at any time abolish a legislative office, there is a conflict of opinion as to the right to abolish the officer and leave the office standing. The leading case denying such right is Malone vs. Williams, 118 Tenn. 390; 121 Am. St. 1002, wherein it was held:

> "An office is a species of property, and the legislature cannot constitutionally legislate an officer out of that property while leaving the office with its duties unimpaired, for this would be taking property without due process of law.
>
> "The legislature can abolish an office and thereby abrogate the rights and duties of the officer, but it cannot leave the office standing and abolish the officer."

But that case and others to the same effect are based either upon the old common law doctrine which regarded an office as a hereditament or property, or upon the promise that an officer has a vested right in his office, or that tenure of office rests upon contract, all of which are opposed to the view taken by our own and other American courts in cases holding that a statutory office is within the absolute control of the legislature. 22 Ruling Case Law, 582.

In State vs. Hawkins, 44 O. S., 98, 113, the court, speaking with respect to cases kindred to Malone vs. Williams, supra, said:

> "But these decisions have, as a rule, proceeded upon the ground, that an incumbent has a property in his office, and that he can not be deprived of his right without the judgment of a court. This view finds support in the doctrines of the common law, which regarded an office as a hereditament, but has no foundation whatever in a representative government like our own. The doctrine is opposed to the view taken by other courts of equal learning and ability."

It may be of interest, however, to know that the doctrine of vested right in public office crept into one of our early decisions (State vs. McCollister, 11 O., 46), but it was repudiated by the Supreme Court at the first opportunity in Knoop vs. Bank, 1 O. S., 603, 616, as follows:

> "It is true that in The State vs. McCollister, 11 Ohio Rep. 50, Judge Hitchcock said, that an officer has 'a vested right' in his office, but that dictum is opposed to many and well considered authorities."

The dictum in State vs. McCollister, supra, is also opposed to the decision in Mason vs. McCoy, 58 O. S., 30; State vs. Egry, 79 O. S., 391, 413; and Taylor vs. Beckham, 178 U. S., 548.

In Crenshaw vs. United States, 134 U. S., 99, 103, Mr. Justice Lamar stated the primary question in the case to be "whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of which Congress could not deprive him." And he said, speaking for the court: "The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right."

In Attorney-General vs. Jochim, 99 Mich., 358, the court, at page 367, said:

> "A public office cannot be called 'property,' within the meaning of these constitutional provisions. If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they are agencies for the state, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it. * * *
>
> The legislature may remove officers, not only by abolishing the office, but by an act declaring it vacant. * * * And, while it cannot remove incumbents of constitutional offices, it is not because of an inherent difference in the qualities of the office, but because the power to remove is limited to the power that creates."

That the General Assembly has the power to legislate an officer out of a statutory office before the expiration of his term, in the absence of constitutional restraint, was expressly held in the following well considered cases:

Taft vs. Adams, 3 Gray (Mass.) 126:

> "The legislature has the power to shorten the term of an officer, the tenure of whose office is not fixed by the constitution."

State vs. Douglas, 26 Wis., 428:

> "An office created by act of the legislature may be abolished in like manner, or the term of the officer otherwise shortened by general legislation after his election, in the absence of any special provision of the constitution forbidding it."

Alexander vs. McKenzie, 2 S. C., 81:

> "In the absence of any constitutional inhibition, political offices are subject to the entire control of the legislative power of the state, which may, at its mere will and pleasure, abolish the offices themselves, or change the tenure by which they are held, or remove the officers and put others in their place, with or without election. A political officer does not hold by contract, in the sense of the constitution, nor has he any vested right of property, in a constitutional sense, in the office, or in the salary thereof, before he has earned it."

People vs. Banvard, 27 Cal., 470:

> "The incumbent of an administrative office created by the legislature

may be legislated out of office pending the term for which he was elected."

State vs. Hyde, 127 Ind., 296:

"The term of the incumbent of a statutory office may be ended by the legislature at any time, and provision made for the selection of his successor."

In the opinion at page 302, the court say:

"Offices are neither grants nor contracts, nor obligations which can not be changed or impaired. They are subject to the legislative will at all times, except so far as the constitution may protect them from interference. Offices created by the legislature may be abolished by the legislature. The power that creates can destroy. The creator is greater than the creature. The term of an office may be shortened, the duties of the office increased, and the compensation lessened, by the legislative will.

* * * * * * * * *

The effect of the act we are now considering was to put an end to the appellant's term of office, and to provide a new mode of selecting some one to discharge, at least some, if not all, of the duties theretofore discharged by the appellant, and that whether the office of state supervisor of oil inspection is to be regarded as a new office or an old office under a new name, the intention to produce this result is plain, both from the title of the act and from its provisions. In order to end the appellant's term of office we do not think it was necessary to abolish the office held by him. As it is a statutory office, it was within the power of the legislature to end the term of the incumbent at any time, and make provision for the selection of a successor."

See also, Bryan vs. Cattell, 15 Iowa, 538, 553; People vs. Haskell, 5 Cal., 357; and Perkins vs. Cook County, 271 Ill., 449.

The question for determination is not one of expediency or propriety, but of legislative power, and the legislature is the sole judge of the exigency which demands its interference in such matters. As was well said in Newton vs. Commissioners, 100 U. S. 548, which involved Ohio laws:

"The legislative power of a state, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service, and it may increase or diminish the salary or change the mode of compensation."

In State vs. Bailey, 37 O. S., 898, the court ousted the members of the board of police commissioners of Toledo who had been elected under section 1984 et seq. R. S. (65 O. L. 152), and inducted into office a new board appointed by the governor under the subsequent act of April 8, 1881 (78 O. L. 117). The members of the old board had been elected for terms of two years, but before their terms had expired the act of April 8, 1881, was enacted conferring authority upon the governor to fill the offices by appointment.

In Butler vs. Pennsylvania, 10 How., 402, it appears that in 1836 the state enacted a law directing the governor to appoint annually canal commissioners for a term of office to commence on the first of February of every year. In April, 1843, certain persons then being in office as such commissioners, the legislature passed

another law providing that in the following October the commissioners should be elected by the people. The court, in holding the law constitutional, said:

> "In every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true, that this power, or the extent of its exercise, may be controlled by the higher organic law or constitution of the state, as is the case in some instances in the state constitutions, and is exemplified in the provision of the federal constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone."

The office of member of the county board of education is statutory, and in view of the foregoing decisions and the absence of constitutional restraint, I am of the opinion that the General Assembly may end the terms of office of the present members, and provide for the election of their successors.

Respectfully,
JOHN G. PRICE,
Attorney-General.

82.

OHIO AGRICULTURAL EXPERIMENT STATION—CONTRACT FOR ERECTION OF GREENHOUSES—PROVISION FOR LIQUIDATED DAMAGES CONSTRUED AS PENALTY FOR NON-PERFORMANCE—DELAY NOT CAUSED BY CONTRACTOR—TIME ALLOWED FOR COMPLETION OF CONTRACT.

1. *Where a stipulation in a contract providing for liquidated damages for delay in the performance thereof, construed with the entire contract, does not clearly evince an intention to contract as to such damages, which were the result of deliberate calculation and adjustment, such stipulations shall be construed as providing for a penalty for such non-performance and not as a provision for liquidated damages.*

2. *Where the delay in the completion of work so agreed upon was occasioned by the act or delay of the contracting owners and was without default of the contractor, the time of performance as agreed upon in the contract shall be extended for a period equal to the time of such delay.*

COLUMBUS, OHIO, February 26, 1919.

The Ohio Agricultural Experiment Station, Wooster, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your letter dated February 13, 1919, with which you enclose a contract with the American Greenhouse Manufacturing Company, referred to in your former letter of February 6, 1919, which was as follows:

> "On June 28 the board of control of this station signed a contract with the American Greenhouse Manufacturing Co., of Pana, Illinois, for the

erection of greenhouses at their bid of $8,500, the next higher bid being $11,323. The signed contract was submitted to the Attorney-General's office for approval, the same day as signed.

The signed contract was approved and returned to us on October 14, 1918.

As soon as the contractors received the signed contract they began ordering their materials, and completed their work on January 25, 1919, in a very satisfactory and workmanlike manner.

Article 6 of the contract reads as follows:

'Art. 6. The contractor is to complete all work contemplated under this contract by November 15, 1918.'

'Upon failure to have all work fully completed by the date above mentioned, the contractor shall forfeit and pay or cause to be paid to the owner, the sum of fifteen dollars ($15) per day for each and every day therafter the said work remains in an unfinished condition, for and as liquidated damages, and to be deducted from any payments due or to become due to said contractor.'

Your opinion is respectfully requested as to whether the delay in approving the signed contract will have any bearing on the date of completion of the work, or will be required to collect the $15 per day from November 15, 1918, to January 25, 1919.

I might say that the delay in completing the work has not caused the station any serious inconvenience."

By an examination of the specifications on file in the state auditor's office, I learn that there were three of these greenhouses constructed under the contract you enclosed, which referred to them merely as greenhouses. In personal conference with Mr. Kramer I learn also that in the matter of construction, workmanship and materials used, the contract was faithfully performed on the part of the contractor and that the only question of non-performance is in the delay of final completion of the work.

It is also noted that the contract was signed by the board of control of the station and the contractor, on June 28, and was submitted to the Attorney-General for approval on the same day, but was not approved and returned until October 14, 1918, or approximately three and a half months after such submission.

As stated in our personal conference and also indicated in your letter, it is to be observed that the station did not suffer any serious inconvenience or damage by reason of such delayed completion, and your question is, whether you will be required by law to collect the $15.00 per day between the day fixed in the contract for the completion of the contract and January 25, 1919, the day of actual completion.

Articles 5, 6 and 7 of the contract are pertinent. It may be added that those parts of the contract not quoted are not inconsistent with said Articles 5, 6 and 7, which are as follows:

"Art. 5.—Should the contractor at any time refuse or neglect to supply a sufficiency of skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the owner shall be at liberty after five days written notice to the contractor, to provide any such labor or material, and to deduct the cost thereof from any money then due or thereafter to become due the contractor under this contract; and if the architect shall certify that such

refusal, neglect or failure is sufficient grounds for such action, the owner shall be at liberty to terminate the employment of the contractor for said work, and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all tools, materials and appliances thereon, and to employ any other person or persons to finish the work, and to provide the material therefor.

And in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly completed, at which time if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid to the contractor by the owner, but if such expense shall exceed the unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties."

"Art. 6.—The contractor is to complete all work contemplated under this contract by November 15, 1918.

Upon failure to have all work fully conpleted by the date above mentioned, the contractor shall forfeit and pay or cause to be paid to the owner, the sum of fifteen dollars ($15) per day for each and every day thereafter the said work remains in an unfinished condition, for and as liquidated damages, and to be deducted from any payments due or to become due to said contractor."

"Art. 7.—Should the contractor be obstructed or delayed in the prosecution or completion of his work by any act, neglect, delay or default of the owner or the architect, or of any other contractor employed by the owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or the abandonment of the work by the employees through no fault of the contractor, then the time herein fixed for the completion of the work shall be extended for a period of time equal to the time lost by reason of any or all of the causes aforesaid, but no set allowance shall be made unless a claim therefor is presented in writing to the architect within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified by the architect."

It is to be noted that Article 6 fixes the time for completion of "all work contemplated under this contract by November 15, 1918," and "upon failure to have all work fully completed by the day above mentioned, the contractor shall forfeit and pay, or cause to be paid, to the owner, the sum of $15.00 per day for each and every day thereafter the said work remains in an unfinished condition, *for and as liquidated damages.*" While the contract uses the terms "for and as liquidated damages," yet it has been held that such names or terms are not conclusive in the construction of such contracts to determine whether it was the intention of the contracting parties to provide a penalty to secure the performance or whether the term "liquidated damages" was used to designate an actual agreement and intention of the parties which was the result of actual and fair calculation and adjustment in advance of uncertain damages which might result in the delay and performance of the agreement.

A general rule of construction in such cases is found in 13 Cyc., page 90, as follows:

"There are two excellent rules given for inferring that the parties intended the sum as liquidated damages: (1) when the damages are un-

certain and not capable of being ascertained by any satisfactory and known rule, whether the uncertainty lies in the nature of the subject itself or in the peculiar circumstances of the case; or, (2) whether from the nature of the case and the tenor of the agreement, it is apparent that the damages have already been the subject of actual and fair calculation and adjustment between the parties."

The rule in Ohio is as announced in Doan vs. Rogan, 79 O. S., 372, the second branch of the syllabus of which reads as follows:

"Whether a stipulation providing for liquidated damages for the breach of a contract is to be construed as liquidated damages or as a penalty depends upon the intention of the parties to be gathered from the entire instrument. While courts will not construe contracts in a way authorizing recovery for liquidated damages *simply because the parties have used that term in the agreement,* yet where parties to a contract otherwise valid have in terms provided that the damages of the injured party by a breach on the part of the other of some particular stipulation, or for a total breach, shall be a certain sum specified as liquidated damages, and it is apparent that damages from such breach would be uncertain as to amount and difficult of proof, *and the contract taken as a whole is not so manifestly unreasonable and disproportionate as to justify the conclusion that it does not truly express the intention of the parties,* but is consistent with the conclusion that it was their intention that damages in the amount stated should follow such breach, courts should give effect to the will of the parties as so expressed and enforce that part of the agreement the same as any other."

It is to be observed, as stated by the court in the last cited case, that the courts will not be bound to construe such provisions as liquidated damages, "simply because the parties have used that term in the agreement," but after all the main question to be determined, considering the whole agreement, the subject matter and the circumstances in the case, is, what was the intention of the contracting parties in their expressions as found in the contract, And, as said in Cleveland vs. Connelly, 14 O. C. C. (n. s.) 433, the test is:

"1. Is the subject-matter of the contract of such a nature that the actual damages in case of breach will be entirely uncertain and indeterminate? 2. Were damages evidently the subject of calculation and adjustment between the parties at the time the contract was made? 3. Is the stipulation reasonable? 4. What was the intent of the parties? 5. What was the language employed?"

It is to be borne in mind, also, that the Attorney-General, to whom the contract was submitted, and whose retention thereof for nearly three and a half months is stated to have materially delayed the performance of this contract, was the legal adviser of the board of control, and in the consideration of said contract did not represent and was in no way under the control of the contractor.

Tested by the rules laid down by the courts of this state, let us consider: (1) when this contract was entered into, was it the intention of the parties hereto to fix by actual and fair calculation and agreement in advance the damages which might result from the delay in performance of the contract; and (2) was the delay occasioned by any "act, neglect, delay or default of the owner or the architect," as provided for in Article 7, supra, of the contract.

It is to be noted that Article 5, above quoted, provides, in case the contractor neglect to employ and supply sufficient skilled workmen and materials, or fails in any respect to prosecute the work with promptness, that the owner may assume charge of and prosecute the work to its completion. Attention is called to these provisions as an indication that the party described as the owner was not relying entirely upon the provisions of Article 6 of the contract and as a further indication that the parties had not by actual and fair calculation adjusted said liquidated damages in advance.

Some light is thrown on this question by the case of Cleveland vs. Connelly, supra. The facts in that case in many respects are similar to the facts herein. In that case the contractor had agreed to furnish a certain number of fire engines to the city of Cleveland, which were to be delivered in installments at the respective dates stated in the agreement. In his written proposal attached to the contract with the city, the contractor had agreed to pay to the city, as liquidated damages, the sum of $25.00 for each day of the delay in the performance of said agreement.

In this and other cases a reluctance to enforce such contractual provisions, unless the intention of the parties is clearly evinced from the terms of the agreement, is very manifest.

In the Cleveland case the fact that the provision, as to liquidated damages, was in the written proposal attached to the contract, was taken as an indication that that particular matter was not prominently in the minds of the contracting parties. This as said by the court, at page 436,

> "is itself an indication that the parties did not have the subject of damages so prominently before their minds when they made their agreement as to make it a matter of deliberate calculation and adjustment."

In that case the fact that a number of engines were to be delivered at different dates was also considered and the court held, as stated on the same page, that the liquidated damages provision did not "apply with precision to the plan of installment deliveries which was written into the blank when Connelly presented his bid." Then the court indicated that if it applied to each engine, it would be manifestly exorbitant, and being uncertain, it would not appear that the parties had clearly expressed an intention to provide for liquidated damages and that the provisions then under consideration would be construed as a penalty, and in the absence of actual damages, the contractor was entitled to recover that part of the purchase price then remaining unpaid.

What the court stated in the Cleveland case is applicable to the facts herein. To illustrate: There were three greenhouses to be constructed. Was it the intention of the contracting party to fix the liquidated damages that would result at $15.00 a day for the delayed construction of all three of the greenhouses, or did they estimate and in advance agree that the damage and loss would amount to $5.00 for each greenhouse and thereby reach the total of $15.00 a day? Obviously if two of the greenhouses were completed on or before November 15, 1918, the result in damages would be less than if all three remained unfinished at that time. So does it not appear that the amount therein fixed and named as liquidated damages was provided and agreed upon more in the nature of a penalty than as liquidated damages?

In this respect the contract submitted is similar to the Cleveland contract in the case above referred to, wherein a similar provision was construed as a penalty and not as liquidated damages.

At this time and in this connection we may inquire what the contracting parties had in mind as to the time for beginning the performance of the work agreed

upon. Was it presumed that the board of control would retain the contract which it was obliged to submit to the Attorney-General for three and one-half months and if such an intention is presumed, may we not take that fact into consideration in deciding whether the contracting parties had deliberately agreed upon the liquidated damages? It is my conclusion that if we indulge in this presumption and hold that a delay in the time of performance of three and a half months was contemplated by the parties, that the matter of the probable damages resulting in a delay of the performance was not, as said in the Cleveland case, "prominently before their minds when they made their agreement as to make it a matter of deliberate calculation and adjustment." On the other hand, if we are to say that it was not presumed or intended by the contracting parties that a delay of three and a half months would be occasioned in securing the approval of the Attorney-General to this agreement, then and in that event it is a fair question to inquire if the contractor was not delayed in the prosecution of his work by the delay of the owner, as provided in Article 7, which delay, through no fault of the contractor, it further provided, would extend the time fixed in said contract for the completion of the work to a period equal to the time lost by reason of such delay. And it must be borne in mind that in approving or disapproving the contract, the Attorney-General, under section 333 G. C., was acting for the owner.

If this latter presumption is to be indulged in, then it may be stated that the delay was occasioned without fault of the contractor and by the owner, and would result in an extention of the time. So that consideration of all of the facts, as stated in your letter and in personal conference, and from consideration of the contract enclosed and the judicial interpretation of such or similar contracts, my conclusion is that you will not be required to collect the $15.00 per day from November 15, 1918, to January 25, 1919, referred to in your letter.

Respectfully,
JOHN G. PRICE,
Attorney-General.

83.

APPROVAL OF CONTRACT FOR ERECTION OF BUILDINGS FOR BUREAU OF JUVENILE RESEARCH.

Approval of contract and bond relative to completion of buildings for the Bureau of Juvenile Research.

COLUMBUS, OHIO, February 28, 1919.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have your letter of February 21, 1919, submitting to me for approval, as per section 2319 G. C. (107 O. L. 455), a contract between your board and Charles W. Schneider & Son, relative to the completion of an administration building and two dormitories for The Bureau of Juvenile Research, to be located on the grounds of The Columbus State Hospital. You have also submitted the bond covering said contract.

I have before me the minutes of your board, wherein it appears that Charles W. Schneider & Son of Columbus, Ohio, was the lowest bidder for the entire work, the bid of said Charles W. Schneider & Son being in the sum of $38,657.00.

It appears that your board has let the contract to the above named party at their said bid.

I have examined the published notice calling for bids in this matter. The minutes of the state building commission show an unqualified approval of said notice and the manner in which same was published.

Subsequent to the receipt of your said letter, you also furnished me the certificate of The Industrial Commission of Ohio to the effect that the said Charles W. Schneider & Son of Columbus, Ohio, was the lowest bidder for the entire the Workmen's Compensation Law, in the matter of premium payment.

I have before me the certificate of the auditor of state, that there are funds in the appropriation heretofore made for the purpose set forth in said contract, sufficient to cover the amounts payable under said contract.

A careful examination of said contract and bond satisfies me that the same are in all respects according to law, and I am this day certifying my approval thereon.

I have this day filed with the auditor of state the contract, bond and proposal relative to the improvement above stated, and am returning, herewith enclosed, all other papers submitted to me.

Respectfully,
JOHN G. PRICE,
Attorney-General.

84.

CORPORATIONS FOR PROFIT—WHEN PROVISION MAY BE MADE FOR PREFERRED STOCKHOLDERS TO HAVE EXCLUSIVE RIGHT TO VOTE FOR ELECTION OF DIRECTORS.

Corporations for profit incorporated under the general corporation laws of this state, may provide in their articles of incorporation and amendments thereto that the preferred stockholders shall have the exclusive right to vote for the election of directors during such time as the company shall be in arrears in its payments into the sinking fund provided for the redemption of the preferred stock, or in the payment of any dividend upon the preferred stock, or in the payment of any installment of rental.

COLUMBUS, OHIO, March 1, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—A letter from your predecessor, Hon. William D. Fulton, dated February 14, 1919, and hereinafter quoted, requesting my opinion as to whether the proposed amendment to the articles of incorporation of The Dixie Terminal Company should be accepted and filed in your office, was duly received. The letter referred to reads as follows:

> "Mr. Carl M. Jacobs Jr. of the law firm of Frost & Jacobs, Cincinnati, Ohio, has presented to this department a draft of a proposed amendment to the articles of incorporation of The Dixie Terminal Company, an Ohio corporation, containing the following provision:
>
> 'The preferred stock aforesaid shall have no voting power except in the matter hereinbefore mentioned unless any payment due hereunder to said sinking fund for the redemption of said preferred stock, or any dividend upon said preferred stock or any installment of rental, shall be in arrears, and unpaid for more than six (6) months. Should either such default occur, then until all arrears to said sinking fund and all accumulated dividends upon said preferred stock and all un-

paid rentals shall have been fully paid, and the payment of said dividends at the regular time shall have been resumed, *the holders of the preferred stock shall have the exclusive right to vote for and elect the directors of the company,* and the holders of the common stock shall have the right to vote on all other matters provided for by law. The right to vote vested in the holders of the preferred stock upon the happening or continuance of default as herein provided shall not deprive them of the exercise of any right they may have in law, in equity or by statute to enforce any of the provisions herein contained with respect to said preferred stock.'

We desire your opinion as to whether we should accept and file an amendment containing the above provision, and particularly that portion of it which gives the holders of the preferred stock the right to elect all of the directors of the company to the exclusion of the holders of the common stock upon the happening of the contingencies set forth in the above provision."

In the absence of a constitutional or statutory provision to the contrary, the common and preferred stockholders have equal voting power and may agree among themselves as to its exercise. It may therefore be said that unless common or preferred stockholders are by constitutional or statutory law prohibited from surrendering their voting power, either class may waive it in favor of the other. The question has generally arisen in connection with the right to take from the preferred stockholders the right to vote, and to confine it exclusively to the common stockholders, and only occasionally has the question of the right to confine the voting power to the preferred stockholders been presented to the courts.

It would seem, however, that if we start, as we must do, with the general rule that both classes have equal voting power unless taken away or abridged by some constitutional or statutory provision, and if it is competent, as it has been held time and again by the courts, to give the common stockholders the exclusive voting power, it would be equally valid to confer such exclusive right upon the holders of the preferred stock. The authorities sustaining provisions restricting the voting power of the preferred stockholders are to the effect that such arrangements are generally matters of private concern to the stockholders only and proper subjects of agreement between themselves. By so contracting, the stockholders do not violate any rule of common law, and if either class, common or preferred, voluntarily agrees to such limitations upon their common right, such agreement can not be said to violate any settled rule of public policy.

1 Machen, Corporations, section 570:

"The right of shareholders to vote is, however, like the right to dividends or to participation equally in a division of capital in liquidation, regarded as a private matter for each shareholder which he may waive if he choose. Consequently, a provision that shareholders of a certain class shall have no right to vote is, if assented to by them, quite valid. Such a provision might theoretically be made as to either the preferred or the deferred shares, but is much more common with respect to the preferred shares so as to compensate the other shareholders for the preference of the preferred shareholders as to dividends. A provision in an incorporation paper, whereby the preferred shareholders shall have no right to vote is, therefore, valid even though a statute provides that every stockholder shall be entitled to one vote for every share held by him."

3 Clark & Marshall, Corporations, p. 1996:

"A stockholder has no right to vote at corporate meetings, whether the stock is common or preferred, if it is so stipulated when the stock is issued, for the stipulation is then a term of his contract. And even after persons have become stockholders, they may surrender or restrict their power to vote by agreement, by consenting to by law or otherwise, provided the agreement does not violate any charter or statutory provision, and is not contrary to public policy," etc.

In 7 Ruling Case Law, p. 345, the law is stated as follows:

"A provision in articles of incorporation that the voting power shall be vested exclusively in the common stock and that preferred stockholders shall have no right to vote has been held not to be violative of any rule of the common law or of public policy. * * * Preferred stockholders may also be given the sole right to vote, to the exclusion of the holders of the common stock."

2 Clark & Marshall, Corporations, p. 1320:

"In the absence of charter or statutory provision or valid stipulation to the contrary, holders of preferred stock have the same right as holders of common stock to vote at stockholders' meetings. And their contract may even give them the right to vote to the exclusion, for a time, of the holders of common stock, so as to place the management of the corporation entirely in their hands for the time specified."

1 Thompson, Corporations, section 859:

"The rule that a right to vote follows the ownership of stock means that in the absence of any common restriction upon all stock, or upon a class of stock, this right prevails. That is, the right of a stockholder to vote cannot be arbitrarily abridged and is not subject to unreasonable restriction. But the rule is equally emphatic, if not so general, that restrictions may be placed upon the right to vote; or, as sometimes stated, the right to vote may be separated from the ownership of stock. It must be remembered, in this connection, that stockholders can make any agreement respecting their stock, or the voting of it, that they may see fit or deem wise, except agreements that are void as against public policy. * * It is simply a contract relation between the two classes of stockholders, in which the public has no concern."

4 Thompson, Corporations, section 3605:

"The whole matter is one of contract or of statutory regulation, and it would not be improper, where there is no statutory or charter prohibition, to confer the sole right to vote upon the preferred stockholders to the exclusion of the holders of the common stock."

In Miller vs. Ratterman, 47 O. S., 141, 157, the court, speaking with reference to a provision in stock certificates, that holders thereof shall not have or exercise the right to vote at stockholders' meetings, said:

"The provision is not unusual. It is sometimes found in the statute itself. * * * It is true that one characteristic of stock generally is that it can be voted upon. But this is not essential. Indeed, instances may arise where it is good policy to prohibit the voting upon stock. And the point here is, not whether any question of public policy intervenes to make it improper for the preferred stockholders to possess a right to vote, but whether any such question intervenes to make it imperative that they shall have that right."

What express provision of our constitution or statutory law is violated by the proposed amendment? All statutes in pari materia must be considered together, and in the light of the general common law rules of equality of right of stockholders to vote and to contract with each other in respect thereto. One may prescribe the general rule, while another on examination may be found to provide an exception to such rule, and thereby become the statute applicable to the subject with which it deals. Keeping these rules in mind, what constitutional or statutory provisions have we that are opposed to the stipulations contained in the proposed amendment, for it must be conceded, in the light of the authorities hereinbefore referred to, that such voting agreements are valid unless prohibited by law.

Under section 8667 G. C., the capital stock of corporations for profit may consist of common and preferred, and by authority of section 8668 G. C. it may be provided in the articles that the preferred stock shall be entitled to dividends in preference to all other stockholders, and that such dividends may be made cumulative.

Those two sections are then followed by section 8669 G. C., whose terms are equally applicable to both classes of stock (excepting only the single provision authorizing the redemption of the preferred), as follows:

"A corporation issuing both common and preferred stock may create designations, preferences, and voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof."

The only statute that can be claimed to place a limitation upon the right of the stockholders to impose limitations or restrictions upon the voting power is section 8636 G. C., which was enacted prior to the other statutes above referred to (see 93 O. L. 230), and reading as follows:

"At the time and place appointed, directors shall be chosen by ballot, by the stockholders who attend, either in person or by lawful proxies. At such and all other elections of directors, each stockholder shall have the right to vote in person or by proxy the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate his shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock equals, or to distribute them on the same principle among as many candidates as he thinks fit. Such directors shall not be elected in any other manner. A majority of the number of shares shall be necessary for a choice, but no person shall vote on a share on which an installment is due and unpaid."

But that section, when read in connection with the other statutes in pari materia, particularly section 8669 G. C., does not, in my opinion, in any way affect the right of corporations to create preferences on voting powers or restrictions or

qualifications therof under the express authority of section 8669 G. C., which is the later statute on the subject.

What is proposed to be done in the proposed amendment to the articles of incorporation of The Dixie Terminal Company is not to destroy absolutely, and for all time, the voting power of the common stock, but only to restrict or qualify temporarily the power during such time as the company makes certain defaults, and then not generally but only as to the election of directors.

It is true that section 8636 G. C. provides that each stockholder shall have the right to vote at elections of directors, but when read in connection with the later statute (section 8669 G. C.,) which clearly and expressly authorizes corporations to create preferences and voting powers, or restrictions or qualifications thereof, the conclusion cannot be escaped that the earlier statute prescribes the general rule only, and that the later statute was intended to authorize exceptions to govern in all cases where the corporation takes advantage of its provisions. And, again, it must not be overlooked that the prohibition in section 8636 G. C., relates exclusively to the *manner* of electing directors as therein provided for, namely, by ballot, in person, or by proxy, and by cumulative voting. In other words, in determining what stockholders are *entitled* to vote, the two statutes above referred to (section 8636 G. C. prescribing the general rule, and section 8669 G. C. expressly providing for exceptions) must be considered and construed together; and in determining the *manner* in which the election must be had, recourse must be had to section 8636 G. C. because it is the only statute on the subject applicable to corporations generally.

Support for my conclusion is also found in section 8698 G. C. (107 O. L. 414), which expressly refers to restrictions or limitations on the voting power of "any of the authorized capital stock," thus furnishing legislative recognition of the right to restrict or limit the voting power of any of the capital stock, either common or preferred or both. See also, Mackintosh vs. Railroad, 32 Fed. 350; and State vs. Swanger, 190 Mo. 561.

If it be contended that the provision in section 8636 G. C. that "such directors shall not be elected in any other manner," has the effect of prohibiting corporations from restricting or limiting the voting power of the common stockholders, then the same line of reasoning would compel us to conclude that neither can the preferred stockholders be restricted or limited in their voting power. Such a construction would render ineffectual the provision of section 8669 G. C., which expressly authorizes any corporation issuing both common and preferred stock to create and incorporate into its charter designations, preferences and voting powers, or restrictions or qualifications thereof.

For the reasons above given, it is my opinion that the provisions of the proposed amendment to the articles of incorporation of The Dixie Terminal Company are not in violation of law, and that the amendment should be accepted and filed in your office.

Respectfully,
JOHN G. PRICE,
Attorney-General.

85.

MUNICIPAL CORPORATIONS—CHARTERED AND NON-CHARTERED CITIES—EXPENSES OF MAYORS AND CITY SOLICITORS FOR DRAFTING LEGISLATION FOR RELIEF OF CITIES UNAUTHORIZED TO BE PAID FROM PUBLIC FUNDS.

The public funds of a non-charter city cannot be used for the purpose of paying the expenses of municipal officers in attending a meeting of mayors and city solicitors held for the purpose of considering and drafting legislation for the relief of municipalities; nor can the funds of a charter city be used for such purpose in the absence of a valid provision in its charter warranting such payment.

COLUMBUS, OHIO, March 1, 1919.

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

GENTLEMEN:—Your letter of February 4, 1919, requesting my opinion on certain questions based upon the statement of facts therein set forth, was duly received.

The statement of facts and questions referred to are as follows:

"Statement of Facts

Council of a Home Rule city which has adopted a charter passed a resolution directing certain officers to attend a meeting of the mayors and solicitors of the cities of the state of Ohio called for the specific purpose of drafting legislation for the relief of cities in general and the city of Cincinnati in particular. The said officers attended said meeting and presented their expense accounts to the city auditor for payment.

Question 1. May the city auditor honor said warrants and pay same from public funds as per the resolution of the council of the city of Cincinnati?

Question 2. In case a chartered city did not pass a resolution prior to attendance at said meeting, may the council of said chartered city pass an ordinance ratifying the action of its officers in attending said meeting and ordering the auditor to pay the expenses necessarily incurred in attending the meeting for the specific purpose of obtaining relief for said city?

Question 3. May the council of a municipality that has not adopted a charter pass a resolution or ordinance authorizing and directing said officers to attend a meeting of the mayors and solicitors of the state of Ohio for the specific purpose of drafting legislation for the relief of said non-chartered municipality?

Question 4. In case said non-chartered municipality has the power to pass said ordinance, may said council of said non-chartered city pass an ordinance ratifying the action of said officers and directing the city auditor to pay the warrant for expenses necessarily incurred in attending said meeting for the specified purpose of obtaining relief for said municipality?"

1. It has long been the settled policy of this state that public officers are not entitled to extra compensation unless clearly authorized by law, and it would seem that, on principle, the same rule is equally applicable to claims for expenses.

In Clark vs. Commissioners, 58 O. S., 107, the court at page 109 say:

"It is well settled that a public officer is not entitled to receive pay for services out of the public treasury, unless there is some statute authorizing the same. Services performed for the public, where no provision is made by statute for payment, are regarded as a gratuity, or as being compensated by the fees, privileges and emoluments accruing to such officer in the matters pertaining to his office. Jones vs. Commissioners, 57 Ohio St. 189. To warrant payment out of the public treasury, it must appear that such payment is authorized by statute. Section 5, Article X of the constitution. Diebolt vs. Trustees, 7 Ohio St., 237; Anderson vs. Commissioners, 25 Ohio St., 13; Strawn vs. Commissioners, 47 Ohio St., 404."

The principle was reaffirmed and applied in Sage vs. Commissioners, 82 O. S. 186. At p. 188 the court say:

"The claim for compensation is made, notwithstanding the rule long established in this state, and recognized in the brief of counsel for the plaintiff, and in the several opinions of the judges of the circuit court who have reached different conclusions upon the question presented, that if a statute imposes a duty upon a public officer it is presumed to be performed by him in consideration of the general emoluments of his office unless the legislature has clearly indicated the intention that compensation shall be paid for the performance of the duty so imposed."

In the recent case of State vs. Maharry, 97 O. S. 272, the court had occasion to define the status of public funds, and the purpose for which they could be disbursed, and did so as follows:

"All public property and public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund, and all persons, public or private, are charged by law with the knowledge of that fact. Said trust fund can be disbursed only by clear authority of law."

An examination of the Ohio cases will disclose that in every case where the claim of a public officer to extra compensation, or for expenses incurred in the discharge of his official duties, was allowed, the decision was based upon the ground that the payment was authorized by statute, and that in every case where the claim was denied the decision was reached because there was no statute authorizing its allowance.

Some of the decisions denying claims for extra compensation and expenses incurred in the performance of official duties, because payment was not clearly authorized by statute, are:

Sage vs. Commissioners, 82 O. S. 186;
Thorniley vs. State, 81 O. S. 108;
Richardson vs. State, 66 O. S. 108;
Higgins vs. Commissioners, 62 O. S. 621;
Clark vs. Commissioners, 58 O. S. 107;
Ward vs. Russell, 57 O. S. 144;
State vs. Wright, 17 C. C. n. s. 396;
State vs. Ganz, 14 C .C. n. s. 381;
State vs. Brown, 20 C. C. 57;
Millard vs. Conrade, 16 Cir. Dec. 445; and
Swartz vs. Wayne County, 12 Cir. Dec. 590.

And decisions allowing such claims, because payment was clearly authorized by statute, are:

Clark vs. Commissioners, 58 O. S. 107;
State vs. Commissioners, 26 O. S. 364;
Kloeb vs. Mercer County, 4 C. C. n. s. 565;
State vs. Hirstins, 15 N. P. n. s. 505; and
State vs. Coeghlan, 6 N. P. 101.

The policy of the state against the allowance of claims of public officers for expenses incurred in the discharge of official duties, except in cases where the incurring and payment of such expenses are clearly authorized by statute, is most forcibly shown by the fact that the legislature has from time to time, and in a great number of cases, expressly provided for the payment of the traveling and other expenses of certain officers, therby negativing, in my opinion, the right to the payment of such expenses except in cases clearly and specifically provided for.

The following statutes selected at random, enacted at various times, are cited and referred to for the purpose of showing the legislative policy on this subject over a long period of time.

Sec. 50.—Member of the General Assembly allowed "mileage" to and from Columbus.

Sec. 275.—"Necessary traveling and hotel expenses" of deputy inspectors and supervisors of the bureau of inspection and supervision of public offices.

Sec. 373.—"Necessary traveling expenses" of state dairy and food commissioner. (Repealed).

Sec. 374.—"Necessary traveling expenses" of assistant dairy and food commissioners. (Repealed).

Sec. 499.—"Actual and necessary traveling and other expenses" of public utilities commissioners.

Sec. 614-81.—"Actual and necessary expenses while traveling" of public service commissioners and assistants. (Repealed).

Sec. 714.—"Actual and necessary traveling expenses" of superintendent of banks, deputies, etc.

Sec. 905.—"Necessary and legitimate expenses" incurred by chief inspector of mines, etc.

Sec. 982.—"Necessary traveling expenses" of assistant chief inspectors of workshops and factories.

Sec. 1171-1.—"Necessary expenses" of members of the board of control of agricultural experiment station.

Sec. 1181.—"Actual traveling expenses" of deputy highway commissioners.

Sec. 1294.—"Necessary expenses" of members and officers of the state medical board.

Sec. 1394.—"Necessary expenses" of fish and game wardens.

Sec. 1465-8.—"Actual and necessary expenses while traveling" of members of the tax commission.

Sec. 1465-24.—"Actual and necessary traveling expenses" of certain tax officers.

Sec. 1830.—"Necessary expenses" of members of women's visiting committee. (Repealed).

Sec. 1836.—"Actual traveling expenses" of members and fiscal supervisor-secretary of board of administration.

Sec. 1869.—"Traveling expenses" of members of board of administration, etc., attending interstate and national conventions.

Sec. 1981.—"Mileage" in conveying insane persons to hospitals.

Sec. 2786.—"Reasonable and necessary expenses" of county surveyor.

Sec. 2997.—"Actual and necessary expenses" of sheriff incurred in pursuing persons accused of crimes, etc.

Sec. 3002.—"Actual traveling expenses" of infirmary directors.

Sec. 3004.—"Expenses" of prosecuting attorneys.

Sec. 3087.—"Expenses" of superintendent and trustees of children's homes, as delegates to state and national conferences.

Sec. 3151.—"Necessary expenses" of trustees of tuberculosis hospitals.

The rule applicable to claims of public officers for payment of expenses incurred in the performance of official duties, is tersely stated in Richardson vs. State, 66 O. S. 108, at p. 11, as follows:

> "To make such expenses an additional burden on the public funds would require a plain and unequivocal provision of the statute. An intention to do so will not be implied."

The General Assembly has also legislated on the subject of meetings and conventions, and the statutes enacted on that subject disclose, in my opinion, the legislative intent to deny the right of public officers to attend meetings and conventions at public expense, except when clearly authorized. Some of the statutes on the subject are as follows:

Sec. 500.—Authorizing the publics service commission to attend conventions with railroad commissioners of other states, and with the interstate commerce commission.

Sec. 1245.—Authorizing the state board of health to provide for annual conferences of health officers and representatives of local boards of health, and providing that each city, village or township shall pay the necessary expenses of delegates etc.

Sec. 1465-11.—Authorizing the tax commission to meet with officers of other states and officers of the United States on matters pertaining to official duties.

Sec. 1869.—Providing that : "No expenditure for traveling expenses to other states, or for attending an interstate or national convention or association shall be made by any member or employee of the board of administration or by any officer of an institution under its control unless authority is granted at a meeting of the board by resolution stating the purpose and reason therefor; but such resolution shall not be effective without the written approval of the governor."

Sec. 2313-3.—Providing that: "No executive, legislative or judicial officer, board, commission or employe of the state shall attend at state expense any association, conference or convention outside the state unless authorized by the emergency board. Before such allowance may be made, the head of the department shall make application in writing to the emergency board showing necessity for such attendance and the probable cost to the state. If a majority of the members of the emergency board approve the application, such expense shall be paid from the emergency fund."

Sec. 3087.—Providing that trustees and superintendent of children's homes shall be allowed their necessary expenses as duly accredited dele-

gates to state and national conferences devoted to child-saving, and other charitable and correctional work.

Sec. 3151.—Authorizing the trustees, medical superintendent, or nurses of district tuberculosis hospitals to attend conferences where pulmonary tuberculosis is a subject for consideration.

No statute has been found imposing a duty upon or authorizing municipal officers generally, or mayors and city solicitors, to attend meetings or conventions held for the purpose of discussing and drafting legislation for the relief of municipalities, or making the expenses of such attendance a burden on the public funds. As was well said in Richardson vs. State, supra, "An intention to do so will not be implied." If it had been intended to permit the expenditure of public funds for such purposes, it is reasonable to presume that the legislature would have spoken on the subject, as it has done in the numerous instances hereinbefore referred to.

There is also judicial authority and official opinion expressly holding that public officers have no legal claim against their respective municipalities for expenses incurred in attending meetings and conventions.

It State vs. Wright, 17 C. C. (n. s.) 396, the building inspector of Cleveland commenced a proceeding in mandamus to compel the payment of traveling expenses incurred by him on a trip to Columbus for the purpose of attending a convention of the building inspectors of the various municipalities. He made the trip and attended the convention by direction of his superior officer, the director of public safety. The court held that municipalities are not liable for the traveling expenses of their officials incurred in attending a convention of municipal officers, and dismissed the petition at the cost of the relator.

In an opinion of the Attorney-General, reported in Annual Report of Attorney-General, 1910-1911, page 354, it was held that the expenses of the city solicitor and other officers and employes of the city government, incurred in appearing at Columbus before a legislative committee for the purpose of securing legislation deemed advantageous to the city, cannot be lawfully paid from the city treasury.

In that opinion it was said:

> "I do not believe that a city government as such may incur expenses for the purpose of procuring legislation deemed advantageous to the community. No such power is conferred by the municipal code, or by any of the provisions of the constitution and laws of this state upon municipal corporations as such. No such power flows by implication from any of the powers expressly conferred by law upon municipal corporations. If there is any rule of public policy at all applicable to the question, such a rule would, in my judgment, be against a public corporation engaging for any reason in the enterprise of influencing legislation.
>
> The city as such then had no right to appear before any legislative committee. The citizens of the city might lawfully undertake this service for their common good. The city solicitor has no powers broader than those of the city itself, his client. However praise-worthy it may have been for him to appear before a legislative committee in behalf of the general good of the citizens of the city he could not be reimbursed for expenses so incurred by the city."

2. In State vs. Cooper , 97 O. S. 86, the court held that taxation is a sovereign function, and, being such, Home Rule cities do not possess the absolute and unrestricted power of levying taxes for local purposes. It was also held that the taxing power of all municipalities may be limited and restricted by general laws, and that such limitations and restrictions are warranted by sec. 6, Art. XIII of the

Ohio Constitution of 1851 and by sec. 13, Art. XVIII of the amendment adopted September 3, 1912.

A claim that the state has yielded to a Home Rule city any of its sovereign functions cannot be sustained unless, as held in the Cooper case, supra, it appear that the people have parted therewith by the adoption of a constitutional provision that is clear and unambiguous, and, as was further held, the Home Rule provisions in the Ohio constitution do not go to that extent.

The statement of facts in your letter does not disclose that any of the Home Rule cities referred to have any provision in their charters authorizing the payment of such expenses from public funds. If it be competent for Home Rule cities to incorporate such a provision into their charters (and I express no opinion on the question), it would seem reasonable to conclude that if the officers of a non-charter city are not entitled to be paid such expenses unless clearly authorized by statute, the officers of Home Rule cities have no such right unless their charters contain a provision warranting such payment.

In view of the settled public policy of Ohio, as announced by the decisions and disclosed in the statutes hereinbefore referred to, I am of the opinion that public funds cannot be used for the purpose of paying the expenses of municipal officers of non-charter cities in attending meetings of mayors and city solicitors held for the purpose of discussing and drafting legislation for the relief of cities, nor of the officers of charter cities whose charters contain no valid provision warranting such payment.

Respectfully,
JOHN G. PRICE,
Attorney-General.

86.

COUNTY CHILDREN'S HOME—NOT AUTHORIZED TO PURCHASE AUTOMOBILE FOR USE OF SUPERINTENDENT.

Sections 3077 to 3108 G. C., providing for the establishment and maintenance of children's homes by counties, do not authorize the board of trustees of the home to purchase an automobile for the use of the superintendent thereof.

COLUMBUS, OHIO, March 1, 1919.

HON. T. R. ROBISON, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—In your communication of February 8, 1919, you submit for opinion the following inquiry:

> "Would the board of trustees of the children's home have authority to purchase an automobile for the use of the superintendent in visiting children indentured out?"

Children's homes as part of the plan of county government are provided for by sections 3077 to 3108 G. C., and of this series of statutes, the particular sections providing for the appointment and compensation and prescribing the duties of a superintendent of the home are sections 3084 and 3085, reading as follows:

> "The board of trustees shall designate a suitable person to act as superintendent of the home, who shall also be clerk of said board, and who

shall receive for his services such compensation as the board of trustees designates at the time of his appointment. He shall perform such duties, and give security for their faithful performance, as the trustees require.

Subject to such rules and regulations as the trustees prescribe, the superintendent shall have entire charge and control of such home and the inmates therein. Upon the approval of the trustees the superintendent may appoint a matron, assistant matrons, and other necessary employes whose duties shall be the care of the inmates of the home, and to direct their employment, giving suitable physical, mental and moral training to them. Under the direction of the superintendent, the matron shall have the control, general management and supervision of the household duties of the home, and the matron, assistant matrons, and other employes shall perform such other duties and receive for their services such compensation as the trustees may by by-laws from time to time direct. They may be removed by the superintendent or at the pleasure of a majority of the trustees."

Section 3087 G. C. reads:

"The trustees shall not receive any compensation for their services, but they and the superintendent shall be allowed their necessary expenses while on duty, including expenses as duly accredited delegates to state and national conferences devoted to child-saving, and other charitable and correctional work, and such expenses shall be paid in the same manner as other current expenses of children's homes, and shall not exceed four hundred dollars in any year for any county."

Unless the three sections quoted confer authority on the board of trustees to purchase an automobile for the use of the superintendent, the board is without such authority, since none of the remaining sections in the series above noted has relation, directly or indirectly, to the matter of such authority.

Statutes of the character of those quoted are construed strictly in Ohio. In the case of State ex rel. vs. Commissioners, 10 C. C. (n. s.) 398, the court at page 399 of the opinion says:

"If the legislature intended to have county commissioners supply sheriffs with horses, vehicles and harness, or to allow them the expense necessarily incurred in their purchase, it would certainly have so provided in unambiguous terms."

And see, also,

Sage vs. Commissioners, 82 O. S., 186;
Commissioners vs. R. R. Co., 45 O. S. 401, 403;
State ex rel. vs. Yeatman, 22 O. S. 546, 551;
Commissioners vs. Leighty, 1 C. C. (n. s.) 431.

Two opinions of this department are also in point: Opinions of Attorney-General, 1913, Vol. 2, p. 1360, holding that the county commissioners might not purchase an automobile for the use of the county surveyor in the absence of express legislative enactment or on necessary implication from the terms used; Opinions of Attorney-General, 1914, p. 520, holding that the words "other equipment necessary for the proper discharge of their duties" did not give authority to the

county commissioners to purchase automobiles for the use of district assessors in the performance of their official duties. See, also, Opinions Attorney-General, 1917, p. 1917.

In the light of the principles thus announced, the provision in section 3084 G. C. that the superintendent shall "receive for his services such compensation as the board of trustees designates at the time of his appointment" does not imply that the board, under the guise of fixing compensation, may purchase an automobile for the use of the superintendent; nor is there any implication of such authority to be found in section 3087, providing for payment of necessary expenses of the superintendent while on duty or engaged in other charitable and correctional work. Section 3085 does not from any standpoint import such authority.

While the foregoing observations make it clear enough that your inquiry should be answered in the negative, another and even more potent consideration leads to the same end. You inquire if there is authority to make the purchase "for the use of the superintendent in visiting children indentured out." The matter of a visiting agent is specifically provided for by section 3099 G. C. (103 O. L. 892), which reads as follows:

> "Unless a children's home places its wards through the agency of the board of state charities, the trustees shall appoint a competent person as visiting agent, who shall seek homes for the children in private families, where they will be properly cared for, trained and educated. When practicable, the agent shall visit each child so placed not less than once in each year, and report from time to time to the trustees its condition, any brutal or ill treatment of it, or failure to provide suitable food, clothing or school facilities therefor in such family. The agent shall perform his or her duties under the direction of the trustees and superintendent of the children's home for which he or she is appointed, and may be assigned other duties not inconsistent with his or her regular employment as the trustees prescribe. His or her appointment shall be for one year, or until his or her successor is appointed, and he shall receive such reasonable compensation for his or her services as the trustees provide."

Said section 3099 was the subject of an opinion of this department, under date March 5, 1914, Reports of Attorney-General, 1914, Vol. 1, p. 272, wherein it was held:

> "The positions of superintendent of a children's home and visiting agent of a children's home are entirely inconsistent, and such superintendent may not serve in the capacity of visiting agent for the home over which he is superintendent. The matron of a county children's home may act as such visiting agent."

If a superintendent may not legally act as visiting agent, it follows of course that an automobile may not be purchased for use by the superintendent while purporting to act as such agent.

Respectfully,
JOHN G. PRICE,
Attorney-General.

87.

SCHOOLS—DISCUSSION OF TIME ADDED TO SCHOOL DAY—HOW TUITION COMPUTED—ATTENDANCE ON ONE DAY IN SCHOOL MONTH CREATES LIABILITY FOR ENTIRE MONTH.

Time added to a regular school session is still a part of that school day for attendance purposes in computing tuition due and cannot be computed into another day; that liability for tuition rests on attendance and an attendance on one day in a school month creates a liability for the whole month.

COLUMBUS, OHIO, March 1, 1919.

HON. ROBERT B. MCMULLEN, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—Acknowledgment is made of your inquiry requesting the opinion of the Attorney-General on the following questions:

> "1. Where a high school has been closed for several weeks on account of the influenza, can a board of education collect tuition for non-resident pupils attending such school, for the period the school was closed?
>
> 2. If, after the school is reconvened, a part of the time lost is made up by adding an extra period of forty minutes each day, would the board of education be required to pay the tuition of non-resident pupils for the time school was dismissed on account of the influenza?"

The answer to your first question is found in the recent opinion, No. 66, issued by the Attorney-General, wherein it was held that liability for tuition rests upon attendance; that if there were no school sessions there could be no attendance and hence no liability on the part of a foreign board or pupils, but attendance on one day of any particular school month makes a liability for that pupil for the whole month.

Relative to your second question, wherein you indicate that after such schools were closed an attempt is being made to make up a part of such lost time by adding an extra period of forty minutes each day, *the same answer would seemingly apply,* for the reason that the law does not contemplate either minutes or hours as the unit of computation on tuition, but uses the language which means days and months as follows:

> "*Section* 7736.—* * * An attendance any part of a month will create a liability for the whole month,"

and the same sentence occurs in section 7747 G. C., referring to high school pupils, the rule being the same for either elementary or high school attendance.

So if a pupil came but an hour on a certain day, it makes him present on that day, and if he were present forty minutes beyond the customary schedule, it would still be part of that day, which is "any part of a month," the language of the statute. Thus the school time consumed on a day still makes it but a *day of attendance* in the view of the second section quoted, and the law does not contemplate that the minutes shall be figured up to make another day.

The law may seem unduly harsh in indicating that liability for tuition rests on attendance, and there was no school to attend, because of elements beyond the control of the maintaining board of education, whose expense went on during epidemic, but on the other hand it will be found that if a school was in session but one day in a particular school month, then would accrue the tuition for the whole of

that month for each of the pupils showing attendance on that particular part of the month, in which event the entire tuition for all the school months since the term began might be due, though a large number of school days may have been without school sessions following intermittent dismissals and reopenings. In other words, there might be a reopening in each school month, and if there was attendance, then was tuition due for the whole month, but the case of one pupil as regards attendance might not be that of another pupil, and the excess of time beyond the customary closing time cannot be computed into other days for tuition purposes, for the school day is the least unit the law has in mind for attendance computation.

The action of school officials and teachers, in attempting to cover lost time in studies, is a commendable one, and yet since attendance for a day makes a liability for that school month on the part of the paying boards, and a number of days will have to be paid for on which there was no school, it is entirely proper that such services in return should be given.

The opinion of the Attorney-General is that time added to a regular school session is still *a part of that school day for attendance purposes* in computing tuition due and cannot be computed into another day; that liability for tuition rests on attendance and an attendance on one day in a school month creates a liability for the whole month.

Respectfully,
JOHN G. PRICE,
Attorney-General.

88.

BOARD OF AGRICULTURE—SECTION 1114 G. C. REQUIRED APPRAISEMENT OF ALL ANIMALS SLAUGHTERED TO PREVENT SPREAD OF CONTAGIOUS DISEASES.

Appraisement of all animals slaughtered to prevent the spread of contagious diseases, is necessary before the value thereof may be allowed under section 1114 *G. C.*

COLUMBUS, OHIO, March 1, 1919.

HON. HENRY W. DAVIS, *Chairman Senate Finance Committee, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your letter of February 7, 1919, as follows:

> "Enclosed please find letter dated March 21 from the department of agriculture, regarding some cattle killed in Hanover township, Columbiana county.
>
> You will observe that it is suggested in this letter that we have your opinion on the validity of this claim and the purpose of this letter is to ask you for such opinion. The facts, I presume, are available from the budget commissioner, Mr. Donaldson.
>
> Kindly let me have this opinion at your reasonable convenience."

In the enclosure of March 21, 1917, referred to in your letter, it appears that the live stock committee of the board of agriculture recommended the payment of fifty per cent of the aggregate amount of these claims, viz., $842.50, subject, however,

to the Attorney-General's approval of the claim, or, as stated in their recommendation, "provided that the attorney finds that this claim is within the provisions of the law."

All of the facts necessary to the consideration of the validity of this claim are not stated in your letter, or in the attached enclosure.

From my personal conference with Mr. Shaw, secretary of agriculture, and Dr. Burnett, state veterinarian, and with Mr. Donaldson, budget commissioner, I learn that the cattle referred to were found to be tubercular or exposed to tuberculosis.

It appears also that these cattle were not appraised before being slaughtered or at any other time. From such personal conferences I also learn that the particular question upon which my opinion is desired is whether the payment for these slaughtered cattle is authorized by sections 1114, et seq., G. C., which provide compensation for the slaughter of animals to prevent the spread of contagious and infectious diseases, and this is the only question herein considered.

To the facts as we have them, sections 1114 and 1115 G .C. are pertinent: They are in part as follows:

> *Section* 1114.—"If, in order to prevent the spread of any dangerously contagious or infectious disease among the live stock of the state the secretary of agriculture deems it necessary to destroy animals affected * * * he shall determine what animals shall be killed and *cause them to be appraised by three disinterested citizens,* one to be selected by owners of the animals * * *. *After being so appraised,* the secretary shall cause such animals to be killed * * *."
>
> *Section* 1115.—"*If an animal is killed under the provisions herein,* the compensation to be paid for such animal shall be computed by said appraisers on the basis of the actual value of such animals * * *. No compensation, however, shall be made to a person who has brought into this state animals infected with such contagious or infectious disease * * or who may by wilful neglect or purposely has contributed to the spread of such contagion. * * *"

It will be noted that section 1114 G. C. provides for an appraisement of the cattle before they are killed. It should also be noted that no finding or statement of facts appear showing that the owners of these animals did not come within the inhibitions of the latter part of section 1115, supra, but it does appear from statements of Mr. Shaw and Dr. Burnett that the animals, when examined, or at least when attention of the board of agriculture was called to them, were in what is known as a herd for dispersal sale, under which circumstances the board of agriculture has not in the past recommended compensation.

This consideration, however, may be disregarded in view of the fact that there was no appraisement of these cattle, as provided by law, and in the absence of compliance with this mandatory provision of section 1114, it is my opinion that the claim under consideration is not valid as a claim the payment of which is authorized by section 1114, et seq., G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

89.

BOARD OF PHARMACY—WHEN REJECTION OF APPLICATION IS BAR TO SUBSEQUENT APPLICATION FOR RENEWAL—PROVISIONS FOR APPEAL DISCUSSED.

1. *A final order of rejection of an application for renewal, under section* 1308 *G. C., by the state board of pharmacy, on the ground that the applicant has been guilty of a felony, immoral conduct or fraud in obtaining his certificate, is a bar to a subsequent application for such renewal.*

2. *The provisions for appeal from the state board of pharmacy, in force and effect at the time the application is rejected, control and the appeal must be perfected under such provisions.*

COLUMBUS, OHIO, March 3, 1919.

The State Board of Pharmacy, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of your letter dated February 11, 1919, as follows:

> "A person has been legally registered as a pharmacist in this state and upon the expiration of his pharmacist certificate he makes application for a renewal certificate, within a specified time of sixty days after the expiration of said certificate.
>
> The Ohio state board of pharmacy, in session with all members present, by official action, decided that this person was not entitled to a renewal certificate. The applicant for the renewal certificate, as well as his attorney, was notified of the action of the board and, about fourteen months later the applicant for the renewal certificate appealed to the court of common pleas from the action of the board. The result was that the case was dismissed at plaintiff's cost.
>
> Now this same person, who has been denied a renewal certificate, through his attorney, makes application to this board again for a renewal certificate, under section 1308 G. C., and filing with his application the fee of two dollars ($2.00) as prescribed in section 1311 G. C.
>
> The question is this: If the renewal certificate is denied the applicant the second time, has he the legal right to appeal to the governor and attorney-general or the court of common pleas? My reason for including the governor and attorney-general is that this renewal certificate was denied the applicant prior to the time the present statute, section 1307 G. C., was amended, providing for the appeal to go to the court of common pleas."

From personal conference with you I learn that the grounds of rejection in the case of the person referred to in your letter was that he was guilty of a felony, having been convicted and sentenced to and confined in the penitentiary, and from such conference it is also noted that you desire to know if, after the application of a registered pharmacist for a renewal certificate, properly filed within sixty days, has been rejected by the state board of pharmacy, the pharmacist can make a subsequent application for such renewal. It is noted that in the facts stated in your letter an appeal was taken from the order of rejection to the common pleas court, where the order of rejection was affirmed. In other words, is an order or judgment of the state board of pharmacy, hereinafter referred to as the board, rejecting an application for renewal, a bar to subsequent applications, or, as verbally stated by

you, may such phamacist continue to make such application indefinitely, notwithstanding former rejection and appeal to the common pleas court.

Let us consider this question first:

Section 1307 G. C. (107 O. L., 541), section 1308 and section 1309 G. C. are pertinent. In part section 1307 reads:

> "Each certificate and each renewal certificate issued by the state board of pharmacy shall entitle the person to whom it is granted to practice the profession of pharmacist for three years. The board *may refuse to grant a certificate* to a person guilty of a felony or gross immorality, *or addicted to the liquor or drug habit to such a degree as to render him unfit to practice pharmacy,* and, after notice and hearing, may suspend or revoke a certificate for like cause or for fraud in procuring it. Within thirty days an appeal may be taken from the action of the state board of pharmacy refusing to grant or suspending or revoking a certificate to the common pleas court of Franklin county or to the common pleas court of the county in which the person who has been refused a certificate or whose certificate has been suspended or revoked resides."

Section 1308 G. C., is as follows:

> "Each person registered as a pharmacist or assistant pharmacist as provided herein, shall be entitled to practice his profession until the expiration of his certificate of registration. If a registered pharmacist or assistant pharmacist *desires to continue the practice* of his profession he shall file with the state board of pharmacy an application for a renewal of his certificate *within thirty days next preceding its expiration;* and if the board finds that the applicant has been duly registered in this state and is entitled thereto, it shall issue him a renewal certificate signed by its president and secretary. The right to *obtain* such a *certificate shall not be denied a person within three years* after the *expiration* of his certificate of *registration.* If a registered person fails to make application for such renewal *within sirty days* after the expiration of his certificate, *he shall* pay the treasurer of *the board ten dollars* in addition to the fee prescribed for the renewal of a certificate."

Section 1309 G. C., in part is as follows:

> "If a registered pharmacist or assistant pharmacist *fails* to make application to the board for a renewal certificate *within* a period of three years from the expiration of his certificate, he must pass an examination for registration."

So far as I am able to ascertain, the courts of this state have not been called upon to construe these sections in the light of the present inquiry and in determining the extent of the board's power of duties and the reciprocal rights of applicants for registration, we must look for guidance in the general purpose of this act and its meaning as gathered from its terms.

Nor, must we lose sight of the fact that the regulation of the practice of pharmacy is an exercise of the police power of the state. For expediency this particular part of the police power has been delegated to the board. It is a well established principle of law that political subdivisions, boards or commissions, to whom this power is delegated, are limited in the exercise thereof to such powers

as are expressly or by clear implication conferred upon it, and have not the broad inherent powers of re-trial or re-hearings that are conferred on courts of general jurisdiction.

So that in the last analysis the answer to your inquiry may properly be said to depend upon the construction which we must give to the sections above quoted, particularly section 1308 G. C., supra. It is to be noted that it provides:

> "If a registered pharmacist desires to continue the practice * * * he shall file * * * an application for a renewal of his certificate within thirty days next preceding its expiration."

If the board finds the applicant entitled to it, a certificate will be issued to him. This part of the statute requiring the application to be made thirty days before the expiration of the certificate to be renewed, contemplates continued practice on the part of the pharmacist. Then follows a provision that if the registered person does not make his application for renewal in sixty days after the expiration of his certificate, he shall be required to pay an extra fee.

Another provision in this section must not be overlooked. It is:

> "The right to obtain such certificate shall not be denied a person within three years after the expiration of his certificate of registration."

It is to be noted that this section provides for an application for renewal prior to the expiration of the original certificate and it provides for an additional fee if the application be not filed within sixty days from its expiration, and provides against the denial to a person of the right to obtain such certificate within three years.

What is the meanng of this last provision, so far as it affects your first question herein?

In view of the provision of section 1307 G. C., supra, fixing the term for which said original certificate is effective as three years, it would appear to have been the legislative intent to fix a time within which an application for renewal could be filed, viz., giving the registrant a right at any time within the three years and thirty days above indicated to invoke the action of the state board in passing on his application. The sixty days provision, in my judgment, is merely a regulation as to an extra fee and has nothing to do with limiting the rights of the registrant in point of time, and the construction to be placed on that part of section 1308, which provides that the right to obtain such renewal certificate shall not be denied within three years, in effect is to say that a pharmacist once having been found to be proficient in pharmacy and granted a certificate for the practice thereof, so far as those matters upon which he was originally required to take examination, is presumed to be still qualified therein at any time within three years and therefore entitled to have a certificate of renewal granted to him unless he has disqualified himself under section 1307 G. C. To hold that the three year provision is to be construed as conferring an unqualified and absolute right to such certificate at any time within three years, is to render section 1307 worse than meaningless, as its provisions that the board may refuse to grant such certificate to a person guilty of felony, etc., would be rendered impotent. On the other hand, considering that three years is the term for which such certificates are effective, and considering that in the forepart of said section 1307 provision has been made for filing thirty days before expiration and a provsion for additional fee if the application were made sixty days thereafter, does it not appear clear that to avoid confusion in fixing the limit within which such application should be made, the legislature used the language "the right to obtain" such certificate in the same sense as if they

had said that such application for renewal may be filed within three years after the expiration of the original certificate? This is the only construction which it can be given consistent with section 1307 and with the other provisions of section 1308, and it may be suggested that this construction would seem to be in accord with the regulatory provisions of the act as a whole.

In the light of this construction on the three-year limit clause in said section, upon final rejection of an application for renewal, which rejection was based on the ground that the applicant was guilty of a felony, may such applicant again file an application for renewal with such board and, as a matter of right, compel the board to entertain and pass upon said application?

Recalling the rule that a board, acting under a delegation of the police power of the state, is limited in the exercise thereof to such powers as are expressly or impliedly conferred upon it, it seems to me that your question may be answered by the answer to this question—Is such duty or power expressed or clearly implied in section 1308, or other statutes in this act? It is not. Provision is made that the registered pharmacists may file an application within a certain time; provision is made for the duties of the state board and the matters within their discretion are outlined in acting upon the application, from which decision an appeal is provided to the common pleas court.

Nowhere in said sections is there any implication that more than one application is contemplated, and on the theory that no provision is made therefor, I am of the opinion that the registered pharmacist is not, as a matter of right, entitled to file a second application on the facts as stated in your letter.

I have discussed this question at some length, but because its solution is not free from difficulty and this recent amendment, so far as I can ascertain, not having been judicially construed, it is deemed advisable to state the reasons for the conclusion reached.

Your other question, stated in the last paragraph of your letter, requires consideration of the effect of amendments changing the manner of appeal on orders or judgments rendered prior to such amendments.

Section 26 G. C. is pertinent, and is as follows:

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

This was held in Bode vs. Welch, 29 O. S., 19, to amount to a saving clause in favor of judgments already rendered in a case involving an amendment which took away the right to appeal in certain cases without specifically providing that such amendment would affect judgments previously rendered.

In the amendment of 1917 (107 O. L., 542) there is no reference to orders or judgments previously rendered and nothing to indicate an intention that it should act retroactively.

You are therefore advised that the provisions for appeal in force at the time of the rendition of the order or judgment on the application, control and if the application referred to in your letter is now denied, the applicant's appeal is to the common pleas court, as provided in the amendment last referred to.

Respectfully,
JOHN G. PRICE,
Attorney-General.

90.

MUNICIPAL CORPORATION—WHEN MUNICIPALITY OWNED ELECTRIC LIGHTING PLANT CAN FURNISH SERVICE OUTSIDE OF CORPORATE LIMITS.

A municipal corporation, which owns an electric lighting plant, has legal authority to furnish service to a person residing outside of the corporate limits of said municipality, provided, however, such service shall not exceed fifty per centum of the total service supplied within the municipality.

COLUMBUS, OHIO, March 3, 1919.

HON. LEWIS G. CHRISTMAN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter dated February 17, 1919, as follows:

> "Has a municipal corporation, that owns its own electric lighting system, a legal right to furnish service to a resident outside of the corporation limits?"

Section 3, 4 and 6 of Article XVIII of the constitution of Ohio, adopted in September, 1912, and section 3618 G. C. are pertinent to your inquiry.

Section 3 is as follows:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce *within their limits* such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Section 4 reads:

> "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

Section 6 provides:

> "Any municipality, owning or operating a public utility, for the purpose of supplying the service or product thereof to the municipality or its inhabitants, *may also sell* and *deliver to others any transportation service of such utility,* and the *surplus product of any other utility* in an amount not exceeding in *either case* fifty per centum of the total service or product supplied by such *utility within the* municipality."

Section 3618 G. C. reads:

> "To establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof

with light, power and heat, and to procure everything necessary therefor and to acquire by purchase, lease or otherwise, the necessary lands for such purposes, within and without the municipality."

From the construction of statutes granting power to municipalities, the general principle of law that municipalities may exercise only such powers as are expressly or by necessary implication granted to them by law, must be borne in mind.

As stated in the first branch of the syllabus in Ravenna vs. Pennsylvania company, 45 O. S., p. 118:

"Municipal corporations, in their public capacity, possess such powers and such only as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted."

With such modifications as may be made to apply to charter cities and the constitutional amendments adopted in 1912, the rule as above stated is the law in Ohio.

Prior to the adoption of sections 4 and 6, supra, sections 3618-G. C., as above quoted, would not have authorized the furnishing of public utility service outside of the corporate limits, and in construing section 4 and 6, we must bear in mind the construction which the courts have placed on the law as it was at the time of the constitutional amendment and we must presume that the electors of the state knew the law as it stood at the time of the adoption of the amendments. One of these general rules as to the limitations of power of municipal corporations, is stated in 28 Cyc., p. 266, as follows:

"As a general rule a municipal corporation's powers cease at municipal boundaries and cannot, without plain manifestation of legislative intention, be exercised beyond its limits. The legislature, however, may authorize the exercise of powers beyond municipal limits, and has frequently done so, particularly in matters within the police power."

I am not now aware of any decision in Ohio directly bearing on this question which had been decided at the time of the adoption of the constitutional amendment, but in Firewell vs. City of Seattle, 43 Wash. 141, 86 Pacific, 217, a statute very similar to section 3618 G. C., giving authority to municipalities to furnish water to the inhabitants thereof, and another statute giving such power to furnish water to the "inhabitants thereof and other persons," were construed with the sole question of the extra-territorial power of municipal corporations under such statutes. And, it was held in the Firewell case, supra, that such statutes did not confer power upon municipalities to exercise their corporate powers beyond the municipal limits, and the general rule announced was:

"It is a general principle that a municipal corporation cannot usually exercise its powers beyond its own limits, and if in any case it has authority to do so, it must be derived from some statute which expressly or impliedly permits it."

So at the time the electors of the state adopted the amendments above referred to, they are presumed to have known that at that time municipalities had no power to sell their utility service outside the corporate limits.

With this in mind let us turn our attention especially to section 6, supra. It

is to be observed that section 4, preceding section 6, authorized the acquisition, construction, ownership and operation within or without the corporate limits of a municipality of any public utility, the product or service of which is to be supplied to the municipality or its inhabitants. Section 6 further provides that any municipality so owning or operating a public utility "for the purpose of supplying the service or product thereof to the municipality or its inhabitants," *may also sell* and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case *fifty per centum* of the total service or product supplied by such utility *within the municipality.*

It should be noted that these constitutional amendments are self- executing and need no intermediary acts of the legislature to enforce them.

It is quite obvious that section 6 was not necessary to confer power upon a municipality to sell the public utility service or product to the inhabitants of the municipality as that power is specifically granted in section 4 and in section 3618. It is apparent, however, that it was intended to cover additional sales, as the granting part thereof, after the descriptive recitals, begins with the words "may also sell and deliver to others such service or product." That this additional power to sell and deliver contemplates the sale or delivery of product or service outside of the corporate limits, is further evinced by the exception that such additional sale and delivery of product or service in either case shall not exceed fifty per centum of the total service or product supplied by such utility "within the municipality."

From the considerations above indicated, it is to be concluded, therefore, that a municipality owning its own electric lighting system has a legal right to furnish service to a resident outside of the corporate limits thereof, provided the aggregate amount of service furnished outside of said corporate limits do not exceed fifty per centum of the total service supplied within the municipality.

Very respectfully,

JOHN G. PRICE,

Attorney-General.

91.

ROADS AND HIGHWAYS—TOWNSHIP HIGHWAY SUPERINTENDENT —RESIDENT OF CITY MAY HOLD POSITION OF TOWNSHIP HIGHWAY SUPERINTENDENT WHEN CITY SITUATED IN TOWNSHIP.

A resident of a city may legally hold the position of township highway superintendent of a township within which said city is situated.

COLUMBUS, OHIO, March 3, 1919.

HON. HOMER HARPER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Attention has been given to your communication of February 22, 1919, wherein you submit for opinion the following:

> "Painesville township comprises one road district; and the city of Painesville is in said township. May a resident of the city legally hold the position of township highway superintendent?"

The appointment of a township highway superintendent is provided for by section 3370 G. C., which section, so far as now in point, reads as follows:

"The township trustees shall have control of the township roads of their township and shall keep the same in good repair. The township trustees may, with the approval of the county commissioners or state highway commissioner, as the case may be, maintain or repair a county road or intercounty highway or main market road within the limits of their township. In the maintenance and repair of roads the township trustees may proceed in any one of the following methods as they may deem for the best interest of the public, to-wit:

* * * * * * * * *

3. They may appoint some competent person, not a member of the board of trustees, to have charge of the maintenance and repair of roads within the township which person shall be known as township highway superintendent, and shall serve at the pleasure of the township trustees. The method to be followed in each township shall be determined by the township trustees by resolution duly entered on their records."

Even if it be assumed that under this statute one of the qualifications necessary to appointment of a person as township highway superintendent is that he be a resident of the township, a person residing in the city of Painesville, possesses that qualification so far as Painesville township is concerned, since, as you state, the city of Painesville is within Painesville township, and said township comprises one road district.

Therefore, answering your question specifically, a resident of the city of Painesville may legally hold the position of township highway superintendent of Painesville township.

Respectfully,
JOHN G. PRICE,
Attorney-General.

92.

COUNTY INFIRMARY—UPON REQUEST OF COUNTY COMMISSIONERS IT IS DUTY OF PROSECUTING ATTORNEY TO REPRESENT SUPERINTENDENT OF ABOVE INSTITUTION—WHEN TOWNSHIP TRUSTEES ARE ADVERSE PARTIES IN LEGAL ACTION, PROSECUTING ATTORNEY'S DUTY.

1. *Upon request of the county commissioners, it is the duty of the prosecuting attorney to represent the county infirmary superintendent in an action to which the latter is a party, where the subject matter of the action concerns the official duties of said county commissioners relative to the county infirmary.*

2. *The appearance of the prosecuting attorney in such a case is not inconsistent with his duty under section 2917 G. C. as legal adviser of township trustees, even though the latter are adverse parties in the action.*

3. *The township trustees have not the right to require the official services of the prosecuting attorney in a case brought by them against the county infirmary superintendent, if the case is one that concerns the official duties of the county infirmary.*

COLUMBUS, OHIO, March 3, 1919.

HON. JOSEPH W. BAGLEY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Your letter of February 20, 1919, receipt of which is acknowledged, reads as follows:

"A petition has been filed in the court of common pleas, Brown county, by the township trustees of Union township, said county, in their official capacity as relators, praying for a writ of madamus against J. R. B. as superintendent of the county infirmary of said county in his official capacity, in which relators seek to compel the superintendent to receive into the infirmary one J. H. who, it is alleged, is a proper subject to be, and should be, admitted into the infirmary by the superintendent.

Mr. B. has requested me as prosecuting attorney of said county to represent him, file his answer, and conduct his defense in said case.

(1) Is it my duty as such prosecuting attorney to represent respondent in the case, or does the fact that, in my official capacity I am the legal adviser of township trustees under General Code, section 2917, render my appearance in the case for the superintendent inconsistent with my duty as such adviser to the relators?

(2) Have the relators the right to require my official services to represent them in the case, upon proper request?"

The duty of prosecuting attorneys, relative to appearing in suits and actions to which county commissioners and certain other public officers are parties, is prescribed by section 2917 G. C., which says:

"The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no such county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve. He shall be the legal adviser for all township officers, and no such officer may employ other counsel or attorney except on the order of the township trustees duly entered upon their journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

Said section does not expressly say that the prosecuting attorney shall prosecute and defend all suits to which township officers are parties, but only that "he shall be the legal adviser for all township officers * * *." The remainder of the sentence just above referred to says, however, "* * * and no such officer may employ other counsel or attorney except on the order of the township trustees," etc.

Sensible construction compels the conclusion that it is the duty of the prosecuting attorney not only to give legal advice to township officers, but, if so requested, to prosecute and defend suits to which such officers are parties, and this is the usual practice.

It might be said that in a technical sense, unless the county infirmary superintendent can be regarded as a "county officer," the prosecuting attorney is not required by section 2917 G. C. to appear for him in any suit or action to which said superintendent is a party.

That the county infirmary superintendent is not a county officer is suggested by two considerations: First, that his position rests upon appointment and not by election, as required by section 1 of Article X of the constitution of Ohio. Secondly, that our Supreme Court, in Palmer vs. Zeigler. 76 O. S. 210, held that the superintendent of a county infirmary is not the holder of a *public office* within the meaning of section 12303 G. C., the quo warranto statute.

At the time the Palmer case, supra, was decided, the infirmary superintendent was appointed by the county board of infirmary directors. Subsequently (102 O. L. 433), the legislature transferred to the county commissioners the power theretofore exercised by said directors, but no substantial change was made in the nature of the infirmary superintendent's position or in the extent of his powers. He is still, as Price, J., said in the Palmer case (p. 224):

> "* * * a mere employe or contractor under oath and bond, limited on all sides in his authority and not authorized by law to contract for the supplies except in a limited degree."

That the relation between the commissioners and the infirmary superintendent is virtually that of principal and agent, is particularly apparent from section 2523 G. C., which says:

> "The county commissioners shall appoint a superintendent, who shall reside in some apartment of the infirmary or other building contiguous thereto, and shall receive such compensation for his services as they determine. *The superintendent shall perform such duties as the commissioners impose upon him, and be governed in all respects by their rules and regulations.* He shall not be removed by them except for good and sufficient cause. The commissioners shall not appoint one of their own number superintendent, nor shall any commissioner be eligible to any other office in the infirmary or receive any compensation as physician, or otherwise, directly or indirectly wherein the appointing power is vested in such board."

It appears from your letter, as well as from a copy which I have seen of the petition in the case your letter refers to, that the county commissioners of your county have not been made parties to the action, the county infirmary superintendent being the only respondent named therein.

As a matter of law, however, the county commissioners have an interest in the outcome of cases of this nature. Section 2522 G. C. charges them with the duty of making all contracts and purchases necessary for the county infirmary; also the duty of promoting sobriety, morality and industry among the inmates.

Section 2528 G. C. requires the commissioners to appropriate from time to time, from the county poor fund, moneys necessary for current supplies and expenses of the infirmary, which moneys are expended by the infirmary superintendent.

Section 2532 G. C. requires the county commissioners to examine each month the condition of the infirmary and the inmates.

Section 5627 G. C. authorizes the county commissioners to determine the amount of money to be raised for the support of the poor, which amount is set forth by them in the annual budget submitted by them under section 5649-3a G. C.

Other sections might be cited to show the close relationship which the county commissioners sustain to the management of the county infirmary and to indicate the interest which they, as representatives of the public, are expected to show in the conduct of that institution.

In other words, any action or suit the result of which may be to increase the number of inmates in the county infirmary, is one that concerns the official duties of the county commissioners, and justifies them in requesting the prosecuting attorney to take whatever steps he deems advisable to protect their interest, and where the suit in fact affects, or may affect, their official interests, their right

to the prosecuting attorney's advice and assistance is not changed by the mere circumstance that they have not been made parties by the pleadings.

This conclusion is in harmony with the view set forth in a former opinion of this department (1915 A. G. R., Vol. I, p. 394), holding that road commissioners under sections 7232, et seq. G. C. (now repealed), while not *county officers* under the constitution, are *agents* of the county commissioners and entitled to the services of the prosecuting attorney in the prosecution or defense of any suit or action.

The desire on the part of the principal (that is to say, the county commissioners) for the appearance in the suit of the prosecuting attorney to represent the agent (meaning the infirmary superintendent) must of course be manifest before the prosecuting attorney is under any obligation to render his services. Whether, as to the case presented by you, the commissioners have requested you to represent the infirmary superintendent, does not appear from your letter.

I am therefore of the opinion that it is the duty of the prosecuting attorney, if and when requested by the county commissioners, to represent the county infirmary superintendent in any action or suit to which the county infirmary superintendent is a party, where it appears that said action or suit concerns the administration of the affairs of the county infirmary.

Thus far nothing has been said as to that part of your first question which reads:

> "* * * does the fact that in my official capacity I am the legal adviser of the township trustees under General Code, section 2917, render my appearance in the case for the superintendent inconsistent with my duty as such adviser to the relators?"

I am of the opinion that your appearance in the case for the county infirmary superintendent is not inconsistent with your duty as adviser to the township trustees.

As explained above, if you appear for the county infirmary superintendent, you will do so on the theory that the suit is one that affects the official duties of the county commissioners. In other words, your real client is the county commissioners. Now when county commissioners and township trustees are adverse parties to an action, it would seem that the former have been given a prior right, so to speak, to the prosecuting attorney's official services, this for the reason that under section 2917 G. C. the county commissioners are not at liberty (except as provided in section 2412 G. C.) to employ other counsel, while such right is expressly given by section 2917 G. C. to township trustees. It would hardly be proper, then, to characterize as inconsistent the doing by the prosecuting attorney of the very thing which section 2917 G. C. requires, to-wit, that

> "he shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party."

Your second question is: "Have the relators the right to require my official services to represent them in the case, upon proper request?" In my opinion, and for reasons just above stated, your question should be answered in the negative. The case being one that concerns the official duties of the county commissioners, whose right to the services of the prosecuting attorney respecting the conduct of litigation is superior to that of the township trustees, you should assume no relation to the case antagonistic to the county commissioners.

Respectfully,
JOHN G. PRICE,
Attorney-General.

93.

APPROVAL OF BOND ISSUE OF WYANDOT COUNTY IN THE SUM OF $21,379.88.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 3, 1919.

94.

APPROVAL OF BOND ISSUE OF ST. MARYS CITY SCHOOL DISTRICT IN SUM OF $19,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 3, 1919.

95.

CORPORATIONS—COVINGTON AND CINCINNATI BRIDGE COMPANY—WHEN AN "OHIO CORPORATION"—SECTION 192 G. C. CONSIDERED.

Corporations should be treated as "Ohio corporations" for the purposes of section 192 G. C. and their stock held exempt from taxation only if they are treated as "domestic corporations" for all purposes under the franchise tax law.

COLUMBUS, OHIO, March 4, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—The receipt of your letter of February 5 requesting the opinion of this office as to the action which should be taken respecting the pending case of Hinkle, Executor, vs. Cooper, Common Pleas Court of Hamilton county, is acknowledged.

It seems from your letter that the case which is being defended by the prosecuting attorney of Hamilton county involves the question as to the taxability of certain shares of the Covington & Cincinnati Bridge Company. The prosecuting attorney joins in your request for the advice of this department as to whether or not the action should be further defended.

The question thus presented may be stated as a legal problem as follows:

> Are the shares of stock of a corporation which owes its existence to the concurrent special legislation of Ohio and another state taxable in Ohio?

The facts necessary to be considered in connection with this request are sug-

gested by the form of the question as above phrased. The Covington & Cincinnati Bridge Company was organized prior to the adoption in Ohio of the constitution of 1851 (47 Ohio Laws, 269). On February 17, 1846, the general assembly of Kentucky passed an act authorizing certain named persons to organize as a corporation in Kentucky for the purpose of constructing a bridge across the Ohio river between Covington and Cincinnati when the state of Ohio should by appropriate legislation confirm the charter. The Kentucky act went on to state the powers of the corporation, the terms upon which its stock should be subscribed, and the amount thereof, and otherwise to provide for the constituent acts of the company.

On March 9, 1849, the Ohio law above referred to was passed. After reciting the Kentucky statute in full, it provided that:

> "The Covington & Cincinnati Bridge Company, thereby created, shall be, and the same is hereby made, *a body corporate and politic of this state*, with the same franchises, rights and privileges, and subject to the same duties and liabilities as are specified in the above recited act, in manner and form as though the said act were fully and at large set forth, section for section, word for word, *except*"
>
> (Here follow seven certain conditions annexed to the grant of corporate power on the part of Ohio).

In spite of these exceptions, which seem to have been tacitly agreed to by Kentucky, the corporation, the organization of which proceeded, appears to have been legally incorporated; at least that question is not now material. That is to say, the fact that the Ohio act was not a perfect acceptance, so to speak, of what might be termed the offer embodied in the Kentucky act did not prevent the former from being a valid law of Ohio, and the corporation, whether properly organized or not, is at least a *de facto* corporation in Kentucky and in Ohio both and possibly is a *de jure* corporation in Ohio; but whether existing *de facto* or *de jure* its status for the purposes of the present question is that of an existing corporation, the only problem being to determine whether or not it is such a corporation as is contemplated in section 192 G. C., which provides that:

> "No person shall be required to list for taxation a share of the capital stock of an Ohio corporation;"

If the company is an "Ohio corporation" within the meaning of this statute, and the statute is valid, its stock is not taxable in this state, though its right to exist might be subject to direct attack.

However, the Supreme Court of this state seems to have treated the corporation as if there were no question as to its lawful existence and to have intimated that the corporation is for purposes of taxation to be treated as an Ohio company. I quote the following from the opinion of Welch, J., in *Bridge Co.* vs. Mayer, 31 O. S. 317, 325:

> "We are satisfied * * * that this corporation, having been chartered and organized under the laws of both states, might lawfully hold its meetings and transact its corporate business in either state; and that, therefore, the stock in question was issued under authority of Ohio law. * * * The truth is, that this is a single corporation, clothed with the powers of two corporations. It acts under two charters, *which in all respects are identical,* except as to the source from which they emanate.

What is authorized by one of these charters is authorized by both. What may lawfully be done under one may lawfully be done under both. * *"

The same proposition is carried into the syllabus of the case.

The proposition that a two-state corporation, in the sense in which this company may be so called, is a domestic corporation in each state is supported by Beale in his work on foreign corporations, sections 773 and 775.

In view of these authorities it is very clear that, for all ordinary purposes at least, the Covington & Cincinnati Bridge Company, is an "Ohio corporation." The exact question, however, is as to whether it is such a corporation within the meaning of section 192 G. C. That entire section has not yet been quoted. For convenience it is now set forth in full:

> "No person shall be required to list for taxation a share of the capital stock of an Ohio corporation; or a share of the capital stock of a foreign corporation, the property of which is taxed in Ohio in the name of such corporation; or a share of the capital stock of any other foreign corporation, if the holder thereof furnishes satisfactory proof to the taxing authorities that at least two-thirds of the property of such corporation is taxed in Ohio and the remainder is taxed in another state or states, provided such corporation, as a fee for the privilege of exercising its franchise in Ohio, pays annually the same percentage upon its entire authorized capital stock that is required by law to be paid by a domestic corporation on its subscribed or issued capital stock."

This statute was passed as an amendment to section 148c R. S. in 1902 (95 Ohio Laws, 539); it became a part of the law of this state at the time of the imposition of what is familiarly known as the "Willis tax" on the franchise of being a corporation (95 Ohio Laws, 124; see present sections 5495 et seq. G. C.). I think it is not going too far to say that section 192 G. C. is to be interpreted in connection with the law referred to, especially in view of the fact that the exemption of shares of stock in a foreign corporation under certain circumstances is conditioned by section 192 upon payment of certain franchise taxes. This being the case, it would seem reasonable to hold that an "Ohio corporation" within the meaning of section 192 is one that is treated as such for the purpose of the franchise tax. In other words, the classification which section 192 makes as between "Ohio corporations" and "foreign corporations" must be that classification which was in the minds of the members of the general assembly which enacted section 192, growing out of their consideration of the general subject of the taxation of corporations in connection with the franchise tax.

It happens that the question as to the proper classification of the Covington & Cincinnati Bridge Company for franchise tax purposes has been adjudicated in this state. The case is unreported; but the Circuit and Supreme Courts have held that the corporation is not to be treated as a domestic corporation for the purpose of the franchise tax. It is true that the opinions which were filed in this unreported case do not make it clear that the corporation is to be treated as a foreign corporation for that purpose. It is, however, at least clear from the judgment that the company is not required to pay franchise taxes upon its entire issued and outstanding capital stock as is an ordinary "Ohio corporation."

The decisions which have been cited cannot be easily reconciled with the unreported decision just mentioned. The whole question is therefore thrown into some doubt. Nevertheless, in view of the adjudicated status of the company for franchise tax purposes, and in view of the evident propriety of interpreting and

applying section 192 G. C. in the light of the franchise tax, it is the conclusion of this department that the question made by the pending case should be settled by the courts. It is certainly not fair that the Covington & Cincinnati Bridge Company should be treated as something other than an "Ohio corporation" for franchise tax purposes, and then treated as an "Ohio corporation" as regards the question of the exemption of its shares from general property taxation, when it is so evidently the policy of section 192 that corporations which are treated as "domestic" or "foreign," as the case may be, for franchise tax purposes shall be similarly treated for the purposes of that section.

In the same connection I cannot forbear to mention the apparent unconstitutionality of section 192 G. C. under Article XII, section 2, though I do not know that it is the desire of the commission to raise this question in this case.

Respectfully,
JOHN G. PRICE,
Attorney-General.

96.

CONSTITUTIONALITY OF AMENDED SENATE BILL NO. 14—CREATING HOTEL DEPARTMENT UNDER STATE FIRE MARSHAL.

COLUMBUS, OHIO, March 5, 1919.

HON. HENRY W. DAVIS, *Ohio Senate, Columbus, Ohio.*

DEAR SIR:—Your letter of February 24, 1919, requesting my opinion on certain questions relating to proposed amendments to Senate Bill No. 14, was duly received.

Your letter reads as follows:

> "I desire your opinion on Senate Bill No. 14. I understand you are advised of the amendments proposed thereto and that a copy of said amendments are now in your possession. The question is, first, will it be legal to put this hotel department in the department of the state fire marshal. Second, will it be legal to collect excess fees from hotels and restaurants and place it in the general fund of the state? And can we properly exempt from the operation of this law villages under certain given size or population. An early answer to this proposition will be very agreeable."

I will take up these questions in the order in which they are stated in your letter.

(1) It is entirely within the discretion of the general assembly to increase or diminish the duties of a statutory office at pleasure. See, Mecham, Public Offices, section 595; Throop, Public Officers, section 19. There is, therefore, no legal objection to the legislature creating in the office of state fire marshal a division to be known as the hotel division, and imposing the duties of the office upon the state fire marshal and his deputies.

(2) The power of the legislature to regulate occupations, and to require each person engaged therein to secure a license and pay a fee therefor, is well settled in this state.

In Marmet vs. State, 45 O. S., 63, the court held:

"The general assembly has power * * * to regulate occupations by license, and to compel, by imposition of a fine, payment of a reasonable fee, where a special benefit is conferred by the public upon those who follow an occupation, or where the occupation imposes special burdens on the public, or where it is injurious to or dangerous to the public."

In that case the court held that the act of April 16, 1883 (80 O. L. 12), requiring owners or keepers of livery stables, dealers in second-hand articles, keepers of junk shops and owners of vehicles to obtain a license and to pay certain license fees therefor, was not in conflict with any provision of the constitution. The case of Cincinnati vs. Buckingham, 10 O., 257; Cincinnati vs. Bryson, 15 O., 625; and Baker vs. Cincinnati, 11 O. S., 534, were cited, approved and followed. See generally, 2 Cooley, Taxation, 1094 et seq.

The obvious purpose of Senate Bill No. 14 is to protect and preserve the public health and comfort of that great number of people who through necessity or otherwise patronize hotels and restaurants, and the bill therefore falls directly within the police power of the state. In Board of Health vs. Greenville, 86 O. S., 1, 21, 23, the court described police power as including anything which is reasonable and necessary to secure the peace, health, morals and best intersts of the public. It was also said that the legislature possesses plenary power to deal with these subjects, as long as it does not contravene any constitutional provisions or infringe upon any right granted or secured thereby, and it is not exercised in an arbitary and oppressive manner, and that such power may be exercised by the general assembly according to its judgment and discretion in any manner not inconsistent with or repugnant to the provisions of the state or federal constitutions.

While the power of the general assembly to exercise the police power in the manner referred to is beyond question, it has, nevertheless, been judicially determined in this state that license fees cannot be imposed for the main purpose of raising general revenue.

In Graves vs. Janes, 18 C. C. (n. s.) 488, the court, in holding unconstitutional provisions of the act passed April 28, 1913 (103 O. L. 763), which imposed license fees upon owners of motor vehicles, because their principal effect was to raise general revenue, said:

"This brings us to a consideration of the amount and legality of the license charge. This feature is the most difficult of solution. The identification and registry of motor vehicles has a legitimate purpose, but it is clear that the charge provided for in the act under consideration goes far beyond this purpose. * * * When, therefore, the legislature clearly exceeds the limit of reasonable taxation for the privilege conferred or the burden resulting, or when the charge imposed is clearly founded upon an improper basis for an unwarranted purpose, it is the duty of the court to declare the acts invalid. * * *

"The act provides that one-third of the revenue paid into the state treasury 'shall be used for the repair, maintenance, protection, policing and patrolling of the public roads and highways of this state under the direction, supervision and control of the state highway department.' *No special provision having been made for the other two-thirds of this revenue, it remains in the general revenue fund.* * * * The act therefore, to that extent, a general revenue measure. * * *

"We are therefore forced to the conclusion that the act under consideration so far as it applies to the owners and users of motor vehicles

is in large part a general revenue measure, and to that extent, is unconstitutional and void. The unconstitutional or revenue features of the act not being separate, vitiates the entire provisions of the act to owners and users."

But it would seem from the opinion in the foregoing case, that the mere fact that a small portion of the license fund may be devoted to general revenue purposes, will not justify the courts in holding license laws invalid. On this point the court, at page 493, 494, said:

"It is true that the general revenue fund is subject to special appropriation for any lawful purpose. But we cannot escape the conclusion that the manifest purpose of the general assembly in appropriating expressly for highway purposes, including both maintenance and policing, but one-third of such revenue and leaving the other two-thirds in the general revenue fund of the state, clearly discloses an intention upon the part of the general assembly to raise the larger portion of this fund for general revenue purposes. The act is therefore to that extent a general revenue measure. * * *

"Increased litigation in the criminal and civil courts would probably support an allotment of some share to the general revenue fund. But that consideration would not of itself justify the large portion of this tax devoted to general revenue. Nor can we conceive of any other reason justifying it."

The extent to which the general assembly may go in fixing the amount of license fees was disposed of by the court as follows:

"The imposition of a reasonable charge * * * in view of the special uses contemplated by the act, is warranted by the general grant of legislative power. This is not a property tax, but a privilege tax. The reasonableness of a privilege tax is confided largely to the discretion of the general assembly, but for the abuse of such legislative power a final review is in the courts. * * *

In view of the finding as to the unconstitutionality of the act we do not feel justified in expressing an opinion as to whether the schedule of fees therein provided is so clearly excessive as to warrant a court in declaring the same invalid, if the legislature had expressly declared it necessary to raise such entire fund for the purpose of maintenance, repairing and policing the public highways and had appropriated the entire amount so raised, less the cost of maintaining the department to such uses."

In Southern Gum Co., vs. Laylin, 66 O. S., 578, while the subject matter of the case was the imposition of a tax on corporate privileges and franchises, one of the general principles of law announced in the case would seem equally applicable to the question as to the amount the legislature may exact from occupations and business by way of license fees. In that case the court held that:

"A tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value thereafter."

The question is pertinent in every case as to who is to determine the reason-

ableness of license fees. In Southern Gum Co. vs. Laylin, supra, it was held that the determination of values for corporate franchise purposes rests largely in the general assembly, but finally in the courts. And in Graves vs. Janes, supra, it was said that:

> "The reasonableness of a privilege tax is confided largely to the discretion of the general assembly, but for the abuse of such legislative power, a final review is in the court."

(4) The question as to the proposed exemption of certain villages from the operation of Senate Bill No. 14, presents the most difficulty. The bill, if enacted, would be a law of a general nature, and therefore, subject to section 26 of Article II of the state constitution, requiring all laws of a general nature to have uniform operation throughout the state. The power of the general assembly to classify cities according to population for purposes of legislation, appears to be sanctioned by the Supreme Court, when the classification is not a false, evasive or unnecessary one.

In State vs. Evans, 90 O. S., 243, the court in sustaining the constitutionality of the Jung school board act classifying city school districts into three classes according to population, said:

> "Our courts have repeatedly held that the matter of classification based on population is a proper standard, so long as such classification is not a false, unnecessary, arbitrary and evasive one.
>
> Now, can it be fairly said that these lines and limitations of fifty thousand, of one hundred and fifty thousand and those in excess of one hundred and fifty thousand are arbitrary, unreasonable and evasive?
>
> All the courts of all the states, including the federal courts as well, have laid down the sound rule that a legislative enactment is presumed in law and in fact to be constitutional; that such acts should not be declared unconstitutional by a court unless they be 'clearly' so. Some of the courts have used the words 'unless it be unconstitutional beyond a reasonable doubt.' Inasmuch as the Jung act operates uniformly upon all school districts in excess of one hundred and fifty thousand population, to-wit: Cleveland, Cincinnati, Columbus and Toledo, how can it be said that it is 'clearly unconstitutional' upon that ground?"

In Board of Health vs. Greenville, 86 O. S., 1, which was cited in the Jung case to sustain the classification based on population then under consideration, the court, at page 37 et seq. said:

> "The question then presented is whether the general assembly of Ohio has attempted a classification or an exception which is a false, unnecessary and arbitrary one, or whether it be reasonable, just and necessary. This court has repeatedly held that classification is often proper and sometimes necessary in legislation in order to define the objects on which the general law is to take effect, but has taken equally as firm a stand against any arbitrary, vicious or faulty classification used to evade this constitutional limitation. * * *
>
> It has been repeatedly held by this court that where a law is available in every part of the state as to all persons and things in the same condition or category, it is of uniform operation throughout the state. * *
>
> It would seem that it would not require a Solomon to determine that

this is not an unjust or unfair discrimination, or false or faulty classification, and that notwithstanding this exception the law does operate uniformly as to all persons and things in the same condition or category. Classification is not only proper, but sometimes absolutely necessary in legislation. It is only when there is no substantial reason for the classification, when it clearly appears that there is no real difference existing, and that classification has been resorted to by the general assembly merely for the purpose of avoiding and escaping the constitutional limitation that a court will declare a statute unconstitutional for this reason."

In Phillips vs. State, 77 O. S., 214, the court at page 217, said:

"The general power of the legislature to determine what is necessary for the protection of the public interests being clear, judicial inquiry is necessarily limited to determining whether a particular regulation is reasonable, impartial and within the limitations of the constitution. The legislature is the judge of the mischief and the remedy, and of what shall be state policy, subject to the restrictions just mentioned."

In Renner Brewing Co. vs. Rolland, 96 O. S., 432, the court at page 436 said:

"It is the settled law of this state that the general assembly in the exercise of the police power of the state has the right to make a classification based upon a sound, substantial reason, and before a court will interfere with this power and prerogative of the general assembly it must clearly appear that there is no valid reason for such classification. * * * These statutes are by no means an isolated example of legislative recognition of the fact that certain character of property and certain kinds of business demand legislation peculiar to the needs of such business or property."

A few of the cases sustaining both the validity and invalidity of classification will be now referred to. General language may be found in some of them which could be used either for or against the validity of any particular law that might be enacted.

In McGill vs. State, 34 O. S., 228, it was held that where it was apparent that a rule differing from that generally in use is necessary to meet the special wants of a particular county, it is competent to enact a law applicable to such county.

In Marmet vs. State, supra, an act requiring proprietors of theatres, livery stables, etc., to procure licenses and pay fees was sustained although applicable only to Cincinnati, because it was considered that a special need for such legislation appeared to exist in that city. In other words, the act was sustained because it was based upon local necessity and the special wants of the particular locality affected.

While the foregoing cases, as well as State vs. Evans and Board of Health vs. Greenville, supra, are typical of the line of cases sustaining classification, the line of cases such as Cincinnati vs. Steinkamp, 54 O. S. 284, holding certain classification to be invalid must not be overlooked.

In the Steinkamp case an act to regulate the construction of buildings within a city of the first class and first grade was held violative of section 26 of Article II of the state constitution, because being a law of a general nature, it was operative only in Cincinnati. The line of reasoning of the court in that case might not be inapplicable to the proposed amendment to senate bill No. 14. At page 296 the court say;

"Protection of life and limb, it would seem, is not a local matter, but is a matter of general public interest, in which every person in the state coming within the category of people exposed to the dangers intended to be guarded against, is equally interested with every other such person, and it would appear to be as much the duty of owners of buildings answering to the description as to construction and occupancy of those named in the statute to observe the humane directions of this act whether located in one part of the state or in another, for buildings (other than private dwellings) of three or more stories in height are found in every locality throughout the state. Doubtless more frequent instances of dangers of the nature referred to may occur in thickly populated cities than in the smaller municipalities or the rural districts, but how can it be said that there is any appreciable difference between the hazards incident to the occupancy of such a building in a city of the first class and those to be encountered in other portions of the state wherever they are found?"

In Commissioner vs. Rosche, 50 O. S., 103, an act providing for the refunding of taxes erroneously paid was held to be of general interest to all inhabitants of the state, and in conflict with section 26, Article II of the state constitution because applicable only to Hamilton county.

In State vs. Bargus, 53 O. S., 94, an act exempting counties from the operation of the general poor laws on account of "trivial differences" in population, was held invalid because it was not of uniform operation throughout the state.

Recurring again to the cases sustaining classification, and considering them in connection with the cases in which classification was condemned, it is pertinent to inquire just what is meant by "uniform operation," in an effort to determine whether any particular law is open to attack on the ground that it is not of uniform operation.

A somewhat analogous phrase, "existing in every county throughout the state," was defined in Cincinnati vs. Steinkamp, supra, at page 295 as follows:

"'Existing in every county throughout the state' means, we suppose, only in every county where the conditions of the statute exist, for in order to be general and uniform in operation it is not necessary that the law should operate upon every person in the state, nor in every locality; it is sufficient, the authorities coincide, in holding, if it operates upon every person brought within the relation and circumstances provided for, and in every locality where the conditions exist. But, upon the other hand, it seems equally well settled, a law is not of uniform operation if it exempts a portion of those coming within its terms; that is, if it confers privileges, or imposes burdens, upon some of a class answering the description which are not conferred or imposed upon all others belonging to the same category. And it would seem to follow from this that the constitutional requirement of uniform operation throughout the state is not answered by showing that the law is of uniform operation within one city of the state only, however populous, and even though described as a city of the first grade of the first class, if it appears that the act does not confer power, corporate or administrative, and that the conditions undertaken to be legislated upon are common to other sections of the state generally."

The language of Mr. Justice Hughes in Mills vs. Wilson, 236 U. S. 373, is also relevant to the inquiry:

"The legislature is not debarred from classifying according to gen-

eral considerations and with regard to prevailing conditions; otherwise, there could be no legislative power to classify. For it is always possible by analysis to discover inequalities as to some persons or things embraced within any specified class. A classification based simply on a general description of work would almost certainly bring within the class a host of individual instances exhibiting very wide differences; it is impossible to deny to the legislature the authority to take account of these differences, and to do this according to practical groupings in which, while certain individual distinctions may still exist, the group selected will, as a whole, fairly present a class in itself. Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based on the nature of the business is not an unreasonable one, considered in its general application, the classification is not to be condemned."

In Steele, etc., Co. vs. Miller, 92 O. S., 115, the court at page 127 said:

"The authorities agree that a statute in general and uniform if it operates equally upon every person and locality within the circumstances covered by the act, and when a classification has a reasonable basis it is not invalid merely because not made with exactness or because in practice it may result in some inequality."

It could be contended with much plausibility that conditions in city and village hotels and restaurants are as a general rule the same, yet there are some considerations that might warrant the general assembly in regulating those in the larger municipalities only without being subject to the criticism that such legislation is arbitrary or unreasonable. It is common knowledge that the bulk of travel is to the large municipalities, and also that the local patronage of hotels and restaurants is greater in such localities. It is also well known that keepers of hotels and restaurants in the larger municipalities do not have the same means or opportunity of knowing the character and condition of their guests as do those in smaller localities. It would seem from these and other considerations that the general assembly, in providing safeguards for the patrons of hotels and restaurants in larger localities (who otherwise might not recive such protection because of the impracticability if not the impossibility of their keepers discovering and adequately guarding against certain evils, which, although possibly common to both localities, are more prevalent in the larger places), would not be subject to criticism on the ground that in so doing it had acted arbitrarily.

Just where the dividing line between reasonable and arbitrary classification should be drawn, is not always of easy solution, and it is probable that it was for that reason that the Supreme Court has laid down the rule that classification in order to be invalid must be false, arbitrary and evasive. The mere fact, however, that occasionally there may be found a hotel or restaurant, which, on account of its peculiar location or local surroundings would not be embraced within the scope and operation of a general law providing for the inspection and regulation of hotels and restaurants, would not, in my opinion, sustain an objection that the act as a whole has created a false, arbitrary and evasive classification in violation of section 26, Article II of the state constitution. But, as has already been indicated, questions of the character under consideration are not free from doubt. Different conclusions might be reached by different minds, and each opinion find some support in the decisions. The final test in all cases is whether or not the classification is false, arbitrary and evasive.

Respectfully,
JOHN G. PRICE,
Attorney-General.

97.

APPROVAL OF LEASE TO FARMERS CO-OPERATIVE COMPANY.

COLUMBUS, OHIO, March 6, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of March 3, 1919, in which you enclose a lease in triplicate, for my approval, as follows:

	Valuation.
To—The Farmers Co-operative Company lot No. 112 and five feet off of the south side of lot No. 113, city of Defiance, containing 6,175 square feet more or less	$1,666 67

I have carefully examined this lease, find it correct in form and legal and am therfore returning the same to you with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

98.

ROADS AND HIGHWAYS—APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HANCOCK, HOLMES, FULTON AND COLUMBIANA COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, March 7, 1919.

99.

APPROVAL OF BOND ISSUE OF LORAIN CITY SCHOOL DISTRICT IN SUM OF $20,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 7, 1919.

100.

APPROVAL OF BOND ISSUE OF PAULDING COUNTY IN THE SUM OF $75,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 7, 1919.

101.

OHIO AGRICULTURAL EXPERIMENT STATION—EXPENSES OF EMPLOYES CANNOT BE PAID FOR ATTENDING MEETING AT BALTIMORE, MD.

The expenses of employes of the Ohio Agricultural Experiment Station in attending a meeting of the Association of Economic Entomologists of America held at Baltimore, Maryland, cannot be paid from the moneys appropriated to the state under authority of the Acts of Congress approved March 2, 1887 and March 16, 1906, commonly called the Hatch and Adams acts.

COLUMBUS, OHIO, March 8, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter of February 8, 1919, requesting my opinion as to your authority to honor two vouchers drawn by the Ohio Agricultural Experiment Station for the payment of traveling expenses of two of its employes in attending a meeting of the Association of Economic Entomologists of America held at Baltimore, Maryland, in December, 1918, was duly received.

Your letter reads as follows:

> "We are herewith handing you two vouchers drawn by the Ohio Agricultural Experiment Station for the payment of traveling expenses of two of its employes in attending a meeting of the Association of Economic Entomologists of America held in Baltimore, Md., in December, 1918; said vouchers authorizing payment of said amount from the Adams and Hatch fund in the state treasury.
>
> These expenses were incurred without the authorization required by section 2313-3 of the General Code. Upon presentation of said vouchers this department requested Hon. W. H. Kramer, bursar of the Ohio Agricultural Experiment Station, to advise under what authority it was claimed that said expenses could be incurred, without complying with the provisions of section 2313-3, foregoing mentioned, and under date of January 23, 1919, we received a letter from Mr. Kramer which we herewith enclose showing that the authority claimed is under a joint resolution of the general assembly adopted February 10, 1888. It appears that

the Act of Congress referred to in said letter purported to authorize the states "to apply such benefits to experiments at stations so established by such states." We are doubtful as to whether the payment of expenses shown by the enclosed vouchers for the purpose specified could be considered as pertaining to 'experiments.'"

In a subsequent letter from Mr. W. H. Kramer, bursar, dated February 20, 1919, it is stated that the primary purpose of the meeting was to bring together entomologists from all the states for conference relative to entomological work, and that authority to attend the meeting was given by the board of control of the station.

1. The Ohio Agricultural Experiment Station was established under an act of the general assembly passed April 17, 1882, entitled "An Act for the establishment of an agricultural experiment station," (79 O. L. 113), separate from the college established in this state under the Act of Congress approved July 2, 1862, and of the acts supplementary thereto, and by reason thereof the state, upon giving the assent hereinafter referred to, became entitled to the benefits conferred by the Act of Congress approved March 2, 1887 (24 U. S. Stat. at Large, 440-442; sections 8878 et seq. U. S. Comp. Stat. 1918).

The Act of Congress approved March 2, 1887, referred to, was entitled "An Act to establish agricultural experiment stations in connection with the colleges established in the several states under the provisions of an act approved July second, eighteen hundred and sixty-two, and of the acts supplementary thereto," and, among other things, authorized the conducting of researches and investigations bearing directly on the agricultural industry of the United States, having due regard to the varying conditions and needs of the respective states.

The act imposed the duty upon each station, annually, to make to the governor a full and detailed report of its operations, including a statement of its receipts and disbursements, and to send a copy thereof to the commissioner of agriculture, the secretary of the treasury and to other stations.

Section 5 of the act authorized the appropriation out of certain public land funds of the sum of $15,000 per annum to each state, to be specially provided for by Congress in its appropriations from year to year for the purpose of paying the necessary expenses of conducting investigations and experiments and printing and distributing the results.

By section 8 of the act, which is the section specially applicable to the Ohio Agricultural Experiment Station, as will appear from the joint resolution hereinafter referred to, it was provided:

> "That in states having * * * agricultural experiment stations established by law separate from said colleges, such states shall be authorized to apply such benefits to experiments at stations so established by such states."

The grants of money authorized by the act having been made subject to the legislative assent of the several states and territories to the purposes of the grants (See sec. 9 of the act), the general assembly on February 10, 1888 (85 O. L. 575, 576) adopted the following joint resolution:

JOINT RESOLUTION

Relative to the control and expenditure of funds appropriated by Congress for agricultural experiment station in Ohio.

Whereas, The Congress of the United States of America has passed

an act, approved March 2, 1887, to establish agricultural experiment stations in connection with the colleges established in the several states under the provisions of an act approved July 2, 1862, and of the acts supplementary thereto; and,

Whereas, Said act of Congress, approved March 2, 1887, provides that in states having colleges entitled to the benefits of this act, and having also agricultural experiment stations established by law, separate from said colleges, such states shall be authorized to apply such benefits to experiments at stations so established by such states; and

Whereas, The state of Ohio, by an act passed April 17, 1882, and by acts supplementary thereto, has established an agricultural experiment station *separate from the college* established in this state under the provisions of said act of Congress, approved July 2, 1862, and of the acts supplementary thereto; therefore,

Resolved by the General Assembly of the State of Ohio, That the annual appropriations provided for by said act of Congress, approved March 2, 1887, be and are hereby applied to the use of the Ohio Agricultural Experiment Station, and shall be controlled and expended by the board of control of said station.

It will thus be seen that the purposes to which the annual Congressional appropriations authorized by the Act of Congress of March 2, 1887, may be applied by states having a station established separate from its colleges, are confined by section 8 of the act "to experiments at stations so established."

2. After the enactment of the act of March 2, 1887, and the adoption of the joint resolution by the general assembly of Ohio on February 10, 1888, above referred to, Congress, by an act approved March 16, 1906 (34 Stat. at Large 63; sections 8891 et seq. U. S. Compiled Statutes, 1918), authorized and provided for annual appropriations of $30,000 to each state and territory

"to be applied only to paying the necessary expenses of conducting original researches or experiments bearing directly on the agricultural industry of the United States."

The act of March 16, 1906 did not expressly repeal the act of March 2, 1887 on the same subject, but it is probable that it was intended to, and actually does, supersede the earlier act, and that the congressional fund now in the state treasury was appropriated and paid to the state under authority of the latter act.

The act of March 16, 1906 requires (sec. 2) that the officer appointed by the governing board to receive the money appropriated, report annually to the secretary of agriculture a detailed statement of the amount received and of its disbursement, and it expressly provides that the grants of money authorized by the act are made subject to the legislative assent of the several states to the purpose of the grants.

Section 3 of the act provides that if any portion of the moneys received by any state shall by any action or contingency be diminished, lost or misapplied, no subsequent appropriation shall be appropriated or paid to such state until it shall have been replaced. Each station is also required to make annually to the governor a full and detailed report of its operations, including a statement of receipts and expenditures, a copy of which report must be sent to each station, to the secretary of agriculture and to the secretary of the treasury of the United States.

The secretary of agriculture is required by section 4 of the act to ascertain and certify annually to the secretary of the treasury as to each state, whether it is complying with the provisions of the act and entitled to receive its share of the

annual appropriation, etc. If the secretary of agriculture withholds such certificate, the state's appropriation is withheld, and unless Congress on the state's appeal directs that it be paid, the amount is covered into the treasury.

It is also made the duty of the secretary of agriculture, by section 5 of the act, to make an annual report to Congress on the receipts, expenditures and work of the experiment stations, and also as to whether the appropriation of any state has been withheld, and if so, the reason therefor.

On April 8, 1908, the general assembly (99 O. L. 634) assented to the purpose of the grants of money authorized by the act of March 16, 1906, as required and provided for by section 2 of the act, by adopting the following joint resolution:

JOINT RESOLUTION

Assenting to the purpose of Congress for increased appropriations for agricultural experiment stations and providing for the control and expenditure of such appropriations.

Whereas, The Congress of the United States of America has passed an act, approved March sixteenth, nineteen hundred and six, to provide for an increased annual appropriation for the agricultural experiment stations established under the provisions of an act of Congress, approved March second, eighteen hundred and eighty-seven; therefore,

Be it resolved by the general assembly of the state of Ohio:

That assent is hereby given to the purposes of said act of congress, approved March sixteenth, nineteen hundred and six, and that the moneys thereby appropriated to the state of Ohio be expended and controlled by the board of control of the Ohio Agricultural Experiment Station, in conformity with the regulations prescribed by said act of Congress."

3. It will thus be seen that the annual appropriations made to Ohio under the acts of March 2, 1887 and March 16, 1906, were made by Congress and accepted by the state to be applied to the purposes authorized by the grants, namely, under the first act "to experiments at stations," and under the latter act to paying necessary expenses of "conducting original researches or experiments." The conference of entomologists at Baltimore, Maryland, relative to entomological work, does not come within either class.

Money received by the state under both acts are trust funds, and their application to purposes other than those therein expressly authorized would be a misapplication and a breach of trust, which, under the act of March 16, 1906, would subject the state to the loss of future appropriations. The state was expressly required by congress to give its assent to the purposes for which the grants of money were made, as a condition precedent to its rights to receive the same, and, having done so, it has thereby entered into a solemn compact with Congress to apply the fund in the manner authorized by the acts of Congress, and to no others.

4. I have also received a letter under date of February 18, 1919, from Mr. Charles E. Thorne, director of the experiment station, in which he refers to section 1171-3 G. C. as authorizing the board of control to apply the congressional appropriations to the general or special use of the station, etc. It is obvious that this statute can not have the effect of warranting the board of control in using the congressional appropriations for purposes unauthorized by the acts hereinbefore referred to, because, as has already been stated, Congress has specified the purposes to which the funds must be applied, and the state was required to and did assent thereto as a condition precedent to its right to receive the money.

It is also pertinent to remark that by the express provision of the section re-

lied upon by Mr. Thorne (sec. 1171-3), grants and donations of money to the station can only be used and applied "as directed by the donor." The donor in this case is Congress, and not Ohio or the board of control. Congress, being a voluntary donor, can make its appropriation to the states on such terms and conditions it may see fit to impose, and having specified the purposes to which agricultural experiment station funds appropriated by it can be applied, and having required and received the assent of the state thereto, it is not within the power of the state to authorize the board of control to apply the fund to any other purpose.

Mr. Thorne also contends that the secretary of agriculture has authority over the disbursement of the fund, and that so long as that officer is satisfied, the state must be. But, for reasons already pointed out, such contention can not be sustained. The secretary of agriculture may inquire into the purposes for which the fund is being applied by the state, but he has no authority to authorize its misapplication.

5. Section 2313-3 G. C., referred to in your letter, relates exclusively to expenditures from the state emergency fund and therefore has no application to the appropriations made by Congress for the benefit of agricultural experiment stations.

For the reasons above stated, I am of the opinion that the two vouchers referred to in your letter of February 8, 1919, covering the traveling expenses of two employes of the Ohio Agricultural Experiment Station, in attending a meeting of the Association of Economic Entomologists held at Baltimore, Maryland, in December, 1918, can not be paid from the funds appropriated by Congress for the benefit of the experiment station.

Respectfully,
JOHN G. PRICE,
Attorney-General.

102.

MUNICIPAL CORPORATIONS—AUTHORIZED TO PROVIDE LICENSES FOR USE OF STREETS BY VEHICLES KEPT FOR HIRE AND BUSINESS PURPOSES—FEE COMMENSURATE TO BURDEN.

Municipal corporations are empowered by virtue of section 3632 G. C. to provide for a license for the use of streets by vehicles kept for hire and business purposes and to impose a reasonable license fee commensurate to the burden imposed by such use of the streets.

COLUMBUS, OHIO, March 8, 1919.

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

GENTLEMEN:—I have yours of February 5, 1919, requesting my opinion as follows:

> "We are respectfully calling your attention to section 3632 of the General Code and are citing decision in the case of Crane vs. Middletown, 4 Ohio Appellate Reports, page 130.
>
> Question: Can a municipality license automobiles which are used for hire and business purposes?"

Section 3632 G. C., to which you refer, is a part of the general grant of pow-

ers of municipalities and is to be read in connection with section 3616 G. C. which provides:

> "All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them."

Section 3632 G. C. provides:

> "To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery stable purposes; to license and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon; to prevent and punish fast driving or riding of animals, or fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of interurban, traction and street railway cars within the corporation."

In *Crane et al.* vs.*City of Middletown et al.,* 4 O. App. Rep., 130, also referred to in your inquiry, the syllabus is as follows:

> "No power has been delegated to municipalities by the general assembly which authorizes the enactment of an ordinance requiring the owner of an automobile to pay a license fee to the city, in addition to the license paid to the state as fixed by statute, as a condition precedent to his use of a car on the streets for pleasure riding, and an ordinance imposing such a license fee is invalid."

The case involved the validity of an ordinance of the city of Middletown to license and regulate the use of the streets by persons who used vehicles thereon.

The city claimed the power to require such a license and the fee prescribed by the ordinance under authority of section 3632 G. C., above quoted. The court observed that the strongest objection to the validity of the ordinance was that it failed to impose any regulations whatever in regard to the use of the streets except the provision that as a prerequisite to their use the license fee must be paid, and at page 134 of the opinion the court said:

> "It is clear on its face that the ordinance was passed purely as a revenue measure. Its purpose evidently was to levy a special tax on those who use the streets of the city. Such a tax, under whatever name it may be called, can not be upheld, because it expressly violates section 2, Article XII of the constitution.'

The court referred with approval to the case of *Pegg* vs. *City of Columbus,* 80 O. S., 367, where the holding was that such a license could not be imposed by a municipal corporation upon non-residents of the city who used vehicles on its streets for the purpose of pleasure or their own private business and not for hire.

The court also referred with approval to the holding in *Frisbie* vs. *City of Columbus,* 80 O. S., 686, where an ordinance of the city of Columbus providing a license fee for the privilege of using vehicles upon the streets was held to be inoperative because in conflict with sections 6290 to 6310 of the General Code which had withdrawn certain powers of municipal corporations in reference to regulations affecting motor vehicles.

The court said, however, at page 133, that while municipal corporations did not have general power to impose regulations on the use of motor vehicles upon the streets yet

> "this clearly would not be the case in regard to a proper municipal ordinance under section 3632, General Code, requiring a license for the use of automobiles kept for hire or livery purposes."

The ordinance in the Middletown case was one of general application and the court said

> "for the reasons given this ordinance of the city of Middletown must be held to be illegal and invalid."

In the case of *Pegg et al.* vs. *City of Columbus,* supra, the court considered the validity of an ordinance of the city of Columbus which required payment of a fee and the procuring of a license for the operation of vehicles upon the streets. in its application to farmers and gardeners driving upon the streets of the city for the purpose of marketing their own products, and in the syllabus the court said that an ordinance

> "which provides, 'that no vehicle shall be used upon the streets of the city of Columbus, Ohio, unless a license to use such vehicle upon said streets has been obtained in accordance with the provisions of this ordinance by the owner, user or person having control of said vehicles'—is unreasonable as to owners, users or controllers of such vehicles who are non-residents of said city, and who bring the same onto its streets for purposes of pleasure, or on their own private business, but not for hire, and the ordinance as to such persons is invalid and cannot be enforced."

This conclusion was reached by a consideration of the fact that the license fees provided would yield returns largely in excess of the expense incident to the regulations involved, which excess was to be applied, under the ordinance, to the repair of streets. After pointing out that the residents of the city owning vehicles have the free use of the country roads and that certain users of vehicles in the city impose much greater burdens upon the streets than those imposed by the non-residents who only occasionally use the streets, the court said:

> "The ordinance therefore lacks the spirit of reciprocity and imposes a burden upon the farmer, in addition to the one he must bear alone.",

also

> "While it may be within the law for a municipal corporation to require its resident citizens to pay a license fee for their use of the streets, (but we do not so decide), we are not ready to hold that it can bar from its streets non-residents and that it may fine one who has the temerity to disregard the exaction of the fee."

It will thus be observed that neither the Middletown case, 4 O. App. Rep., 130, to which you call attention, nor the authorities therein reviewed and followed, are determinative of the question of power to license vehicles used for hire, involved in your inquiry

Regulations of the character under consideration involve the exercise of the

police power which extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state.

It is said in *Marmet* vs. *State,* 45 O. S., 63:

> "According to the maxim, *sic utere tuo ut alienum non laedas,* which is of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others."

An early authority upon the power to license vehicles used for hire, and which has frequently been quoted in later decisions, is *City of Cincinnati* vs. *Bryson,* 15 Ohio, 625, wherein the first paragraph of the syllabus is as follows:

> "The city council of Cincinnati has power to license and regulate draymen; and may require a reasonable sum, by way of excise, on the special employment."

In the opinion the court approved the early case of Boston vs. Schaffer, 9 Pick. 419, as follows:

> "The court in that case held, that it was proper that towns, when put to expense by the exercise of particular employments, should be compensated. So in this case, the employment of drays, hacks, omnibuses, and other heavy vehicles, upon their pavements, cause no inconsiderable amount of expenditure to the city in the way of repairing the streets and alleys. It is manifest to every one, that, in a large city, vehicles of this description cause great destruction to the public ways—far greater than the usual ordinary travel of citizens otherwise employed. There is therefore no injustice in exacting a reasonable portion of the expenses which such special occupation cause to the community; and those who enjoy the special privilege, can refuse to bear a reasonable portion of the burden but with an ill grace."

In upholding the ordinance under consideration the court said:

> "The employment gives the drayman or hackman special privileges, which he enjoys to the prejudice of the city, in the injury necessarily done to her streets and pavements, to an amount far greater than any benefit to be derived from the price of the license, excluding the necessary burden of supervision."

The case of *Marmet* vs. *State,* 45 O. S. 63, is perhaps the leading case in Ohio upon the question which you have presented. The second branch of the syllabus is as follows:

> "The provisions of sections 1, 2, 22, 26 and 35 of the act of April 16, 1883 (80 Ohio L. 129), and section 29 as amended March 25, 1884 (81 Ohio L. 78), which require that in cities of the first grade of the first class each proprietor or lessee of a theater, etc., and all keepers or owners of livery, sale or boarding stables, every dealer in second-hand articles and keepers of junk shops, and the owners of all vehicles used upon the streets of the city, shall pay license as therein provided; that no person

shall engage in any such business until a license therefor shall have been obtained, and that any person who shall violate any of the provisions of the act shall be punished by fine, are not in conflict with the constitution. Cincinnati vs. Buckingham, 10 Ohio, 257; Cincinnati vs. Bryson, 15 Ohio, 625; and Baker vs. Cincinnati, 11 Ohio St. 534, approved and followed."

This court quoted with approval from the case of *City of Cincinnati* vs. *Bryson,* supra, and in upholding the ordinance imposing a license fee and certain other regulations for the use of certain vehicles upon the streets, in the course of its opinion said:

"Nor is the exercise of power as to vehicles generally an unreasonable exercise of it. The ownership of the streets is in the city, and the duty is imposed to keep them open, in repair and free from nuisance. This involves, in many ways, the expenditure of large amounts of money. It calls for constant vigilance as to all the streets, and for extensive pavements upon the more important ones. These, ordinarily, are laid at the expense of the owners of the abutting property. If neglected they soon wear out, and then, in most cases, another burden is imposed on the same property for repaving. It matters not that a particular property owner has not kept a vehicle, and has not had direct agency in the destruction of the street. If enough pressure is brought to procure the city's order for a new pavement, he must, *nolens volens,* pay the assessment, and meantime pay the general tax upon his property for the making of repairs to such of the streets as the authorities see fit to repair. Expense of early renewal of the pavement is to be avoided only by careful and constant repairs, made necessary by constant use on the part of those who run vehicles upon the street, and the better the pavement and the more carefully it is kept in repair, the more useful and convenient it becomes for those who use it. They thus receive a special, direct benefit by the original outlay and by the repairs from time to time, and by such use impose burdens upon the property owners and the public at large. * * * Why should not these favored ones pay a small sum toward making good that which they wear out? * * * Then, too, there is force in the point made by counsel that special police regulation is needed upon the streets of large cities to prevent accidents, to protect pedestrians at crossings, to prevent fast and reckless driving, and to prevent blockades."

And by way of conclusion the court said:

"We think it may safely be affirmed, upon both principle and authority, that power to regulate by license, and to compel payment of a reasonable fee, may be maintained where a special benefit is conferred at the expense of the general public, or the business imposes a special burden on the public, or where the business is injurious to, or involves danger to the public."

In *Tea Co.* vs. *Tippecanoe,* 85 O. S. 120, Shauck, J. in considering a kindred question approved the holding in *Marmet* vs. *State,* supra, in the following language:

"It is not necessary to enlarge upon the subject since the first proposition of the syllabus in Marmet vs. The State, 45 O. S., 63, is an author-

itative and exclusive definition of the subjects upon which a license fee may be imposed."

The case of *Marmet* vs. *State* has received further approval in the case of *Graves* vs. *Janes,* 2 Ohio App. 383, where the court said:

"The constitutionality of laws enacted for the purpose indicated was challenged and the power of the legislature to enact such laws was sustained in the leading case of Marmet vs State, 45 O. S., 63."

As indicative of the modern trend of judicial decisions on the subject, the following is quoted from the case last above cited:

"In recent years new problems of road building and repair have arisen by the prevalent use of motor vehicles and this problem has been increased by the skill of the inventor and the manufacturer in building practical cars of high power and speed. The city is, therfore, confronted with the necessity or expediency of building better roads for the accommodation of this new method of travel, of providing for the increased expense of repairs upon highways by reason of this new use, to preserve the highways in repair for all kinds of travel and of establishing proper police regulation."

At page 389 the court further said:

"It is apparent from the entire act that in addition to identification and registry the privilege of the use of the roads by motor vehicles and of police regulation thereof is contemplated. The imposition of a reasonable charge for reimbursement for road maintenance and repair and for policing the road, in view of the special uses contemplated by the act, is warranted by the general grant of legislative power. This is not a property tax but a privilege tax. * * *

The right of the use of the public ways of the state is in a measure inherent in every citizen, but clearly that right may be regulated to subserve the interests of the public welfare."

While the act under consideration in the foregoing case was held to be unconstitutional as being primarily and essentially a general revenue producing measure, yet the language of the court clearly indicates the recognition of authority to impose proper regulations in the exercise of the police power.

It will thus be concluded from the foregoing authorities that regulations, including a license fee imposed against those using the public ways for hire, when reasonable, are not objectionable and are not in contravention of the constitution.

Your inquiry pertains particularly to the authority of a municipality to exercise the power in question and under the authority delegated to municipalities in section 3632 G. C., hereinabove quoted, it is apparent that the licensing of vehicles used for hire and business purposes may be made the subject of proper municipal action.

In the case of *Tea Co.* vs. *Tippecanoe,* 85 O. S., 120 the court, after approving the doctrine in the case of *Marmet* vs. *State,* supra, said:

"It is true that the court was there considering a statute to exact the fee by the direct act of the general assembly, but the point is wholly un-

important since it could not confer upon municipalities a power which it does not itself possess."

The fair inference from the foregoing observation of the court as well as the general principle involved leads to the conclusion that within the scope of the legislative authority of the municipality, such action by a municipality is valid for the same reasons as those pointed out in the foregoing cases in support of similar action by the legislature.

In the case of *Fremont* vs. *Keating,* 96 O. S., 468, the court considered the validity of an ordinance of the city of Fremont which imposed speed regulations applicable to the streets of the city.

The regulations with respect to the maximum speed limitations provided were not in conflict with the provisions of section 12604 G. C. and the power of the municipality to legislate on the subject, notwithstanding the existence of similar regulations of the state, was upheld as a valid exercise of the constitutional power of the city pursuant to section 3 of Article XVIII. The court said with respect to the ordinance:

> "This section of the ordinance is not in conflict with the provisions of section 12604, General Code, and was passed by the council in the exercise of its constitutional authority, and is therefore a valid and subsisting ordinance of the city of Fremont, Ohio.
>
> This statute (12604 G. C.) is a police regulation, and, under the section of the constitution above referred to, the municipality has the right to adopt and enforce within its limits police regulations in regard to the same subject-matter, not in conflict with this statute."

In this case section 6307 G. C., purporting to withdraw from municipalities the power to regulate the speed of motor vehicles, was held to be unconstitutional and void.

The foregoing decision is authority for the proposition that cities, either charter or non-charter, may enact local police regulations of the character involved in your inquiry, providing the same are not in conflict with general laws of the same character.

Answering your question specifically I therefore advise that municipalities may license automobiles which are used for hire and business purposes by reasonable and appropriate provisions therefor.

Respectfully,
JOHN G. PRICE,
Attorney-General.

103.

SCHOOLS—TEACHER ALLOWED TO TEACH WITHOUT CERTIFICATE —WHO LIABLE.

Where a teacher is allowed to teach without the certificate demanded by statute, with and under full knowledge of the board of education, as well as the clerk of the board, the members of the board of education participating in such illegal act, the clerk of such board and the person receiving misappropriated funds under such illegal employment, are liable for any compensation paid from school funds to such person without certificate.

COLUMBUS, OHIO, March 8, 1919.

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

GENTLEMEN:—Acknowledgment is made of your request for an opinion on the following statement of facts:

> "If in a certain school district of the state of Ohio, with and under full knowledge of the board of education as well as the clerk of the board, a teacher is allowed to teach without the certificate demanded by statutes:
>
> QUESTION: Is the board of education or clerk, or both, financially liable for compensation paid such teacher?"

Attention is invited to section 7830 G. C., which reads:

> "No person shall be employed or enter upon the performance of his duties as a teacher in any elementary school supported wholly or in part by the state in any village, or rural school district who has not obtained from a board of school examiners having legal jurisdiction a certificate of good moral character; that he or she is qualified to teach orthography, reading, writing, arithmetic, English grammar and composition, geography, history of the United States, physiology, including narcotics, literature and elementary agriculture, and that he or she possess an adequate knowledge of the theory and practice of teaching."

From the language of this section it will be noted that no person shall either be employed or enter upon the performance of the duties of a teacher in the public schools without first having obtained a certificate covering such qualifications. So under such statute both the employer and the person performing the work of teaching are at fault, for the language says—no person *"shall enter upon* the performance" until proper certificate has been obtained, and where a person has entered on such duties of teaching, and a board of education has employed and compensated such person, the entire transaction is contrary to section 7830 G. C., above quoted.

Your statement of facts says that in this particular case the person is allowed to teach without a certificate, such teaching being done "with and under full knowledge of the board of education as well as the clerk of the board" and that compensation has been paid such person in question as a teacher, though no certificate has been filed as demanded in the statutes to make such employment valid.

The law has wisely provided that certificates are necessary to teach school

in order to establish competency to do that particular thing, and since section 7826 G. C. provides for the issuing of temporary certificates by county boards of school examiners, to be valid till opportunity comes for regular examination, there is little excuse for a competent person of good moral character to lack the certificate necessary to valid school employment, even in emergency.

Attention is invited to section 4752 G. C., which provides as follows:

> "A majority of the members of a board of education shall constitute a quorum for the transaction of business. Upon a motion to adopt a resolution authorizing the purchase or sale of real or personal property or to employ a superintendent or teacher, janitor or other employe or to elect or appoint an officer or to pay any debt or claim or to adopt any text book, the clerk of the board shall publicly call the roll of the members composing the board and enter on the records the names of those voting 'aye' and the names of those voting 'no'. If a majority of all of the members of the board vote aye, the president shall declare the motion carried. Upon any motion or resolution, a 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 'aye' and those voting 'no'. Each board may provide for the payment of superintendents, teachers and other employes by payroll, if it deems advisable, but in all cases such roll call and record shall be complied with; provided, the board of education of township school districts may provide for the payment of teachers monthly if deemed advisable upon the presentation, to the clerk, of a certificate from the director of the sub district in which the teacher is employed, stating that the services have been rendered and that the salary is due; the adoption of a resolution authorizing the clerk to issue warrants for the payment of the teacher's salary on presentation of such certificates shall be held as compliance with the above requirements, provided, however, that whenever a board of education of a city school district by a majority vote of its members has adopted an annual appropriation resolution, as hereinafter provided, then such board may, by general resolution, dispense with the adoption of resolutions authorizing the purchase or sale of property, except real estate, the employment, appointment or confirmation of appointment of janitors, truant officers, superintendents of buildings or other employes, except teachers, the payment of debts or claims, the salaries of superintendents, teachers or other employes, if provision therefor is made in such annual appropriation resolution, or approving warrants for the payment of any claim from the school fund, if the expenditures for which such warrant is issued is provided for in such annual appropriation resolution."

The above section is quoted to show the manner and method of properly employing teachers legally and the parts in such transaction performed by both the board and the clerk, and clearly provides that the board shall do the employing and may provide for the payment of employes by payroll or a resolution authorizing the clerk to issue warrants for the payment of teacher's salaries. It is apparent, then, that only the board can employ teachers and the clerk, as such officer, has no authority to do so and the board makes the provision for teachers' salaries and the manner in which the clerk shall pay such teachers from the funds so provided by the board, but every payment by the clerk shall be by authorization of the board itself. It might be said the clerk merely performed a ministerial act for the board when he paid out the funds of the board, but the

clerk is more than a ministerial officer *in the paying of teachers* because of section 7786 G. C., which reads:

> "No clerk of a board shall draw an order on the treasurer for the payment of a teacher for services until the teacher files with him such reports as are required by the superintendent of public instruction and the board of education, a legal certificate of qualification, or a true copy thereof, covering the entire time of the service, and a statement of the branches taught. But orders may be drawn for the payment of special teachers of drawing, painting, penmanship, music, gymnastics, or a foreign language, on presentation of a certificate to the clerk, signed by a majority of the examiners, and the filing with him of a true copy thereof, covering the time for which the special teacher has been employed, and the specialty taught."

Under this section the clerk is not permitted to draw any warrant for the payment of a teacher for services until a legal certificate of qualification is filed with him by the teacher, and such reports as are required.

In an opinion of the Attorney-General, 1913, Vol. II, page 1097, holding that the positions of teacher and clerk of a board of education were incompatible because as clerk such teacher would pass upon his own reports, the Attorney-General said:

> "The clerk is the sole judge of the performance of such duty,"

referring to the filing of monthly reports by teachers.

Thus the clerk has first knowledge whether the required certificate is on file with him, as required by law; he knows the law on this subject; he has compelled other teachers on his payroll to file proper certificate; it is for him to advise the board who has certificates and who has not, the same being filed with the clerk. The board of education members know this law and that it is mandatory. Section 7786 G. C. clearly says that no clerk shall draw an order for payment of a teacher unless such *certificate is on file with him,* and the law contemplates that the clerk shall not draw such order even though directed by the board; so if he draws such order, knowing that the person in whose favor the order is drawn has no certificate on file, he violates section 7786 G. C. and becomes a party to the transaction, and if the person has never had a certificate, the case is more flagrant than where a certificate had expired.

Attention is invited to section 7690 G. C., which says:

> "Each board of education shall have the management and control of all the public schools of whatever name or character in the district. * * * Each board shall fix the salaries of all teachers. * * *"

Thus whatever salary or compensation paid the person in question acting as a teacher, must have been fixed by the board, as you say that both the board and the clerk have "full knowledge" of her being so engaged as a teacher. You further say that both the board and the clerk have "full knowledge" that the person in question has no certificate and that said person is allowed to teach and was being compensated therefor in the same manner as though a certificate was properly filed. Such being the case, it would indicate that both had a joint knowledge of such dereliction and misfeasance and one is knowingly permitting the other to violate statutes which both know in their official capacity to exist. The board members are the employers and the clerk is the sole judge as to whether

the duties demanded in section 7786 G. C., on the part of the teacher, have been complied with before warrant will issue. Neither of the parties seem to have cared to take cognizance of the law which permits granting of temporary certificates, though having knowledge of it. The clerk pays the teacher, knowing there is no certificate on file with him. An employment under these circumstances is a nullity and violation of the law, is not a full official act of the board of education in such official capacity, but is the voluntary act of those in charge of school management and funds.

The liability of members of a board of education for misappropriation of funds has been treated in an opinion of the Attorney-General, 1911-1912, page 272, and the second branch of the sylabus is here quoted.

> "2. The members of the board of education who voted for the move, are guilty of a misfeasance and are subject, under the terms of 286 G. C., to civil action by the proper legal officer for a recovery."

This was a case where a board had paid a newspaper for publishing an annual financial statement, such publication not warranted by law; the third branch of the syllabus exonerates the clerk as a "ministerial officer" and does not apply here, for in this case the clerk has violated the additional section 7786 G. C., which specifically provides that he must not pay out funds until proper certificate of competency is filed with him personally.

And so, while you do not ask for the liability of the person who actually received the misappropriated funds, it is well to consider that angle also, though the bureau is possibly familiar with the decision of the Ohio Supreme Court, which affirmed the constitutionality of sections 274, 284 and 286 et seq. G. C. creating the bureau of inspection and supervision of public offices, defining its powers, and providing for a short form of pleading. This was the case of The State ex rel Smith, Pros. Atty, vs. Maharry, which came up on error to the court of appeals of Muskingum county and was decided March 5, 1918, reported in 97 O. S. at page 272. The facts in this case were that one Maharry, a contractor, had constructed a bridge for the county and had received $18.30 in excess of the amount due him. For the recovery of this sum the prosecuting attorney of Muskingum county brought an action before a justice of the peace of the county and in the later appeal to the Supreme Court the plaintiff suing for a recovery was assisted by the Attorney-General and special counsel from his office. In this late decision Judge Wanamaker, speaking for the court, says:

> "In the hearing before the court of appeals the court held the statute to be constitutional, but *that it did not contemplate or include actions against others than public officers;* in short, that *no action* under this statute (286 G. C.) *could be brought against* contractors or other *private persons* or corporations."

And it may be said that such was a general view prior to the time of the decision in 97 O. S. 272, here quoted. Coming to the important feature of the liability of parties who actually receive the misappropriated funds, the court further say:

> "The statute is a most efficient policeman in safeguarding public property and public funds. * * *
>
> The more serious question arises as to the *scope of the statute.* It clearly applies to public officers. Does it likewise afford a remedy against the public generally? This is a remedial statute, that is, it furnishes a

remedy, and remedial statutes are to be liberally construed in order to effect their manifest purpose.

What is the paramount purpose of these statutes? It is to protect and safeguard public property and public moneys. Finally we have come to regard all public property and all public moneys as a public trust. The public officers in temporary custody of such public trusts are the trustees for the public, and all persons undertaking to deal with and participate in such public trust do so at their peril, that is, the rights of the public, as beneficiaries, are paramount to those of any private person or corporation.

Courts have unanimously held that any person who knows, or ought to know, that he is dealing with a trustee of a private trust, deals at his peril, and is put upon inquiry to ascertain if the action of the trustee is proper and legal. If this is the doctrine as to private trusts, with greater force of reason it should be the prevailing doctrine as to public trusts.

The pertinent part of section 286 is as follows: 'If the report sets forth that any public money has been illegaly expended or that any public money collected has not been accounted for, or that any public property has been converted or misappropriated, within ninety days after the receipt of such certified copy of such report the Attorney-General or such prosecuting attorney * * * shall cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions in the proper court.'

It should be noted that the statute covers 'any public money * * * illegally expended * * * or any public property * * * converted or misappropriated.'

When either of these two facts appear, that is (a) illegal expenditure of public money or (b) any public property converted or misappropriated, then there is warrant and authority in law for bringing the action under these statutes.

But it is claimed that such actions can only be brought when the 'public money' has been unlawfully paid to some officer, or when the 'public property' has been unlawfully misappropriated by some public officer.

These statutes do not place any such limitation upon actions brought under them. They are manifestly in the interest of conserving 'public money' and 'public property,' and he who wrongfully takes such 'public money' or 'public property' may be, and should be, sued under these statutes.

Private persons may undertake, and it is common knowledge very often do undertake, to dissipate or misappropriate public money and public property, and these statutes impose upon officers of the law the duty to bring suits to recover the same. But how can such actions be made effective unless suit is brought against the person or persons who wrongfully hold the 'public property' or who have wrongfully taken the 'public money?'

Manifestly the wrongful acts contemplated by this statute, that is, the wrongful taking of public money or public property, if limited only to public officers, would emasculate and destroy 95 per cent of the virtue of the statute.

This court does not feel warranted in giving the statute such a narrow and technical construction as would paralyze this important safe-

guard to the protection of the public trust in more than nine-tenths of the cases arising thereunder.

* * * Public authorities have their option as to which sections they will utilize in protecting public money and public property."

The above quotation at length is here given as showing the view of the Supreme Court on cases of this kind, and such view is now Ohio law as regards a recovery against the person who actually received the misappropriated funds. But it may be said that the cases are not parallel in that the contractor seemingly rendered no service for the funds received, while here the teacher did render service; service that was satisfactory at least to her employers, the school authorities; and possibly to the patrons of the school and so only the court can say as to what the measure of damages in such a case might be. On the other hand however, is the presumption of the law that a person without a certificate to teach is incompetent to do so, for the certificate is the legal measure of competency. The certificate is a license to teach granted on ability shown; until the person can show a certificate, either temporary or otherwise, that person cannot be considered a *teacher in the eye of the law,* any more than a person studying medicine can be called a doctor before he has complied with the requirements of his profession; or a law student can appear in the Supreme Court without an admission to the bar, showing competency. The law demands a teacher's certificate before pay, yes, even before entry on service that might bring pay, for section 7830 G. C. says:

"No person *shall* * * * *enter upon the performance* of his duties as a teacher * * * who has not obtained from a board of examiners having legal jurisdiction, a certificate * * * that he or she possesses an *adequate knowledge* of the theory and practice of teaching."

Here the person entered "upon the performance" in direct violation of section 7830 G. C. and must have had knowledge of the existence of the same; again, it is a rule of law that persons dealing with public officials are charged with having knowledge of the powers of such officials; all concerned still had the avenue of the temporary certificate provided for in section 7826 G. C. for emergency purposes, but seemingly failed to take advantage of such curative regulation.

It is therefore the opinion of the Attorney-General that where a teacher is allowed to teach without the certificate demanded by statute, with and under full knowledge of the board of education as well as the clerk of the board, both the members of the board of education participating in such illegal act and the clerk of such board are liable for any compensation paid from school funds to such person without certificate; and the person receiving funds misappropriated can be sued under section 286 G. C.; that all three of the parties concerned in the illegal act have violated separate sections of the statutes.

Respectfully,
JOHN G. PRICE,
Attorney-General.

104.

SCHOOLS—DISTRICT SUPERINTENDENT—DUTIES—SALARY PAYABLE IN TWELVE INSTALLMENTS.

A district school superintendent is appointed for the school year and his duties run throughout such school year; salary should be paid in twelve installments rather than nine.

COLUMBUS, OHIO, March 8, 1919.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of February 4, 1919, requesting the opinion of the Attorney-General on the following statement of facts:

> "The question has arisen as to whether the district superintendent mentioned in section 7706 of the General Code can draw his pay in nine equal installments annually instead of twelve equal installments. The district superintendent contends that he should be permitted to draw his pay in nine equal installments annually because his work is completed within the nine months.
>
> I have rendered an opinion to the effect that the services of the said superintendent shall be paid for dependent on the *time,* and not on the amount of the services rendered; and inasmuch as said superintendent is employed in this county for a year at a time, I have advised that his pay shall be made in twelve equal installments instead of nine."

In a later letter dated February 24, 1919, you say that the employing resolution "simply stated that the superintendent was to be hired for a period of two years at a fixed *salary per annum.* * * * you are to assume that the compensation is based upon an annual wage hire."

Attention is invited to section 7706 G. C., covering the duties of a district superintendent, which says:

> "* * * He shall report to the county superintendent annually, and *oftener if required* as to *all matters* under his supervision. He shall be the chief executive officer of all boards of education within his district and *shall attend any and all meetings.* He may take part in their deliberations, but shall not vote. *Such time* as is not spent in actual supervision shall be used for *organization and administrative purposes* and in the instruction of teachers. At the request of the county board of education he *shall* teach in teachers' training courses which may be organized in the county school district."

Section 7706-3 G. C. says:

> "The county superintendent shall hold *monthly meetings with the district superintendents* and advise them on matters of school efficiency. * *"

Section 4741 G. C. says:

> "The first election of any district superintendent shall be for *a term* not longer than *one year,* thereafter he may be re-elected in the same district for a period not to exceed *three years.* Whenever for any cause

in any district a superintendent has not been apointed by September first, the county board of education shall appoint such superintendent for a term of one year."

Section 4743 G. C. says:

"The *compensation* of the district superintendent *shall be fixed* at the same time that the appointment is made and *by the same authority which appoints him;* * * *. The salary of any district superintendent shall in no case be less than one thousand dollars *per annum.* * * *."

Section 7689 G. C. says:

"The school year shall begin on the first day of September of each year, and close on the thirty-first day of August of the succeeding year. * * *."

From the analysis of the above quoted sections, it is apparent that the district superintendent is elected for *the school year* which ends with the thirty-first day of August of each calendar year and his compensation would not be all due until the end of his term for which elected, that is to say, the end of August of each year. It must be remembered that a portion of the annual salary of district superintendents is paid by the state, and a board of education is but a trustee for that portion furnished by the state; so in reality, if they feel that the salary had been fully earned at the end of nine months and paid the same out in full with three months of the school year yet to run, they would be paying out state funds, aside from their own, in advance of the rendering of service.

But a closer examination of the sections above quoted clearly shows that the district superintendent, as well as the county superintendent, is elected for the year, for he shall be paid so much "per annum," in the language of section 4743 G. C. His duties in his jurisdiction are largely the same as the city or village superintendent in the latter's territory, and no one can well say that a school superintendent has no duties to perform in the period from the last day of school to the thirty-first day of August. And it is idle to say that it is good policy to advance the pay of a public servant before the duties and work are completed, but such would be the case of an annual employe who received an annual pay in nine installments ending three months before the close of the year for which appointed, especially if duties are to be performed in those three months.

Under section 7706 G. C. he is to report to the county superintendent as often "as required," and reports might be wanted during the three months in question. If the district superintendent had received his full pay and it was the expiration of his contract, his whereabouts might not be known and he would not be in readiness for any reports. In the absence of additional compensation he might fail to do any of the things expected of him, in that three months, having been paid in full at the end of nine months.

He is further required to attend "any and all meetings" of boards of education in his district, for he "shall be the chief executive officer of all boards of education in his district" and no one can say that there might not be one or more board meetings in his district in those three months.

The section further provides that the time not spent in "actual supervision"—that is, the session of school—shall be used for "organization and administrative purposes," it being the intent of the law that some steps on organization be taken before the opening of school in September, where the same is possible.

The section further says: "* * * he *shall* teach in teachers' training courses which may be organized *in the county* school district."

Thus it is contemplated that he must be in readiness to do this particular thing and this might occur, and does occur, frequently in the period prior to August thirty-first.

Again, the purpose of section 7706-3 G. C. would be defeated if the district superintendent was considered as entirely through with his work at the end of nine months, for the section says: "The county superintendent *shall hold monthly meetings* with the district superintendents and advise them * * *." Nothing herein indicates that the county superintendent can not hold such meetings in June, July or August; and if such meetings are called at the times indicated, it is the duty of the district superintendents to attend.

As to the question of compensation of district superintendents, section 4743 G. C. says that the same "shall be fixed * * * by *the same authority* which appoints him." That is to say, the boards of education doing the employing, and the fixing of compensation usually carries with it the times when such compensation is due, and it is not due until service is rendered, and it is for the board to say when services are rendered, for section 7690 G. C. gives boards of education the management and control of public schools and the power "to fix salaries."

The district superintendent is more than a teacher, for while a teacher might have his work completed with the last month of school and is free to go, the same is not true of the district superintendent, for he must take up the threads of detail which are left undone, such as certifying the names of those eligible to high schools, and this can not be done until the term of active school work is ended. Aside from mere supervision during the school session, it must be held that his position was created for the purpose, in part, of having the organization ready for the reopening after September first, and the law did not contemplate a period of three months in which there would be no superintendency, and the "school year" is what is in mind in the employment of a school superintendent and the school year ends on August thirty-first of each calendar year.

From the sections quoted, it seems the clear intent of the law, and the opinion of the Attorney-General is, that a district superintendent is an annual employe, appointed for the school year, ending August thirty-first, and his whole compensation is not earned until that time and hence is not due, and if such annual compensation was paid in monthly installments, there would be twelve payments.

Respectfully,
JOHN G. PRICE,
Attorney-General.

105.

SCHOOLS—TRANSFERRED SCHOOL PROPERTY—BECOMES VESTED IN BOARD OF EDUCATION TO WHICH TERRITORY TRANSFERRED.

Legal title to school property located in territory transferred by a county board of education to an adjoining exempted village school district or city school district, or to another county school district, becomes vested in the board of education of the school district to which such territory is transferred.

COLUMBUS, OHIO, March 8, 1919.

HON. JOHN P. PHILLIPS, JR., *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following statement of facts given by you:

"Under authority and by virtue of section 4696 of the General Code

of Ohio, a county board of education transferred a part of a school district of the county school district to an adjoining exempted village school district situate in an adjoining county. All proceedings have been regular and the transfer is now in effect.

Does the legal title to the real estate of the board of education in the district, so transferred, remain in the board of education of the former district or pass to the board of education of the new district?"

It is noted that you say all proceedings in the transfer in question have been regular and made under section 4696 G. C., the section which governs the transfer of territory from one county school district to another county school district or to an exempted village school district. On your statement of facts it is apparent that the village school district to which the territory was transferred is both an exempted village district and is situate in another county. The question is, when does legal title to such territory or property pass, if it passes at all?

The legal title to school property in such territory for school purposes passes at the time that the transfer is regularly made under section 4696 G. C., and showing the intent of the legislature in the matter of legal title to school property transferred, the following language occurs in section 4692 G. C.:

"* * * The legal title to the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred * * *."

It is true that the above section referring to transfers in same county does not refer to a transfer such as you have in mind, but section 4692 G. C. and section 4696 G. C. were enacted at the same time and such necessary language may have been omitted in section 4696 G. C. because the prior section shows the intent as regards legal title to transferred school property.

Bearing directly upon section 4696 G. C., as regards the legal title to school property situate in territory transferred, a former Attoney-General has said in opinion found in Vol. II of Annual Report of the Attorney-General for 1912, page 1282:

"Under section 4696 G. C. the funds and indebtedness of the township school district should be equitably apportioned between the township and village district as therein provided.

The statutes do not provide *specifically* for the disposition of the school building situated in *the village but the decisions endorse the reasonability* of permitting the newly created district to *take title to school property within its limits* and which was designed for its use, and such is to be deemed *the policy of the law.*"

It is therefore the opinion of the Attorney-General that legal title to school property located in territory transferred by a county board of education to an adjoining exempted village school district, or a city school district, or to another county school district, becomes vested at the time of transfer properly made under section 4696 G. C. and when a map is filed with the auditors in the counties affected by such transfer.

Respectfully,
JOHN G. PRICE,
Attorney-General.

106.

ROADS AND HIGHWAYS—TOWNSHIP TRUSTEES PROCEED WITH ROAD IMPROVEMENT UNDER SECTIONS 3298-1 TO 3298-15n G. C.—WHEN WHOLE COST OF IMPROVEMENT CAN BE PAID OUT OF ROAD LEVIES—ORDER REQUIRES UNANIMOUS VOTE.

If township trustees, acting by virtue of sections 3298-1 *to* 3298-15n *G. C.* (107 *O. L.* 73), *begin proceedings for road improvement by unanimous vote in the absence of the filing of a petition as provided in section* 3298-5, *such trustees have authority, under section* 3298-15, *to order that the whole cost of the improvement be paid out of the road levies mentioned in said section* 3298-15, *provided that such order be made by unanimous vote and be set forth in the resolution declaring the necessity of the improvement.*

COLUMBUS, OHIO, March 8, 1919.

HON. CALVIN D. SPITLER, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—In a communication dated February 24, 1919, you submit, for the opinion of this department, the following:

> "One of the townships in this county is proceeding to pike a certain road and it will be necessary to issue bonds in order to pay for the improvement. The trustees are piking this road by resolution unanimously agreed upon, and it is their desire that the township pay all the costs and expenses instead of assessing any part thereof against the land owners, inasmuch as all other roads in the township have been piked at the expense of the taxpayers and no one has been assessed on any road improvement.
>
> I would like your opinion as to whether section 3298-15 will permit them to order the expenses of said improvement to be paid out of the proceeds of any levies for road purposes including the proceeds of the bonds to be issued."

It is assumed that the township trustees are undertaking the proposed improvement by virtue of sections 3298-1 to 3298-15n, G. C., found in 107 O. L., beginning at p. 73. This series of statutes begins with the statement in section 3298-1:

> "The board of trustees of any township shall have power, as hereinafter provided, to construct, reconstruct, resurface or improve any public road or roads, or part thereof, under their jurisdiction,"

and sets forth a general plan whereby the township trustees may make road improvements. Sections 3298-2 to 3298-4 G. C. have reference to action by the trustees when there is presented to them a petition for the improvement signed by at least fifty-one per cent of land or lot owners, etc.; while section 3298-5 provides that the trustees may by unanimous vote take the necessary steps for the improvement, even though no petition may have been presented. Provision is made that the cost and expense of the improvement may be paid in any one of the methods set forth in section 3298-13, whether the improvement proceedings be initiated by petition or by unanimous vote of the trustees (sections 3298-2 and 3298-5 G. C.)

Said section 3298-13 provides:

> "The compensation, damages, costs and expenses of the improvements shall be apportioned and paid in any one of the following methods,

as set forth in the petition: All or any part thereof shall be assessed against the real estate abutting upon said improvement, or against the real estate situated within one-half mile of either side thereof, or against the real estate situated within one mile of either side thereof, according to the benefits accruing to such real estate; and the balance thereof, if any, shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of all the taxable property in the township, or from any funds in the township treasury available therefor; when the board of township trustees acts by unanimous vote and without the filing of a petition, the trustees shall set forth in their resolution declaring the necessity for the improvement, the method of apportioning and paying the compensation, damages, costs and expenses of the improvement, which may be any one of the methods above provided."

The next section in point is that which gives rise to your inquiry, section 3298-15, reading as follows:

"The township trustees upon a unanimous vote, may without a petition thereof, order that all the compensation, damages, costs, and expenses of constructing any improvement be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the township, or out of any road improvement fund available thereof."

Since sections 3298-13 and 3298-15 have a subject-matter in common, namely, payment of the "compensation, damages, costs and expenses" of the improvement, and are parts of one enactment, they must of course be construed together. Section 3298-13 in turn relates back to and provides for the two distinct situations contemplated in sections 3298-2 and 3298-5, respectively: First, an improvement initiated by petition, as to which the cost and expense shall be paid in accordance with such of the methods named in section 3298-13 as shall have been designated in the petition; and second, an improvement initiated upon unanimous vote of the trustees, as to which the cost and expense shall be paid in accordance with such of the methods named in section 3298-13 as shall have been designated by the trustees in their resolution declaring the necessity of the improvement. It is thus seen that, in any event, the first step in the improvement proceedings must embrace a statement of the plan according to which the improvement is to be paid for.

With these considerations in mind, it becomes clear that where the township trustees, acting by virtue of the series of statutes first above noted, initiate the improvement proceedings by unanimous vote, such trustees have authority, by section 3298-15, to order that the whole cost of the improvement be paid out of the proceeds of any levy or levies on the grand duplicate of the township, or out of any available road improvement fund of the township; provided, however, that such order be made by unanimous vote and be set forth in the resolution declaring the necessity of the improvement.

The foregoing constitute sufficient answer to your inquiry, if your only purpose is to ascertain whether the improvement may be made without assessing part of the cost against abutting or contiguous real estate. However, inasmuch as in the course of your communication you use the expression "whether section 3298-15 will permit them" (the township trustees) "to order the expenses of said improvement paid out of the proceeds of any levies for road purposes including the proceeds of the bonds to be issued," some further observations may not be out of place.

Section 3298-15 provides, in terms, that the trustees upon unanimous vote may "order that all the compensation, damages, costs and expenses of constructing any

improvement be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the township, or out of any road improvement fund available thereof."

Section 3298-15d G. C. provides for a levy on all the taxable property of the township for the purpose, among others, of "improving roads under the provisions of section 3298-1 to 3298-15n inclusive of the General Code"; and section 3298-15e provides that bonds may be issued in anticipation of the collection of such taxes, "in any amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, costs and expenses of such improvement."

While the provisions of section 3298-15 G. C. are very broad in authorizing the trustees to *order* the cost of the improvement paid out of the proceeds of any levies for road purposes on the grand duplicate of the township, yet in making actual use of the funds which have accrued and which are to accrue from such levies, certain other matters must be borne in mind. For instance, if funds in the treasury or funds coming in to the same through current levies have already been appropriated, or if such funds have been anticipated by bond issues, such funds to the extent thus appropriated or anticipated may not be used for the proposed improvement work (See section 5660, G. C. and Art. XII, section 11, Constitution of Ohio). Furthermore, the provisions of said section 5660 G. C., relative to filing of clerk's certificate of funds on hand before contract may be entered into by the trustees, must not be overlooked.

Respectfully,
JOHN G. PRICE,
Attorney-General.

107.

APPROVAL OF BOND ISSUES OF MAHONING COUNTY IN THE SUM OF $65,000.00, $18,000.00 AND $36,000.00.

COLUMBUS, OHIO, March 8, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

108.

APPROVAL OF BOND ISSUE OF VILLAGE OF CELINA IN SUM OF $20,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 8, 1919.

109.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN GUERNSEY, PERRY AND WAYNE COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, March 8, 1919.

110.

DISAPPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN MONTGOMERY AND WAYNE COUNTIES.

COLUMBUS, OHIO, March 8, 1919.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of March 6, 1919, enclosing, for my approval, final resolutions on the following improvements:

Cincinnati-Dayton road, I. C. H. No. 19, sec. O-1, Montgomery county.
Cincinnati-Dayton road, I. C. H. No. 19, sec. O-2, Montgomery county.
Cleveland-Wooster road, I. C. H. No. 25, sec. E, Wayne county, type A, B and C.

The certificate of your department accompanying the two resolutions first named, Montgomery county, shows that the appropriations have been made from main market road fund, while the final resolutions themselves do not indicate that the roads to be improved are main market roads. As under section 1221 G. C. the main market road funds may be used only on main market roads, the resolutions are not in proper form unless they show the roads in question are main market roads, if such be the fact.

As to the final resolution covering I. C. H. No. 25, section E, Wayne county, type A, B and C, it is noted that the resolution relating to type C is signed by one of the county commissioners only.

For the reasons indicated, the resolutions are returned without my approval.

Respectfully,
JOHN G. PRICE,
Attorney-General.

111.

APPROVAL OF LEASES OF CANAL AND RESERVOIR LANDS.

COLUMBUS, OHIO, March 8, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of February 28, 1919, in which you enclose leases, in triplicate, for my approval, as follows:

	Valuation.
Benjamin McCracken for State Canal lands, East of Newark, Ohio, agricultural purposes	$700.00
A. L. Coakley, lease of abandoned Hocking Canal property near Nelsonville, Ohio, agricultural purposes	433.33
Frank Koenig, abandoned Ohio Canal lands near Ashville, Ohio, agricultural purposes	625.00
B. B. Magill, small island in Lake St. Marys, cottage site purposes	200.00
Frank Minner, portion of abandoned Hocking Canal near Nelsonville, Ohio, agricultural purposes	500.00

I have carefully examined these leases, find them correct in form and legal and am, therefore, returning the same to you with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

112.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY IN SUM OF $100,000.00.

Industrial Comm'ssion of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 10, 1919.

113.

APPROVAL OF AB TRACT OF TITLE TO LOTS No. 47, 48, 49, 50 AND 51 OF WOOD-BROWN PLACE ADDITION—OHIO STATE UNIVERSITY.

COLUMBUS, OHIO, March 10, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You recently submitted for examination abstract of title covering the following premises:

> "Being lots Nos. 47, 48, 49, 50 and 51 of Wood-Brown Place Addition as the same are numbered and delineated upon the recorded plat thereof, of record in plat book 5, page 196, recorder's office, Franklin county, Ohio."

I have carefully examined the abstract which is dated February 18, 1919, and

find that it properly evidences title to the premises described, in the name of Annie Warden on said date, and that there are no liens or assessments against said title.

Since the submission of said abstract, certain unsigned deeds for the conveyance of said premises to the state of Ohio were submitted to me and examined and found to be in proper form, and therefore finding the title to said premises to be in said Annie Warden, and finding the proposed deeds in proper form for vesting title in the state when duly executed and delivered, I hereby approve said title as exhibited by said abstract.

Respectfully,
JOHN G. PRICE,
Attorney-General.

114.

INTOXICATING LIQUORS—SEIZED FOR USE OF VIOLATION OF LIQUOR LAWS—PROPERTY OF OWNER—NOT APPLICABLE TO DRY TERRITORY.

Intoxicating liquors seized for use as evidence of violation of liquor laws remain the property of the owner at the time of seizure and should be released to him upon the final disposition of the case, in the absence of statutory provision to the contrary, such as is now applicable to liquor seized in dry territory.

COLUMBUS, OHIO, March 10, 1919.

HON. CHESTER A. MECK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I have your recent communication regarding the disposition of intoxicating liquors seized by inspectors of the state liquor licensing department in the course of an investigation, and now held in the possession of the sheriff, and requesting my written opinion as to the proper disposition of such liquors upon the following statement of facts and inquiry:

> "A raid was made on a building occupied by R. after he was found to be selling intoxicating liquor, without a license, and in this raid, several hundred dollars worth of intoxicating liquor was seized. We filed a charge against R. under section 1261-63 of the General Code in the mayor's court. He pleaded guilty and was fined $300.00 and costs, which he paid. He now claims the intoxicating liquor which was seized, and which is now in the possession of the sheriff, and which the sheriff is holding, under my orders, until the matter can be determined.
>
> Section 6181 of the General Code provides that a judgment of conviction shall be a bar to suits for the recovery of liquors seized or their value. But this seems to apply to dry territory only. I was of the opinion that the liquor still belongs to R. because of the fact that this is wet territory.
>
> I would like to have your opinion as to the present ownership of this liquor, and what disposition is to be made of it."

Section 6181 G. C., to which you call attention, is as follows:

> "Liquors seized, as hereinbefore provided, and the vessels containing them, shall not be taken from the custody of the officer by writ of replevin or

other process while the proceedings herein provided are pending. Final judgment of conviction is such proceedings is in all cases a bar to all suits for the recovery of liquors seized or their value, or for damages alleged to arise by seizure and detention thereof."

The subdivision of the General Code, of which section 6181 is a part, by its terms is applicable to proceedings arising under local option laws and is not of general application. I am not aware of any similar statute of general application.

It is presumed from your statement that the liquors in question were obtained by inspectors of the liquor licensing department in the course of their inspections to be used as evidence of violation of the liquor laws. You further state that the liquors were obtained in wet territory and therefore I am of the opinion that section 6181 G. C. supra, would not be applicable in the case under consideration.

In Englehardt, Admr. vs. Kumming, 10 O. N. P. (n. s.) 609, the question of disposition of gambling devices was considered and the following is quoted from the syllabus:

1. Where the record of a magistrate shows that at a trial held before him he finds from the evidence that certain slot machines are gambling devices, his action in ordering them destroyed is lawful.

3. The law does not recognize any property rights as existing in gambling devices."

In the opinion the court said:

"The law does not throw its protecting arm about gambling devices and gambling instruments, nor does the law recognize any property rights existing in gambling devices, for the use of such devices and instruments are subversive and destructive of the best interests of society."

Obviously, a different result must be reached with respect to the disposition of intoxicating liquors held as evidence, inasmuch as the property right therein is expressly recognized by our laws and an owner, by bringing himself within the requirements of the law, may make legitimate disposition of such property.

In an opinion of my predecessor, under date of November 20, 1917, and reported in Vol. III of the Opinions of the Attorney-General for that year at page 2113, the disposition of moneys in connection with a raid upon a gambling place was considered and the conclusion reached was as follows:

"In the absence of any statute authorizing the forfeiture of money recovered in a gambling raid, there would be no authority to transfer such money to the police relief fund or to the treasurer of a municipality. Such money may be applied to the payment of the costs and fines assessed against the owner thereof. If any remains after fine and costs are paid, it should be returned to the owner as provided in section 4400 General Code, or to the party from whom taken as provided in section 4399 G. C."

It is my opinion that in the absence of statutory authority therefor, and so long as property rights are recognized in intoxicating liquors, such liquors as may be held for evidence in cases of law violations should be released to the owner when they have served their purpose as evidence, and that such liquors remain the property of the owner at the time of their seizure.

Respectfully,
JOHN G. PRICE,
Attorney-General.

115.

ROADS AND HIGHWAYS—APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN CLERMONT COUNTY.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, March 12, 1919.

116.

APPROVAL OF ABSTRACT OF TITLE FOR TRACT OF LAND KNOWN AS "RESERVE" OF WOOD-BROWN PLACE.

COLUMBUS, OHIO, March 12, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of the abstract of title for the following described real estate situate in the county of Franklin, state of Ohio, and in the township of Clinton:

> "Being a tract of land known as the 'RESERVE' of Wood-Brown Place, more particularly described as follows: Beginning at a point where the western line of the Columbus, Hocking Valley and Toledo right of way intersects the north line of Jerry O. Lisle's land; thence west along said Lisle's north line to a corner; thence north 1,153 feet to a corner; thence east 33.50 feet to said western line of the right of way of the railway aforesaid, thence along said line to the place of beginning, containing 5.029 acres more or less."

I have carefully examined said abstract and find no defects in the title to said real estate as disclosed thereby. No liens or encumbrances are shown against said real estate excepting the taxes for the last half of the year 1918 amounting to $3.03 which are unpaid and constitute a lien; no special assessments are reported as against the premises.

Subject only to the payment of said taxes, I am of the opinion that the abstract discloses a good and sufficient title in fee simple in Ludwig and Joseph Bernhard, on the date of said abstract, February 21, 1919.

The abstract is therefore returned with my approval of the title.

Since my examination of the abstract hereinbefore referred to, there has been submitted to me certain unsigned deeds for the conveyance of said premises to the state of Ohio which upon examination I find to be in proper form, and when duly executed, sufficient for vesting title in fee simple in the state.

Respectfully,
JOHN G. PRICE,
Attorney-General.

117.

APPROVAL OF BOND ISSUE OF MARSHALL TOWNSHIP RURAL SCHOOL DISTRICT IN THE SUM OF $14,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 12, 1919.

118.

APPROVAL OF BOND ISSUE OF HANCOCK COUNTY IN THE SUM OF $42,100.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 12, 1919.

119.

APPROVAL OF BOND ISSUE OF HANCOCK COUNTY IN SUM OF $18,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 12, 1919

120.

TREASURER OF STATE—REGISTERED UNITED STATES GOVERNMENT BONDS—WHEN ACCEPTABLE AS COLLATERAL SECURITY FOR STATE DEPOSITS.

Registered United States bonds are acceptable as collateral security for state deposits, if assigned to and registered in the name of the state board of deposit and held in trust for the purpose of securing the deposit.

COLUMBUS, OHIO, March 13, 1919.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—You have asked me to advise you whether registered United States Government bonds are acceptable under the law as security for the deposit of state funds.

Section 330-3 of the General Code provides, in part, that—

> "The treasurer of state before making such deposits shall require that each and every approved bank or trust company to deposit with him United States Government bonds * * * or municipal bonds of this state at not less than their par value, in an amount equal to the amount of money to be deposited * * *."

In this connection section 330-6 G. C. expresses what is lacking in section 330-3 when it provides that—

"If, on demand or order of the treasurer of state, a state depository fails or refuses to pay over the deposit, or any part thereof made therein as provided by law, the treasurer of state shall sell at public sale any or all of the bonds deposited with him as collateral security for such deposits. * * *"

and section 330-7 provides that—

"When a sale of bonds has been made by the treasurer of state, and upon payment to him of the purchase money, the chairman and secretary of the board of deposit shall transfer such bonds whereupon the absolute ownership of the bonds shall pass to the purchasers thereof. * * *"

The general provisions of the statutes of the United States, R. S sections 3704 and 3706; U. S. Compiled Statutes, sections 6819-6821, respectively, are as follows:

"Whenever it is proved to the secretary of the treasury by clear and satisfactory evidence, that any duly registered bond of the United States * * * has been lost or destroyed, so that the same is not held by any person as his own property, the secretary shall issue a duplicate of such registered bond. * * *

The secretary of the treasury is hereby authorized to issue, upon such terms and under such regulations as he may from time to time prescribe, registered bonds in exchange and in lieu of any coupon bonds. * * *"

There is also the provision of section 3705 R. S., section 6820 U. S. Compiled Statutes, to the effect that the owner of a missing registered bond must give bond to indemnify the United States from any claim because of the lost or destroyed bond.

These provisions seem to assume at least that registered bonds issued by the secretary of the treasury are negotiable. However, it is clear that they are not negotiable. I have examined a registered bond of the issue known as the "Third Liberty Loan." By it the United States promises to pay a named person *or his registered assignee* the amount therein named. Assignment can be made only in the manner specified by the regulations of the treasury department and set forth on the back of the bond. Briefly stated, the requirement is that the assignment must be endorsed on the bond in writing and attested before certain designated officers. When such attested assignment is made the named assignee is entitled to have the bond transferred on the books of the treasury department, and thereafter to receive the installments of interest, and ultimately, if he remains the owner thereof so long, the principal sum.

It is clear that such an instrument is not negotiable. See—

Scollins vs. Rollins, 173 Mass. 275;
Savings Institute vs. National Exchange Bank, 170 N. Y., 58;
Benwell vs. Newark, 55 N. J. Eq., 260.

Not being negotiable, such bond is not an obligation the absolute ownership of which can be transferred to a vendee in the sense in which the absolute ownership of a negotiable instrument would be transferred by delivery or endorsement and delivery. It is not an obligation the mere *deposit* of which would afford any security of the kind contemplated by section 330-3 G. C.; for such naked deposit would not vest in the treasurer of state or the state board of deposit any special legal property in the obligation represented by the paper writing which might be so deposited. In other words, the mere deposit of a registered bond with the treasurer of state would be worthless as security.

For this reason, and because neither the treasurer of state nor the board of deposit could make to the vendee of such bonds which might be sold under section 330-6, supra, such a title as would amount to "absolute ownership" within the meaning of section 330-7, it might be technically argued that the statute does not contemplate the use of such registered bonds as collateral security for state deposits. But though it is true that such use is not within the precise letter of the statute, it may be deemed to be within its spirit; for by the employment of adequate devices such registered bonds may be so employed as to afford in truth a higher form of real security for the performance of the obligation of the depository than coupon bonds might afford. Section 330-3 does not discriminate among the different kinds of United States bonds which may be "deposited," but on its face makes all such government bonds acceptable as security for state deposits. By giving to this section and to the other sections which have been quoted a liberal interpretation to effectuate the main purpose for which they were enacted, it is possible to say that they contemplate such steps as may enable the use of any kind of United States bonds as security for the purposes therein mentioned. Such steps in the case of registered bonds would be as follows:

Inasmuch as the state board of deposit must make title to possible purchasers (section 330-7), registered bonds intended to be used for the purpose named should be assigned to and registered in the name of the state board of deposit of the state of Ohio. This is all that can appear on the back of the registered bond. There should, however, be executed in duplicate a trust agreement reciting the assignment and transfer o the bonds to the state board of deposit and their custody by the treasurer of state, and declaring that such assignment and transfer of possession is upon trust to secure the faithful performance of the obligation of the assignor (the depository) to the state of Ohio under the state depository law; and that the state board and the treasurer of state are faithfully to account, for all interest received on bonds, to the depository so long as it is not in default, and to execute such proper re-assignment as may enable the depository to secure again the legal title of the bonds upon the complete discharge of its obligations under the depository contract. The trust agreement should also provide that in the event of default the trustee (the board of deposit and the treasurer of state) should have such power of sale as is provided for by section 330-6 G. C., and power to transfer the legal title of the bonds by assignment, in the manner provided by the regulations of the United States treasury department, to the purchasers at such sales in the manner provided by section 330-7 G. C., accounting, however, to the depository for any surplus in the fund realized from the sale of the bonds and the interest collected and unpaid over the amount due the state and the expenses of the sale.

In the event of default under such deposit the proceedings would be such as are indicated by the form of the above outlined trust agreement.

Respectfully,
JOHN G. PRICE,
Attorney-General.

121.

APPROVAL OF BOND ISSUE OF NEW PHILADELPHIA CITY SCHOOL DISTRICT IN THE SUM OF $10,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 13, 1919.

122.

COUNTY CHARGE—EXECUTION OF DEFECTIVE DEED BY SAID PARTY —PROCEDURE FOR COUNTY TO FOLLOW TO OBTAIN SAID REAL ESTATE.

On or about December 21, 1918, V. L., a resident of M. county, for an alleged consideration of $1.00, which was not paid, executed and delivered to B. M. G. and others, a deed for real estate of which said V. L. was then the owner. Said deed was attested by but one witness. A few days after the execution and delivery of such defective deed, through the efforts of said B. M. C., said V. L. was placed in the county infirmary of M. county and became a charge therein.

1. *The county commissioners of M. county may take possession of said land and sell it under favor of section 2548 G. C.*

2. *The grantees of said defective deed are proper parties defendant in the proceedings to sell said real estate under sections 2548 and 11255.*

3. *In such action to sell, in said grantees answer, setting up and relying upon the deed to them, the commissioners may reply alleging fraud, failure of consideration and invalidity of said deed under section 11325 and on the authority of Judy v. Lauderman, 48 O. S., 562.*

4. *Such reply would not constitute a departure from the cause of action stated in a petition upon section 2548 G. C.*

5. *In such an action it would not be necessary to have a guardian appointed for said V. L., unless she is under such disabilities defined in sections 10989, 10915 and 11011 G. C., nor would a guardian for V. L. be the proper party plaintiff in said action to sell, as said commissioners under sections 2548 and 11244 G. C. would be proper parties plaintiff therein.*

6. *The brothers and sisters of said V. L., or their legal representatives, said V. L. never having married, are the necessary parties defendant under section 10947, providing that such persons entitled to the next estate of inheritance shall be parties defendant.*

COLUMBUS, OHIO, May 14, 1919.

HON. WALTER B. MOORE, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Acknowledgement is made of the receipt of your letter of February 28, 1919, relative to matters stated in your letter of January 24, 1919, which was as follows:

> "On or before December 21, 1918, V. L., a resident of Monroe county, was the owner of about 26 acres of land in said county. She was living alone at that time on this real estate.
>
> One of her nieces, B. M. C., and her husband, J. C. C., came here and about the above date procured from V. L. a deed for this land.
>
> The deed does not bear any date but was acknowledged December 21, 1918. The signature of grantor is attested by only one witness. The consideration for the deed was $1.00 which was not paid, and there was no other consideration moving between the parties.
>
> V. L. also had a certificate of deposit which the above named persons had endorsed and which was cashed and turned over to an innocent holder at the same time.
>
> A few days after these transactions, through the efforts of B. M. C., V. L. was placed in the county infirmary of this county, and I would like to have your opinion on the following questions:

1. Can the county commissioners sell this property under section 2548, General Code, as amended in Vol. 102, Ohio Laws, at page 437?

2.(a) Can the county commissioners bring an action under section 2548, General Code, as amended in Vol. 102, Ohio Laws, at page 437, for the sale of the real estate of V. L., and make the grantees in the deed, referred to above, parties and allege that they claim some estate or interest in the land adverse to plaintiff's rights, and bring in the said grantees and if they set up their deed, can the commissioners reply alleging fraud, failure of consideration, and also the invalidity of the deed?

(b) If the commissioners would make the above claim in their reply, do you think the same would be a departure in pleading?

3. Would it be necessary to have a guardian appointed for V. L. and for this guardian to bring the action to set aside the instrument under which B. M. C. and J. C. C. claim the property?

"V. L. never married but had some sisters who have married and since deceased, leaving heirs.

4. If the commissioners can bring the action direct to sell this property, would the heirs of the deceased sisters be necessary parties?

"B. M. C. and J. C. C. are non-residents of this state."

Section 2548 G. C., referred to in your letter, is as follows:

"When a person becomes a county charge, and is possessed, or owner of property, *real or personal*, or has an interest in remainder, or is in any other manner legally entitled to a gift, legacy, or bequest, *whatever*, the county commissioners or board of administration or directors of a corporation infirmary shall take possession of all *such property or other interests*, or as soon thereafter as they deem proper, sell or dispose of it, the real estate to be sold as hereinafter provided. The net proceeds thereof shall be applied in whole or in part, under the special direction of the county commissioners or board of administration as they think best to the maintenance of such person, so long as he remains in the infirmary."

Section 8510 G. C., relative to legal requirements for the execution of deeds, is as follows:

"A deed, mortgage, or lease of any estate or interest in real property, must be signed by the grantor, mortgagor, or lessor in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation. Such signing also must be acknowledged by the grantor, mortgagor, or lessor before a judge of a court of record in this state, or a clerk thereof, a county auditor, county surveyor, notary public, mayor or justice of the peace, who shall certify the acknowledgement on the same sheet on which the instrument is written or printed, and subscribe his name thereto."

It is noted in the facts stated in the above letter that the deed is attested by but one witness. Preliminary to the consideration of your first question, it is necessary to consider what effect and operation in law is given to the obviously defective deed from V. L. to the grantees.

Section 8510 G. C., supra, requires that the signature to a deed for real estate in Ohio be attested by two witnesses.

In Courcier v. Graham, 1 Ohio 330, in the syllabus, it is held:

"A deed attested by one witness does not convey title."

In that case Judge Hitchcock, in the opinion at page 351, says

> "This deed was defective, inasmuch as it was attested but by one witness. The law was not complied with. It could convey at most only an equitable interest. The plaintiffs were to receive a legal estate, free from incumbrance the title to which should be indisputable. This deed did not convey such an estate."

In Lessee of Patterson vs. Pease et al., 5 Ohio, 191, the same question was raised and decided as follows:

> "Can a deed executed in 1811, attested by one witness, pass the legal title to lands? It is conceded that such a deed is evidence of a contract, that, *under proper circumstances*, may be enforced in equity; but the legal estate must pass by it, to defeat, in this case, the plaintiff's recovery. The statute requires that the transfer of title to land must be attended with certain forms, among which is the attestation of witnesses. No deed is complete without such attestation nor can such deed, executed since 1808, pass the legal title by its direct operation."

So it appears that the legal title to the land involved herein remained in the alleged grantor.

This being so, upon V. L. becoming a county charge, what are the commissioners rights and duties under said section 2548 with respect to the possession and disposition of the real estate?

It is to be noted that said section embraces all kinds of property, real and personal * * * whatever and provides that said commissioners shall take possession of all such property "or other interests" and is sufficiently comprehensive in its terms to cover all kinds of property, and your first question is, therefore, answered affirmatively.

It also follows that the commissioners may bring an action under section 2548 G. C., as stated in that part of your letter described as 2-a, and you inquire (a) if they may "bring in the grantees and if they set up their deed, can the commissioners reply alleging fraud, failure of consideration," and (b) if a reply setting up such want of consideration would constitute a departure.

The first question stated as "a" involves the consideration of necessary parties and proper parties.

We must turn to section 10946 et seq. G. C. for guidance as to necessary parties in such sale, as section 2552 G. C. provides that for the purpose of such sale the commissioners shall file a proceeding in the common pleas or probate court in the county in which the property is situated, and "the proceedings therefor, sale and confirmation of sale, and execution by such commissioners * * * shall in all respects be conducted as for the sale of real estate by guardians." Sections 10946 et seq. G. C. are the statutes governing such sale of real estate by guardians. Section 10947 G. C. in part reads as follows:

> "Upon such petition being filed (to sell real estate) * * * the court shall order the petitioner to give notice to his ward, to the husband or wife of such ward, and *to all persons entitled to the next estate of inheritance* in such real estate, who also shall be defendants to the petition, * * *."

Under this section the brothers and sisters, or their legal representatives of said grantor, would be necessary parties. It may be said that the grantees of the deed

would be proper parties because a distinction is drawn between necessary and proper parties defendant. As stated in Pates Pleading & Practice, Vol. 1, 96,

> "parties are generally divided into those who are necessary and those who are proper but not necessary."

It would seem that said section 10947 G. C. provides that those persons named therein are necessary parties in such a proceeding to sell. However, sections 11255 and 11262 G. C., of a more general nature, must also be considered as to the matter of proper parties defendant.

Section 11255 is:

> "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or *who is necessary party to a complete determination or settlement of a question invested therein.*"

Section 11262 further provides

> "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. When such determination can not be had without the presence of other parties, the court may order them to be brought in, or dismiss the action without prejudice."

The conclusion to which I have come, therefore, is that under section 10947 said brothers and sisters are necessary parties and under sections 11255 and 11262, supra, said grantees are proper parties to the commissioners' action to sell, and on the question of whether the commissioners may plead lack of consideration in their reply, section 11326 G. C. is pertinent.

It is therein provided that the plaintiff "may allege in ordinary and concise language, new matter not inconsistent with the petition, constituting an answer to such new matter."

A similar provision in section 11315 G. C., applicable to the answer of the defendant, was considered in Judy vs. Lauderman, 48 O. S., 562, and results in the conclusion that the want of consideration may be properly pleaded.

The matter of departure, stated in paragraph b, may be tested by the rule announced in Fanning vs. Insurance Company, 37 O. S., 344, the first branch of the syllabus of which is:

> "The plaintiff may, in reply to new matter, set out in the answer by way of defense, allege any new matter not inconsistent with the petition, which in law constitutes an answer to the new matter relied on by the defendant."

In the contemplated action to sell the commissioners rely on the rights conferred upon them by operation of law, as contained in section 2548 et seq. G. C., and their cause of action is not based, in the first instance, on the lack of consideration, but the matter of consideration would be brought into the case by the grantees, setting up their deed, and it seems quite clear to me that the allegation of want or failure of consideration would not be inconsistent with the petition and such a reply would be conformable to the rule state in Fanning vs. Insurance Company, supra. It is suggested however, that as the commissioners would most probably file a cross petition in the case, the further pleading on the part of the commissioners would be in the form of an answer to their cross petition rather than in the form of a reply. Inasmuch as there

may be a question of the probate court's jurisdiction to quiet title or entertain the cause of action, which presumably would be stated in the defendant's answer and cross petition, it is suggested that the petition be filed in the court of common pleas.

In paragraph 3 the question of the necessity of appointment of a guardian for the grantor, and the necessity of such guardian bringing an action to set aside the alleged deed, is raised.

Consideration of section 2548 G. C. leads me to conclude that the appointment of a guardian is not contemplated in that section.

In the case of Kissell v. Gram, 4 O. N. P., 333, 7 O. D., 232, it was held that section 2548 did not prevent the appointment of a guardian for an embicile, inmate of the infirmary, and the inference to be drawn from such decision is that such appointment is not necessary if the inmate is not under mental disability.

It might be argued that the provisions of section 2552, making the proceedings in cases of the sale of real estate by guardian, applicable to the action in the present case, would also require the appointment of a guardian, but it must be borne in mind that that which is adopted from section 10947 et seq. G. C., is the proceedings for the sale, etc., and that the appointment of a guardian must necessarily have preceded an action by a guardian to sell his ward's real estate. In section 2552 G. C. it is only the proceedings to sell which are adopted by reference to cases like the one under consideration, and to hold that by such reference a guardian must be appointed, is to read into section 2552 an additional provision. To reach such result it would have to be construed as though it read "all the proceedings prior to the proceedings for sale," etc., would be applicable.

The conclusion that the appointment of a guardian for said grantor is unnecessary in the contemplated case, is based on the assumption that she is not a minor or under mental disability. And if she is not a minor and not under any such disability, the probate judge would have no authority in law to appoint a guardian for her.

Attention is directed to sections 10915, 10989 and 11011 G. C., which sections authorize the appointment of a guardian for minors, idiots, imbiciles, lunatics and drunkards, and it is suggested that the probate judge can make no appointment of a guardian unless such appointment is authorized by law.

It is, therefore, concluded that in the absence of mental disability, the appointment of a guardian would be unnecessary. That the commissioners are the proper parties is borne out by the provision that they "shall file a petition" to sell such real estate.

Section 11244 G. C. in part provides:

> "Officers may sue and be sued in such name as is authorized by law,"

and it is concluded that the commissioners are the proper parties plaintiff.

It occurs to me that the provisions of section 10947 G. C. answer the question stated in the fourth question of your letter in the affirmative, as said section provides that those having the next estate of inheritance are necessary parties defendant.

Respectfully,
JOHN G. PRICE,
Attorney-General.

123.

A COOPERATIVE TRADE ASSOCIATION CANNOT BE INCORPORATED FOR PROFIT—ARTICLES OF INCORPORATION OF THE CECIL EQUITY EXCHANGE COMPANY DISAPPROVED.

1. *A cooperative trade association cannot be incorporated for profit under sections* 10185 and 10186 G. C.

2. *The "profits" of a cooperative trade association contemplated by section* 10186 *G. C., are such as arise incidentally from sales, on account of the impracticability if not the impossibility of determining in advance the exact cost and expense of purchasing, holding and distribution, or such as may arise from the sale of surplus stock remaining after the stockholders and customers embraced in the association's plan of distribution have been supplied.*

3. *Distribution of such profits among the association's stockholders must be in proportion to the "several amounts of their respective purchases."*

4. *The articles of incorporation of a cooperative trade association should, by appropriate language, confine the authorized purchases to those authorized by sections* 10185 *G. C.*

COLUMBUS, OHIO, Mar. 14, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of March 6, 1919, with which you transmitted proposed articles of incorporation of The Cecil Equity Exchange Company for my approval, was duly received.

The articles indicate the intention of the incorporators to organize a cooperative trade association. Such associations are governed by sections 10185 and 10186 G. C, which read as follows:

> "Section 10185. An association incorporated for the purpose of purchasing, in quantity, grain, goods, groceries, fruits, vegetables, provisions, or any other articles of merchandise, and distributing them to consumers at the actual cost and expense of purchasing, holding, and distribution, may employ its capital and means in the purchase of such articles of merchandise as it deems best for itself, and in the purchase or lease of such real and personal estate, subject always to the control of the stockholders, as are necessary or convenient for purposes connected with and pertaining to its business.
>
> "Section 10186. Such association may adopt such plan of distribution of its purchases among the stockholders and others as is most convenient, and best adapted to secure the ends proposed by the organization. Profits arising from the business may be divided among the stockholders from time to time, as it deems expedient, in proportion to the several amounts of their respective purchases."

I am unable to approve the proposed articles under the foregoing sections for the following reasons:

(1) The statutes referred to do not authorize the incorporation of such associations for profit. Under section 10185 G. C. the distribution of the association's authorized purchases must be made "at the actual cost and expense of purchasing, holding and distribution." While it is true that section 10186 G. C. provides that "profits arising from the business" may be divided among the stockholders in proportion to the several amounts of their respective purchases, the "profits" referred to are, in my opinion, such as may arise incidentally from sales, on account of the impracticability if not the impossibility of determining in advance the exact cost and expense

of purchasing, holding and distribution, or such also as may arise from the sale of surplus stock remaining after the wants of stockholders and customers, who are embraced in the association's plan of distribution, have been supplied. A contrary interpretation of section 10186 G. C. would render ineffectual the provisions of section 10185 G. C., which contemplates distribution to consumers at actual cost, etc.

(2) The words in the purpose clause of the articles, "farm produce," might include farm products other than grain, fruit and vegetables, or any other articles of merchandise, and if so, the purpose clause is broader than the statute. The proper course will be for the articles to follow the words of the statute in specifying what the company proposes to purchase and distribute.

(3) The words in the purpose clause, "all merchandise such as said company may deem necessary in their operations," while perhaps not subject to serious objection, might, to some minds, be considered broader in scope than the general words of the statute, "or any other articles of merchandise," which follow a specific enumeration of authorized purchases. In redrafting the articles, it will be better to follow the words of the statute in this regard.

(4) The provision in the purpose clause with respect to profits is unauthorized. In providing for the division of profits among the stockholders, the articles should provide for a division in proportion to the "several amounts of their respective purchases."

For the reasons above stated, I am unable to approve the proposed articles of incorporation.

Respectfully,
JOHN G. PRICE,
Attorney-General

124.

CRIMINAL LAW—STATUTES DO NOT AUTHORIZE STATE TO PROSECUTE ERROR TO JUDGMENT OF JUSTICE OF PEACE ACQUITTING DEFENDANT.

The statutes do not authorize the state of Ohio to prosecute error to the judgment of a justice of peace acquitting the defendant in a criminal case.

COLUMBUS, OHIO, March 14, 1919.

HON. VICTOR L. MANSFIELD, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Receipt is hereby acknowledged of your letter of March 3, 1919.

In said letter, referring to the case of the State of Ohio v. John Keller, you ask to be advised whether or not the State should carry this case up in the event that the court upon the trial renders a judgment acquitting the defendant.

The case you refer to is a prosecution before a justice of peace for a violation of section 1415 G. C. Such violations, under section 1445 G. C., are punishable by fine only.

Stated generally, the question for consideration is this: Do the statutes of Ohio authorize the state to prosecute error to the judgment of a justice of peace acquitting the defendant in a criminal case? For there can be no appeal or proceedings in error from one judical tribunal to another unless the right thereto is given by statute. In re Januszewski, 196 Fed. 123; 10 O. L. R. 151.

The following are the only sections of the statutes which seem applicable to our inquiry:

"Section 10359. In all cases before a justice of the peace, mayor or police judge, whether tried by jury or the justice, mayor or police judge, either party shall have the right to except to the decisions of the justice, mayor or police judge, upon any matters of law arising in the case.

Section 10360. The party objecting to the decision must except at the time it is made and shall have ten days from the date of overruling the motion for a new trial, if such motion be made, or from the date on which the decision, judgment or sentence of the justice, mayor or police judge is entered to reduce his exceptions to writing and present them to the said court.

Section 13426. In all cases of summary conviction before a justice of the peace of an offense punishable by fine or imprisonment, the defendant shall have the right to except and to have a bill, containing the exceptions, signed by such justice and made part of the record. Such convictions may be reviewed by the common pleas court on proceedings in error and reversed or affirmed.

Section 13751. In a criminal case, including a conviction for a violation of an ordinance of a municipal corporation, the judgment or final order of a court or officer inferior to the common pleas court may be reviewed in the common pleas court; a judgment or final order of a court or officer inferior to the court of appeals may be reviewed in the court of appeals; and a judgment or final order of the court of appeals in convictions of a felony or the common pleas court in conviction of a felony or misdemeanor, and a judgment of the court of appeals involving the constitutionality of a statute; or a judgment in a case of public or great general interest may be reviewed by the supreme court. The supreme court in a criminal cause or proceeding, except when its jurisdiction is original, shall not be required to determine as to the weight of the evidence.

Section 13752. On application, by or on behalf of the accused, to an officer required to make a record or docket entries in such case, and upon tender of the proper fee, such officer shall make and deliver to such accused or his counsel a complete certified transcript of the record, omitting, if so requested, a bill of exceptions therefrom. If the prosecution was before a court or tribunal in which a complete record is not made, such officer shall so make and deliver a certified transcript of the judgment and all entries in the case, and on receipt of a copy of a summons as hereinafter mentioned, shall forward, to the clerk of the court, the original papers in the case.

Section 13764. Whenever a court, superior to the trial court, renders judgment adverse to the state in a criminal case or proceeding, error may be prosecuted to reverse such judgment in the next higher court by either the prosecuting attorney or attorney-general. If such conviction has been for a violation of a municipal ordinance, such proceedings in error may be brought by the solicitor of the municipality. Like proceedings shall be had in such higher court at the hearing of the petition in error as in the review of other criminal cases. The clerk of the court, rendering the judgment sought to be reversed, on application of the prosecuting attorney, attorney-general or solicitor, shall make a transcript of the docket and journal entries in such case, and transmit it with all bills of exceptions, papers and files in the case to such higher court."

Sections 10359 and 10360 G. C., first above quoted, seem on their face to give the state, as well as the defendant, the right to except upon any law point arising in the case. That these sections apply to criminal as well as civil cases, was decided in State v. Ransick, 62 O. S. 283 and in State v. Langenstroeder, 67 O. S. 7. Examina-

tion of these cases, however, discloses nothing to show that the court thought any right existed in the State to except. Both cases concerned the preparation and filing of bills of exceptions by defendants who had been convicted in justice court.

Section 13426 G. C., supra, confers upon the defendant only, the right to review a judgment of the justice of peace.

Section 13751 G. C., supra, does not expressly restrict the right of review to the defendant, but practically does so by making a *conviction* a condition precedent to such right of review. Notice the first words of the section:

> "In a criminal case, including a *conviction* for a violation of an ordinance of a municipal corporation * * *."

Section 13752 G. C., supra, gives the accused the right to receive a transcript of the record, but gives the State no such right.

Section 13764 G. C., supra, furnishes no authority for the State to prosecute error to the judgment of a justice of the peace acquitting a defendant. The right therein given to the State arises only after a court, *superior to the trial court*, has rendered judgment adverse to the State. For instance, if the defendant is convicted before a justice of peace and prosecutes error to the court of common pleas, and that court reverses the judgment of the justice of peace, the State, then may by virtue of section 13764 G. C., prosecute, in the court of appeals, error proceedings to reverse the judgment of the common pleas court.

Sections 13681 and 13682 G. C. give the prosecuting attorney or the attorney-general the right to except to a decision of the court and upon the basis of such exceptions to prosecute error to the supreme court, upon leave of that court first obtained. That these sections are inapplicable to the situation before us, appears from several considerations: First, that the history of these sections, as well as their present position in the General Code, demonstrates that they do not refer to exceptions taken to a decision of judgment of a justice of peace or other inferior court. Secondly, that under the Constitution of Ohio, as amended, September 3, 1912, the Supreme Court has neither original nor appellate jurisdiction in cases of misdemeanors, unless such cases involve questions arising under the Constitution of the United States or of this State, or questions of public or great general interest, or in cases the records of which are certified to the Supreme Court by the judges of the Court of Appeals under the provisions of Sec. 6 of Art. IV of the Constitution.

State v. Mansfield, 89 O. S. 20.

Furthermore, such a proceeding would be of no avail so far as subjecting to further trial the defendant mentioned in your letter, because section 13684 G. C. says:

> "Section 13684. The judgment of the court in the case in which the bill was taken shall not be reversed nor affected; but the decision of the supreme court shall determine the law to govern in a similar case."

Section 1406 G. C. (103 O. L. 408), to the effect that:

> "A petition in error to the court of common pleas, court of appeals or supreme court may be prosecuted by the officer or person filing the complaint, or by the owner or user of the property seized, to review the judgment and order of the court in forfeiting the property or in ordering its release. Such petition shall be governed by the provisions governing petitions in error in felony cases tried in the court of common pleas."

refers only to the action for the forfeiture of property seized. See section 1399 G. C.

Section 1261-70 G. C. gives to a defendant, who has been convicted in a court in-

ferior to the common pleas court, of a second offense against the liquor laws, the right to a review of said judgment of conviction. This section is not pertinent here except that it indicates that where the legislature intends to give the right to review the judgment of a justice of peace in a criminal case, it does so expressly, and does not leave such right to a mere inference.

You are therefore advised that the statutes of Ohio do not authorize the state to prosecute error to the judgment of a justice of peace acquitting the defendant in a criminal case.

Respectfully,
JOHN G. PRICE,
Attorney-General.

125.

BOARD OF PARK COMMISSIONERS OF CLEVELAND METROPOLITAN PARK DISTRICT—NOT COUNTY BOARD—EMPLOYES NOT SUBJECT TO JURISDICTION OF STATE CIVIL SERVICE COMMISSION.

The board of park commissioners of the Cleveland Metropolitan Park District is not a county board within the purview of section 2917 G. C., and the prosecuting attorney of the county is not required to furnish legal advice to such board.

Employes of the aforesaid park board are not in the service of the state, nor counties, cities or city school districts thereof within the purview of the civil service laws, and are not subject to the jurisdiction of the state civil service commission.

COLUMBUS, OHIO, March 14, 1919.

The State Civil Service Commission, Columbus, Ohio.

GENTLEMEN:—I have your communication of February 7, 1919, requesting my opinion as follows:

> "We attach hereto copy of letter under date of February 4, 1919, just received from the Board of Park Commissioners of the Cleveland Metropolitan Park District; also copy of an opinion rendered the park board by Albert Lawrence, assistant prosecuting attorney of Cuyahoga county.
>
> Your advice and opinion is respectfully requested as follows:
>
> 1. Is the board of park commissioners of the Cleveland Metropolitan Park District a county board?
>
> 2. If so, is the prosecuting attorney of Cuyahoga county required to furnish legal counsel and advice to this board under the provisions of section 2917 General Code of Ohio?
>
> 3. Are the employes of the Cleveland Metropolitan Park board subject to the jurisdiction of the State Civil Service Commission?"

With your communication you also submitted copy of a communication from the Cleveland Metropolitan Park District and copy of an opinion of Hon. Albert Lawrence, assistant prosecuting attorney of Cuyahoga county, Ohio, with reference to the questions involved in your inquiry.

Considering your questions in the order in which they are stated, attention is invited to the provisions of the act authorizing the establishment of park districts of the character involved in the case under consideration.

The act is found in 107 O. L. page 65, and provides for the creation of park dis-

tricts for the preservation of natural resources, upon application either by a majority of the resident electors of the proposed district or of the township trustees or city council or other legislative body of any township, village or city within such proposed district; the boundaries of the district are to be designated in the application and may include all or a part only of any county, but shall be so drawn as not to divide any existing township or municipality within such county, and the proposed boundaries as designated in the application are subject to amendment or change by the probate court upon the hearing of the application.

Section 5 of the act provides that upon the approval of the application by the probate judge, he shall enter an order creating the district under the name specified in the application and shall appoint three commissioners who shall constitute the board of park commissioners of the district.

Section 6 provides that the board of park commissioners shall be a body politic and corporate and shall be capable of suing and being sued, and may employ a secretary and such other employes as may be necessary in the performance of the powers conferred by the act.

Section 7 authorizes the board of park commissioners to acquire lands for the conservation of natural resources of the district and create parks, parkways and other reservations and develop and improve the same; such lands may be acquired by gift, devise, purchase or appropriation.

Other sections of the act authorize the board to assess a portion of the cost of such developments and improvements upon abutting property according to the special benefits conferred, and also to borrow money in anticipation of the collection of such special assessments; the board is also authorized to levy taxes not in excess of one-tenth of one mill upon all the taxable property in the district, and may issue notes in anticipation of the collection of such taxes.

From a consideration of the functions of the board of park commissioners, together with the territorial limits and scope of the exercise of such functions, it is to be noted that they are not such as to characterize the activity as of the class of the usual political or govermental functions of the county.

The assistant prosecuting attorney of Cuyahoga county, Mr. Lawrence, in the copy of his opinion attached to your communication, observes:

> "The character of a public office is determined by the nature of the public service to be performed in connection with the territorial limits of the authority to act in an official capacity. A consideration both of the nature of the public service to be performed by the park board and the territorial limits of the authority to act in an official capacity leads to the inevitable conclusion that members of this board are not county officials within the meaning of section 1 of article 10 of the constitution."

I concur in the foregoing observations of Mr. Lawrence, and in his conclusion that the board of park commissioners may not be considered as county officials.

Section 1 of article X of the Ohio constitution provides:

> "The general assembly shall provide by law for the election of such county and township officers as may be necessary."

Since the members of the board of park commissioners are not to be elected, it is clear that they cannot be held to be county officers without contravening the provisions of the constitution above quoted.

Both your first and second questions involve the inquiry as to whether the park commissioners constitute a "county board," In considering the similar question as to the status of the board of school examiners, my predecessor in an opinion found at page 983 of the 1916 Opinions of the Attorney-General, said:

"The prosecuting attorney is not only made the legal adviser of all county officers, but of all county boards as well. If, then, it be determined that the board of school examiners is a county board, the prosecuting attorney is by the terms of said section 7811 G. C., supra, unquestionably, by virtue of his office, the legal adviser of such board.

While the board in question is specifically designated a 'county board' by the terms of the statute under which the same was created, that, of itself, is not conclusive of the question whether it is a 'county board' in contemplation of section 2917 G. C., supra.

Since the incumbent of an appointive position may not be a county officer, we are confronted with the question: May there be, within the terms of section 2917 G. C., supra, a county board, the members of which are not county officers?

It was held in Opinion No. 336, under date of May 6, 1915, found at page 664, of the opinions of the attorney-general for the year 1915, and also in opinion No. 1615, addressed to Hon. J. W. Watts, prosecuting attorney, under date of May 24, 1916, that the county board of education, since its members were not elected and therefore not county officers, was not a county board within the terms of section 2917 G. C.

This rule, it would seem, must be equally and as clearly applicable to the county board of school examiners. I am, therefore, of the opinion, in answer to your inquiry, that the prosecuting attorney is not, by the provisions of section 2917 G. C., made the legal adviser of the county board of school examiners."

In opinion No. 336, found at page 664 of the Attorney-General's Opinions for the year 1915, referred to in the opinion just quoted, it was said:

"The members of the county board of education are not county officers, and the said board is not a county board within the meaning of the provisions of section 2917 G. C., as limited by the above provision of the constitution, and this section has, therefore, no application to a county board of education. * * *

The authority of the local board, in the case above referred to, to employ counsel other than the prosecuting attorney to represent it, provided it has sufficient funds in its treasury available for such purposes, is clear. * *"

In considering the authority of the board of directors of the county agricultural society to employ counsel, my predecessor in an opinion found at page 1459 of the Reports of the Attorney-General for the year 1913, said:

"Inasmuch as the directors of the county agricultural society are not county officers and said board of directors is not a county board, within the meaning of the provisions of section 2917 G. C., the prosecuting attorney is neither required nor authorized to act as the legal advisor of said directors."

No stronger reasons are perceived for holding the board of park commissioners in question to be county officers or to constitute a county board than might be suggested in the case of the Board of School Examiners, the Board of Education or the Board of Directors of the Agricultural Association of the county, and I am clearly of the opinion that the board of directors of the Cleveland Metropolitan Park District are not to be considered as a county board within the purview of the statute relating to the duties of the prosecuting attorney as adviser of the county officers and boards, which section is as follows:

"Section 2917. The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards, and any of them may require of him written opinions or instructions in matter connected with their official duties * * * and no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve."

It therefore follows that your first and second questions must be answered in the negative.

Your third inquiry involves a consideration of the provisions of the civil service law, and in my opinion is determined by the provisions of sub-division (1) of section 486-1, which is as follows:

"The term 'civil service' includes all offices and positions in the service of the state and the counties, cities and city school districts thereof."

By the provisions of the Act under which the Cleveland Metropolitan Park District was created, the park district is constituted a disti ct sub-division of the state for the exercise of the particular governmental functions provided in the Act, and the board of commissioners of such district is a body politic and corporate with powers to levy taxes and assessments, issue bonds and exercise generally the functions for which the district may be established.

While the employes or appointees of the board of park commissioners may be said to hold positions within the state, or under the general authority of the state, yet in the sense in which the language is used in the civil service laws, such employes are not in the service of the state in the more limited sense in which it is used as in contradistinction with the counties, cities and city school districts, all of which are sub-divisions thereof.

From which observation it is concluded that the enumeration of the particular departments or divisions of the state government as set forth in the first section of the civil service law, supra, as embraced within the civil service is exclusive."

In considering the application of the provisions of the civil service law to employes of a village school district, my predecessor in an opinion found at page 1186 of the Opinions of the Attorney-General for the year 1916, quoting that section of the civil service law, said:

" 'The term "civil service" includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof.'

This paragrpah specifies what offices, positions and employments are included in the civil service law of the state and it is exclusive. It will be observed that it does not include offices or positions in villages or village school districts. It follows, therefore, that the position held by the janitor named in you inquiry is not within the operation of the civil service law, and said janitor is not entitled to its protection or to hold his position under any of its provisions. * * *"

Again, considering the application of the civil service laws to the county school examiners, this department in an opinion found at page 1301 of the Annual Report of the Attorney-General for 1914, said:

"The civil service act applies only to city school districts. It does not apply to village, rural or county school districts * * *. The county school examiners are not, therefore, subject to the civil service act."

From the foregoing observations it follows that since the officers of the park district are neither county nor state officers, but constitute a distinct agency in the administration of the functions of a special sub-division of the state for particular purposes, I conclude that they are not to be considered as in the service of the state or the counties, cities or city school districts thereof, and, therefore, are not subject to the provisions of the civil service law, nor the jurisdiction of the state civil service commission.

Respectfully,
JOHN G. PRICE,
Attorney-General.

126.

THE WORDS "TENTATIVE APPORTIONMENT" IN SECTION 1214 G. C. CONSTRUED.

The words "tentative apportionment" as used in section 1214 G. C. contemplate the setting forth in dollars and cents of the amount proposed to be assessed against each tract within the zone or district determined upon for assessment purposes.

COLUMBUS, OHIO, March 15, 1919.

HON. LLOYD S. LEECH, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Attention has been given to your letter of March 6, 1919, wherein you submit the following:

> "The question has arisen in connection with the issuing of certain road bonds for this county, as to what construction is to be placed upon that part of section 1214, as found in the Road Laws of Ohio, 1917, which reads as follows:
>
> 'The county commissioners or township trustees upon whose application the improvement is made, shall cause the county surveyor to make a tentative apportionment of the amount to be paid by the owners of the property specially assessed, which apportionment shall be made according to the benefits accruing to the land so located.'
>
> The point in question is, what construction is to be placed upon the word 'tentative.' Does it mean that the surveyor is to make his apportionment in the form of a certain per cent of the costs, or does it mean that he is to make the apportionment against each property holder in the tax zone, in dollars and cents, according to his estimate for the entire contract."

Said section 1214 G. C. reads as follows:

> "Except as otherwise provided in this chapter, the county shall pay twenty-five per cent of all cost and expense of the improvement. Fifteen per cent of the cost and expense of such improvement, except the cost and expenses of bridges and culverts, shall be apportioned to the township or townships in which such road is located. If the improvement lies in two or more townships the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township. Ten per cent of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the prop-

erty abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent of the valuation of such abutting property for the purposes of taxation. Provided, however, that the county commissioners by a resolution adopted by unanimous vote may increase the per cent of the cost and expense of the improvement to be specially assessed and may order that all or any part of the cost and expense of the improvement contributed by the county and the interested township or townships be assessed against the property abutting on the improvement; and provided further, that the county commissioners by a resolution passed by unanimous vote may make the assessment of ten per cent or more, as the case may be, of the cost and expense of improvement against the real estate within one-half mile of either side of the improvement or against the real estate within one mile of either side of the improvement. Township trustees shall have the same power to increase the per cent. to be specially assessed and to change the assessment area where the improvement is made on their application. The county commissioners or township trustees upon whose application the improvement is made shall cause the county surveyor to make a tentative apportionment of the amount to be paid by the owners of the property specially assessed which apportionment shall be made according to the benefits accruing to the land so located. The county surveyor shall file such apportionment with the county commissioners or township trustees for the inspection of the persons interested. Before adopting the estimate so made and reported the commissioners or trustees shall publish once each week for two consecutive weeks in some newspaper published in the county and of general circulation in the township where the improvement is located notice that such estimated assessment has been made and that the same is on file in the offices of the county commissioners or with the township trustees and the date when objection, if any, will be heard to such assessment. If any owner of property affected thereby desires to make objections he may file his objection to said assessment in writing with the county commissioners or township trustees, as the case may be, before the time for said hearing. If any objections are filed the county commissioners or township trustees shall hear the same and act as an equalizing board and they may change said assessments if in their opinion any change is necessary to make the same just and equitable, and such commissioners or trustees shall approve and confirm said assessments as reported by the surveyor or modified by them. Such assessments when so approved and confirmed shall be a lien on the land chargeable therewith."

Doubtless your inquiry arises from the fact that said section contains references both to the percentage of cost and expense of the improvement to be assessed against adjacent lands, and to the share of such percentage to be borne by each parcel of real estate within the tax zone.

However, is not a conclusive answer to your inquiry furnished in the last two sentences of said section 1214? The substance of these two sentences is that the county commissioners or township trustees, as the case may be, shall act as an equalizing board in the hearing of objections to the estimated assessment and shall make changes therein if in their opinion any change is necessary to make the assessment just and equitable, whereupon th assessment as reported by the surveyor or modified by the commissioners or trustees is to be approved and confirmed. Then, "*such assessments*, when so approved and confirmed, shall be *a lien on the land chargeable therewith.*" Since the idea of a lien embraces the further idea that the amount secured by the lien shall at some stage be definitely known, and since by the last two

sentences of section 1214 the amount which the lien is to secure is determined by the "tentative" apportionment or assessment made by the surveyor as finally acted on by the commissioners or trustees, it follows that the words "tentative apportionment" as used in said section mean a statement in dollars and cents of the asesessment proposed to be made against each tract in the tax zone.

If the words "tentative apportionment" are construed as above stated, section 1214 is found to contain a complete plan for making the assessment. First, attention is given to the extent of the tax zone and the percentage of the cost of the improvement to be specially assessed within such zone. These matters having been determined in accordance with said section 1214, the county surveyor on the order of the county commissioners or township trustees upon whose application the improvement was made, proceeds to apportion such percentage to the several tracts in the taxing zone, according to benefits to such tracts. This apportionment—the "tentative apportionment"—is then filed, showing in dollars and cents the amount proposed to be assessed against each tract; whereupon the newspaper notice is given showing that the list of proposed assessments is on file and that on a given date objections, if any, will be heard. Then, if objections are filed, a hearing is had, and the apportionment put into its final form, as compared with its previous "tentative" form; and when it has been approved and confirmed in its final form, the assessments which it sets forth become a lien on the several tracts which it specifies.

Therefore, specific answer to your inquiry may be made by the statement that the words "tentative apportionment" as used in section 1214 contemplate the setting forth in dollars and cents of the amount proposed to be assessed against each tract within the zone or district determined upon for assessment purposes.

Respectfully,
JOHN G. PRICE,
Attorney-General.

127.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN WAYNE AND MONTGOMERY COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, March 17, 1919.

128.

SECRETARY OF STATE—AUTOMOBILES—NO AUTHORITY FOR DUPLICATE REGISTRATION CERTIFICATE OR FOR ISSUANCE DUPLICATE SET OF NUMBER PLATES.

There is no authority in section 6298 G. C., relative to registration of automobiles, for the issuance of a duplicate registration certificate or for the issuance of a duplicate set of number plates, and collection of a fee of one dollar therefor.

COLUMBUS, OHIO, March 17, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter dated March 5, 1919, as follows:

> "I would like an opinion from your department regarding the issuing of duplicate sets of automobile licenses to an individual owner.
>
> We are receiving numerous reques's for duplicate licenses on the ground that the original licenses have been lost and these owners expect us to issue duplicates for the fee of One Dollar."

Section 6298 G. C. (107 O. L., 545) is pertinent to your inquiry and in part is as follows:

> "Upon the filing of such application * * * the secretary of state shall assign to such motor vehicles a distinctive number, and, * * * issue and deliver to the owner in such manner as the secretary of state may select a certificate of registration, in such form as the secretary of state shall prescribe, and two number plates, duplicates of each other, * * *."

This section seems to have had a rather active career, having been amended in 103 O. L., p. 764, supplemented in 104 O. L., 248, and amended in 107 O. L., 545, supra. Said statute, during the course of its various amendments, and in its present form, makes no provision for the issuance of a duplicate certificate of registration.

The only provision relative to a second registration certificate (without reference to section 6301, 103 O. L., 765, referring to manufacturers' applications) that I have been able to find, wherein a fee of one dollar is provided for, is section 6294-1, 105 O. L., 197, which provides that where the owner of a registered motor vehicle has transferred the same, the original owner shall remove the number plates upon such transfer and that should he make application for the registration of another motor vehicle within thirty days after such transfer and cancellation of the original license, he may obtain a new certificate by the payment of a fee of one dollar for the unexpired period of the original registration. Obviously this provision applies only to cases of transferring ownership of a registered motor vehicle.

In view of the terms of the present laws applicable to the registration of such motor vehicles, it is concluded that there is no provision in law authorizing the issuance either of duplicate registration certificates or duplicate number plates.

It is noted that your letter refers to "automobile licenses" but it is assumed that by such terms you mean the registration certificate or number plates provided for in section 6298 G. C., supra.

Respectfully,
JOHN G. PRICE,
Attorney-General.

129.

ROADS AND HIGHWAYS—LEVY UNDER SECTION 3298-44 G. C. IS OUTSIDE OF TEN MILL LIMITATION OF SECTION 5649-2 G. C.

The levy authorized by section 3298-44 *G. C. is outside of the ten mill limitation of section* 5649-2 *G. C.*

COLUMBUS, OHIO, March 17, 1919.

HON. CHESTER A. MECK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your letter of March 5, 1919, requesting my opinion as follows:

> "Section 3298-44 of the General Code, which pertains to my question, reads as follows:
>
> 'For the purpose of providing by taxation a fund for the payment of the road district's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, resurfacing or improving roads and under the provisions of sections 3298-25 to 3298-53, inclusive, of the General Code, the board of trustees of any township containing a road district is hereby authorized to levy annually a tax not exceeding three mills upon each dollar of the taxable property of said district. Said levy shall be *subject only to the limitation on the combined maximum rate for all taxes now in force.* * * *.'
>
> (1) Does the phrase 'subject only to the limitation on the combined maximum rate for all taxes now in force,' refer to the 10 mill or 15 mill limitation?
>
> The Cass Highway Law provided in section 3298-9, to-wit, section 68 of that law, that before bonds could be issued to improve roads, the question must be submitted to a vote of the people. This seems to have been eliminated in the 1917 Road Law.
>
> (2) If question number one is answered that 'the 15 mill limitation is meant,' does this section mean that the 10 mill limitation can be exceeded without a vote of the people, as required by section 5649-5b of the General Code? As, for instance, the tax rate of a road district is now 9 mills, and they wish to improve roads under section 3298-44 G. C. (107 O. L.), page 89, by adding 3 mills, can this be done by a district, without a vote of the people?"

In answer to your first question you are advised that the language of section 3298-44 G. C., as quoted by you, refers to the fifteen mill limitation.

In answer to your second question you are advised that the making of the road levy provided for in section 3298-44 G. C. outside of the ten mill limit does not require a vote of the people. In this respect section 3298-44 must be regarded as an exception to the general provisions of the Smith One per cent law.

Respectfully,
JOHN G. PRICE,
Attorney-General.

130.

WHEN DISCHARGE FROM DRAFT MAY BE RECORDED—SECTION 2770 G. C. CONSTRUED.

A discharge from draft under the selective service act may be recorded under section 2770 G. C.

COLUMBUS, OHIO, March 18, 1919.

HON. JOHN L. CABLE, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of your letter dated January 31, 1919, as follows:

> "Your predecessor, Mr. McGhee, in opinion No. 1561, November 19, 1918, ruled in part that persons discharged from the draft are not entitled to have their discharge recorded under provisions of section 2770, General Code.
>
> In this county and no doubt other counties, we have cases where a person was inducted into service by the local draft board, went to camp, was administered the oath, passed the examination at camp, taken before an officer and accepted. After spending several days in camp was rejected on account of physical disability and was reexamined, obtained a discharge from draft and sent home.
>
> I am enclosing for your convenience a copy of one of these discharges.
>
> Kindly advise if a person under these circumstances is permitted to have such discharge from draft certificate recorded or not."

Section 2770 G. C., referred to in your letter, is in part as follows:

> "Upon request of any discharged soldier and presentation of his discharge, the county recorder shall record such discharge in a book to be furnished by the county commissioners for that purpose."

You also enclose a copy of one of the discharges to which you refer, which is considered as the basis of this opinion so far as the discharge is concerned. In part it is as follows:

> "Discharge from Draft.
>
> * * * * * * * * * * * * *
>
> While this certificate discharges the person named herein from his *present obligation* to serve in the army, *it does not operate as a permanent bar to his subsequent entrance* into the military service. Under section 5 of the act of May 18, 1917, all registered persons remain subject to the draft unless *exempt* or *excused* as in that act provided. Therefore, this discharge *does not excuse* the holder from obedience to the process of exemption boards."

I find it impossible to agree with my predecessor in the view described in your letter.

Aside from the fact that our statute should receive a liberal construction to effectuate the purpose of its enactment; and also aside from the fact that, as you state, discharges of the kind above abstracted have been issued both under circumstances that might raise some doubt as to the status of the person to whom issued as a "soldier," and under circumstances leaving little doubt on that score, I am satisfied that the correct view of the status of a drafted man requires the conclusion that such discharges may be recorded.

Under what had formerly been the traditional policy of this country prior to 1917, the status of a soldier was acquired by the consensual act of enlistment; that is to say, when a man enlisted he became at once a soldier, though not immediately assigned to any organized unit of the United States Army. Of course his status as such soldier was subject at all times to be defeated as it were upon a condition subsequent, in that the law and the regulations of the United States Army have always authorized discharges for physical disability or for misconduct prior to the expiration of the enlistment period. In a sense, therefore, acceptance by a recruiting officer at the time of enlistment was never an act of finality having the effect of binding the United States to treat the enlisted man as a soldier for the entire period of enlistment, or binding him to remain in the military service for that period, if he should on subsequent examination, or from causes subsequently arising, be found to be unfitted therefor.

The selective service act of 1917 was a departure from this policy and radically changed the process by which the status of soldier was created in the case of draf ed men. It proceeded upon the great principle long declared in the statutes of the United States and of the several states, that military service is an obligation of all male citizens between certain ages. It authorized the president, as commander-in-chief of the army, to enforce that obligation, by process of selection, upon enough of such citizens to meet the military emergency.

The details and practical workings of the selective service act and the regulations thereunder are well known to all. Suffice it to state, that roughly, though accurately, speaking, the local draft board, acting thereunder, took the place, so to speak, of the recruiting officer under the system of voluntary enlistment; and that the process or ceremony of induction into the military service of the United States served the same purpose as the act of enlistment under the other system. Both functions and acts pertained to the *raising* of a military force which is a step which precedes its organization in appropriate units into an army.

Thus the following terminology of section 1 of the selective draft act is suggestive:

> "* * * The President * * * is hereby authorized—
>
> First. Immediately to *raise*, organize, officer and equip * * * increments of the regular army * * *.
>
> Third. To *raise* by draft as herein provided, organize and equip an additional force of five hundred thousand *enlisted men*."

When acting under the first paragraph, it is obvious that the raising of the increments to the national army by the President would be done through voluntary enlistment; but when the President was acting under the third and other similar paragraphs of the act, he was "raising" a military force or forces by draft.

Without pursuing the analysis further, I reiterate the statement previously made, to the effect that a man inducted into the military service by draft sustains the same relation to that service as a man who has enlisted voluntarily. Indeed, he is called by the Selective Service Act an "enlisted man," though in truth his enlistment was, legally speaking, not voluntary, though doubtless in almost every instance voluntary in truth and in fact.

The phrase "enlisted man" is synonymous with "soldier." So that it is clear that an individual who was inducted into military service through the machinery of the selective draft was just as much a "soldier" as one who entered that service by enlistment; and both were just as much "soldiers" in this sense, prior to their entrance into organized units of the United States army, and even prior to their entrance into training units, as after either of these steps might have been taken.

For these reasons it is clear, I think, that a discharge from the obligations re-

sulting from the operation of the machinery of the selective service act is of the same legal effect as a discharge from a voluntary enlistment. The fact that a discharge of the first type did not prevent the further exercise of the power of the United States to exact military service from the same person is immaterial. The situation of the person so discharged in this respect is analogous to that of a person discharged from a voluntary enlistment with respect to his capacity for re-enlistment.

Your question is, therefore, answered by the statement that a discharge from draft of the kind partially quoted in this opinion is subject to recordation under section 2770 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

131.

APPROVAL OF BOND ISSUE OF CITY OF WARREN, OHIO, IN SUM OF $12,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 20, 1919.

132.

CORPORATIONS—PURPOSE CLAUSE MANUFACTURE OF NEAR BEER—MAY USE WORDS "PRODUCTS" AND "BREWING" AS PARTS OF CORPORATE NAME.

Companies incorporated for the purpose of manufacturing near beer may use the words "products" and "brewing" as parts of their corporate names.

COLUMBUS, OHIO, March 21, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of March 20, 1919, requesting my opinion as to the right of companies incorporated for the purpose of manufacturing near beer to adopt and use the names of "The Pilsener Products Company" and "The Standard Brewing Company," was duly received.

The question as to what names corporations may or may not adopt is elaborately discussed in the following authorities:

2 Fletcher, Corporations, Sec. 722;
1 Clark & Marshall, Corporations, Sec. 53;
1 Cook, Corporations, Sec. 15;
1 Thompson, Corporations, Sec. 53;
1 Machen, Corporations, Sec. 448.

and the texts are supported by court decisions cited in the foot notes.

In 2 Fletcher, Corporations, Sec. 722, the law is stated as follows:

"Unless it is otherwise provided by statute, corporations may choose

any name they see fit, however strange, uncuphonious or unrhetorical it may be, provided it is not one identical with or prejudicially similar to a name which has previously been adopted or is being used by another corporation as its corporate name, etc."

In 1 Clark & Marshall, Corporation, section 53, it is held:

"Unless it is otherwise provided in the statute under which a corporation is formed, or some other statute, the members or officers of a corporation, or proposed corporation, may select any name they may see fit."

And in 1 Cook, Corporations, section 15, the decisions are summed up as follows:

"The corporate name is usually the choice of the incorporators, and is specified in the creating instrument. * * * The statutes frequently limit the choice of the corporate name. A corporation may take the name of an individual or any other name, if the statutes do not forbid."

The only Ohio statutes on this subject applicable to corporations generally, such as companies of the class referred to in your letter, are sections 8625 and 8628 G. C., the former of which provides that corporate names shall begin with the word "The" and end with the word "Company," and the latter of which provides that:

"The secretary of state shall not file or record any articles of incorporation wherein the corporate name is likely to mislead the public as to the nature or purpose of the business its charter authorizes, nor if such name is that of an existing corporation, or so similar thereto as to be likely to mislead the public, unless the written consent of the existing corporation, signed by its president and secretary, be filed with such articles."

As I understand it, you desire my opinion as to whether or not the names above mentioned are likely to mislead the public as to the nature or purpose of the business authorized by the companies' charter, within the meaning of the first clause of section 8628 G. C.

The word "product" was judicially defined in White v. Barney, 43 Fed. Rep. 474, at page 477, as follows:

"The word 'product,' however, imports an article which is made of something, and which, when made, has characteristics which are apparent to the senses."

and in Elder v. State, 162 Ala., 41, 52, the same definition is given, with 6 Words & Phrases, p. 5653, cited in support thereof.

And the word is also defined in Webster's dictionary as follows:

"That which is produced, brought forth, effected, or generated; production; yield, result; effect; fruit; whether of growth or labor, either physical or intellectual; as the product of land; the products of the season; the product of manufacture, of commerce or of art, etc."

The word "brew" is defined by Webster as follows:

"To boil or soothe.

2. To prepare, as a liquor, from malt and hops, or from other materials, by stooping, boiling and fermentation.

* * * * * * * * * * * * *

"1. To perform the business of brewing or making beer.

* * * * * * * * * * * * *

"The mixture formed by brewing; that which is brewed,"

and the word "brewing" is also defined by the same authority, viz.:

"The act or process of preparing liquors from malt and hops, etc.
"A mixing together."

While the words "brew" and brewing" are commonly used in connection with the manufacture of intoxicating liquor, yet that is not its only application, for the definitions above quoted clearly show that the word has a broader meaning, and includes products other than intoxicating liquors.

As near beer is an article "made of something," and has "characteristics which are apparent to the senses," and, under the express terms of the companies' charters, it is to be manufactured, and as the manufacture or preparation of an article is included in the definitions of "product" and "brew," and the process of manufacturing is at least kindred to "brewing," I am of the opinion that the corporate names mentioned in your letter are not likely to mislead the public as to the nature or purpose of the business authorized by the charters.

Respectfully,
JOHN G. PRICE,
Attorney-General.

133.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN ASHTABULA, SCIOTO, GALLIA AND GREENE COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, March 22, 1919.

134.

DISAPPROVAL OF BOND ISSUE OF CLEVELAND HEIGHTS IN SUM OF $25,000.00.

COLUMBUS, OHIO, March 24, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

Re bonds of Cleveland Heights in the amount of $25,000.00 "for the purpose of resurfacing and repairing or improving any existing street or streets, as well as other public highways in the village of Cleveland Heights, Ohio."

GENTLEMEN:—I have examined the transcript of proceedings submitted to me in connection with the above bond issue and decline to approve the same for the reason that the resolution authorizing the issuance of said bonds does not specify the particular street or streets for the improvement or repair of which it is proposed to issue bonds. Said bonds are issued under authority of paragraph 22 of section 3939 G. C. (107 O. L. 553).

The fourth branch of the syllabus in the case of Heffner v. City, 75 O. S. 413, is as follows:

> "A city is not authorized to issue bonds to provide a fund from which to pay its part of the cost of improvements that may from time to time be made, but it may, under section 53 of the Municipal Code of 1902, section 1536-213, Revised Statutes, or under section 2835, Revised Statutes, issue bonds to pay its part of the cost of specific improvements."

Section 2835 of the Revised Statutes, above referred to, is now section 3939, General Code.

In view of the position taken by the supreme court in the above entitled case, I do not believe that a municipality is authorized, under the provisions of section 3939 G. C., to issue bonds for the purpose of improving or repairing streets generally, but that it must, either in a preliminary resolution of necessity or in the ordinance authorizing the issuance of said bonds, specify the particular streets which it intends to improve.

I therefore decline to approve the validity of said bond issue and am returning the transcript of proceedings, with a copy of this opinion, to the clerk of the village of Cleveland Heights.

Respectfully,
JOHN G. PRICE,
Attorney-General.

135.

APPROVAL OF BOND ISSUE OF WASHINGTON TOWNSHIP RURAL SCHOOL DISTRICT, LUCAS COUNTY, IN SUM OF $200,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 24, 1919.

136.

APPROVAL OF OIL AND GAS LEASE TO CARRIE W. OKEY OF TRACT OF LAND IN CITY OF MARIETTA, OHIO.

COLUMBUS, OHIO, March 24, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of March 20, 1919, addressed to Hon. James M. Cox, Governor of Ohio, and myself, requesting our approval of an oil and gas lease, as follows:

> "Lease to Carrie W. Okey, dated March 18, 1919, and covering a tract

of land situate in the county of Washington, township of Marietta, city of Marietta and state of Ohio, and being described as follows:

Situated in the city of Marietta, county of Washington, state of Ohio, section 29, township 2, range 8, being parts of city lots 856 and 872 in square 55, lying north of a line marked at present by a hedge fence extending from a point in the westerly line of lot 839, said square, forty-eight (48) feet from the southeasterly corner thereof to a point in the easterly line of said lot 872, eighty-two (82) feet from the south-easterly corner thereof.

I have carefully examined said lease and the same meets with my approval. I am, therefore, returning same properly endorsed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

137.

APPROVAL OF ABSTRACT OF TITLE OF LOT No. 83 IN WOOD BROWN PLACE, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, March 25, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You recently submitted to this department abstract of title covering the following described premises:

"Being known as lot No. eighty-three (83) in Wood Brown Place, being a subdivision made by the manufacturers' committee of the board of trade of the city of Columbus, Ohio, as said lot is numbered and delineated on the recorded plat thereof, in plat book 5, pages 196-7 of the records of Franklin county, Ohio."

With the said abstract you also submitted proposed deeds for the conveyance of said premises to Carl E. Myers and finally to the state of Ohio, which said deeds I find to be in proper form and, when duly executed, stamped and delivered, sufficient for the conveyance of title as now held by Charles T. Anderson and wife.

Upon examination of the abstract dated March 12, 1919, I find the title to the premises described to be in Charles T. Anderson and that there are certain clouds and liens against said premises as follows:

An unsatisfied mortgage in the principal sum of $400.00, dated May 28, 1906, to the Central Ohio Building & Loan Company, and appearing as a matter of record in Vol. 351, p. 160, Mort. Rec.

Taxes for the last half of the year 1918, falling due in June, 1919, in the amount of $6.82, which, however, by the proposed deeds, are to be assumed by the grantees and therefore should be taken into consideration as against the purchase price.

The taxes payable June 20, 1906, in the amount of 39 cents, are not shown to have been paid, but it is considered only such taxes as are carried as current upon the duplicate at this time are to be regarded as constituting a lien, in the absence of any showing of a forfeiture or tax sale on account of delinquent taxes.

I advise that the matter of the $400.00 mortgage of the Central Ohio Building & Loan Company be investigated and the records cleared if same has been satisfied, and that, subject to said mortgage and the taxes falling due in June, 1919, the title to said premises was in said Charles T. Anderson at the date of said abstract, and the proposed deeds, when properly executed, would convey good title to the state of Ohio.

Respectfully,
JOHN G. PRICE,
Attorney-General.

138.

CORPORATION NOT FOR PROFIT—PURPOSE CLAUSE DISTRIBUTING ELECTRIC CURRENT TO ITS MEMBERS—LAWFUL—TERMINI OF IMPROVEMENT MUST BE STATED WITH REASONABLE CERTAINTY.

1. *The incorporation of a company not for profit for the purpose of distributing electric current to its members, is not prohibited by the laws of Ohio.*

2. *When a company is incorporated for a purpose which includes the construction of an improvement not to be located at a single place, the termini of the improvement must be stated with reasonable certainty.*

COLUMBUS, OHIO, March 25, 1919

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of March 12, 1919, enclosing proposed articles of incorporation of The Lyms Mutual Light and Power Company, and requesting my opinion as to whether or not the company can be incorporated not for profit, and if so, the amount of the filing fee, was duly received.

1. I am unable to find any statute prohibiting the incorporation of such companies not for profit. On the contrary, the general corporation chapter of the General Code authorizes the incorporation of companies not for profit as well as for profit, subject to the restriction that companies cannot be formed for an unlawful purpose or for carrying on professional business. There is also to be found in the public utilities law legislative recognition of the right to organize electric light companies not for profit. See section 614-2 G. C. which defines an electric light company as any corporation engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state; and section 614-2a G. C., which provides that the term "public utility" means and includes every company defined in section 614-2 G. C., and expressly excepts

> "Such public utilities as operate their utilities not for profit."

2. The amount of the filing fee to be charged and collected by your department for filing the proposed articles of incorporation would be $10.00.

3. The only objection I have to the proposed articles is with respect to the provision which is evidently intended to fix the termini of the proposed improvement, viz.:

> "Constructing, owning, operating and maintaining poles and wires and other equipment for the distribution of said electric current."

This provision is too indefinite. While it is true that the proposed articles confine the distribution of electric current to certain townships, and the poles and wires to be constructed are to be used for such distribution, nevertheless the language employed is broad enough to include poles and wires from power stations and points located without the townships named, and from which the company's supply of electric current may be furnished.

I suggest therefore that the articles be returned with the request that the termini of the improvement be made definite and certain in this respect, and that you ask the attention of the company's attorney to the cases of Callender v. Railroad Co., 11 O. S., 239 et seq.; Warner v. Callender, 20 O. S., 190, and State v. Railroad Co. 82 O. S., 461, 462, all of which will prove helpful in redrafting the articles.

Respectfully,
JOHN G. PRICE,
Attorney-General.

139.

APPROVAL OF BOND ISSUE OF JACKSON TOWNSHIP, GUERNSEY COUNTY, OHIO, IN SUM OF $36,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 26, 1919.

141.

APPROVAL OF BOND ISSUE OF MARION COUNTY IN SUM OF $130,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 26, 1919.

142.

APPROVAL OF BOND ISSUE OF VILLAGE OF ORRVILLE, OHIO, IN SUM OF $36,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 26, 1919.

143.

FEES—VILLAGE MARSHALS—GUARDING, SAFE-KEEPING OR CONDUCTING PERSONS ARRESTED BY THEM IN MAYOR'S OR POLICE COURTS.

Section 4387 G. C. fixes at twenty cents a fee which is legally payable to village marshals for guarding, safe-keeping or conducting into the mayor's or police court any person arrested by them or by their deputies or any other officer.

COLUMBUS, OHIO, March 26, 1919.

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

DEAR SIRS:—I have your letter of recent date reading as follows:

> "We respectfully request your written opinion upon the following matter:
> We are enclosing you herewith copy of circular No. 347 issued by this department under date of September 19, 1917, and are referring you to section 4387, G. C.
> Question:
> 1. Is the fee of 20 cents mentioned for guarding, safe-keeping or conducting into court legally payable in view of the court decision?
> 2. In view of the language used in this section is this fee fixed at 20 cents?"

Section 4387 G. C., to which you refer, relates to the powers and fees of the marshal of a village, and reads as follows:

> "In the discharge of his proper duties, he shall have like powers, be subject to like responsibilities and shall receive the same fees as sheriffs and constables in similar cases, for services actually performed by himself or his deputies and such additional compensation as the council prescribes. In no case shall he receive any fees or compensation for services rendered by any watchman or any other officer, nor shall he receive for guarding, safekeeping or conducting into the mayor's or police court any person arrested by himself or deputies or by any other officer a greater compensation than twenty cents."

The court decision to which your letter refers and which is set out in your said circular, is that rendered in the case of Haserodt v. State, ex rel, 27 O. C. A. 225. The syllabus of the case is as follows:

> "Sections 4581 and 3016, General Code, do not fix definitely the amount of compensation that may be allowed a chief of police for services in state criminal cases in a police court, and no fees may be allowed said officer for such services under favor of these sections."

The sections construed in the Haserodt case read as follows:
Section 4581 G. C.:

> "Other fees in the police court shall be the same in state cases as are allowed in the probate court, or before justices of the peace, in like cases, and in cases for violation of ordinances such fees as the council, by ordinance, prescribes, not exceeding the fees for like services in state cases."

Section 3016 C. C.:

"In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the judgment of conviction, so that such costs may be paid to the county from the state treasury, in all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

In the case of State ex rel. v. Kleinhoffer, 92 O. S. 163, the supreme court considered the right of a humane officer to fees for services rendered by him in cases prosecuted before a justice of the peace, construing section 10076, G. C., which reads:

"For this service and for all services rendered in carrying out the provisions of this chapter, such officers and the officers and agents of the association, shall be allowed and paid such fees as they are allowed for like services in other cases, which must be charged as costs,and reimbursed to the society by the person convicted."

The court said:

"* * * If the pronoun 'they,' as used in section 10076 could be held to refer to officers other than humane officers—for example, to a sheriff or constable—it would be impossible to determine to which it does refer. *And it is important and necessary that this be known, for the fees of a sheriff and those of a constable as fixed by sections* 2845 *and* 3347, *respectively, are different.*"

(Italics mine.)

Of the language just quoted, the court in the Haserodt case says (p. 229):

"We think this language of the court is equivalent to a holding that if the section there under condiseration could be construed as providing that humane officers should receive *the same fees as a sheriff or constable for like services, it would be inoperative because of its indefiniteness.*"

(Italics mine.)

Relative to the provision of section 4534, G. C. that

" * * * The fees of the chief of police * * * shall be the same as those allowed sheriffs and constables in similar cases,"

the court, in the Haserodt case, also said (p. 230):

"While it is not contended here that any authority may be found in the provisions of section 4534 for the allowance of the fees in question, yet it is well to observe that this section is *subject to the same infirmity* and nothing may be claimed for a chief of police under its favor because of the *indefiniteness and uncertainty* of its provisions in respect to the amount that may be allowed said officer in state cases."

(Italics mine.)

Relative to the fees of the village marshal, the words of section 4387 G. C. are: "* * * and shall receive the same fees as sheriffs and constables in similar cases." Under the decisions above cited, that part of section 4387 G. C. which has just

been quoted, which undertakes to compensate the village marshal by the payment to him of the same fees as are allowed "sheriffs and constables in similar cases," would seem to be inoperative because of uncertainty.

However, the above noted uncertainty does not prevent the marshal from receiving fees, the payment of which may be authorized with sufficient definiteness by other statutory provisions. In opinion number 823, 1917 Opinions of Attorney General, p. 2207, this department construed section 13436 G. C., which reads:

> "In pursuing or arresting a defendant and in subpoenaing the witnesses in such prosecutions, the constable, chief of police, marshal or other court officer shall have like jurisdiction and power as the *sheriff* in criminal cases in the common pleas court, and he shall receive like fees therefor."

In said opinion it was held that (page 2210):

> "* * * this provision of the statute, allowing the constable, chief of police, marshal and other court officers, fees in the state cases enumerated in section 13423, G. C. * * * is not open to the objection found by the court in the case of Haserodt v. State, supra, since the provision of section 13436 is definite and certain in that the fees there allowed are to be the same as received by the sheriff in criminal cases in the common pleas court."

The question before us, then, is this: Is the language in section 4387 G. C., to-wit:

> "* * * nor shall he receive for guarding, safe-keeping or conducting into the mayor's or police court any person arrested by himself or deputies or by any other officer *a greater compensation than twenty cents.*"

sufficiently definite to authorize the payment to the marshal of a fee of twenty cents for the services mentioned?

The words "nor shall he receive * * * a greater compensation than twenty cents" are susceptible of two meanings. First, that for the service of guarding, safe keeping, etc., the marshal is to get a *sliding or variable fee*, that is, one ranging from one cent to, but not greater than, twenty cents—the precise amount being fixed by the magistrate preparing the cost bill.

One need only to state this view to demonstrate its legal invalidity. All the objections to uncertainty mentioned by the Haserodt and Kleinhoffer cases, supra, and others besides, are available to render such a view untenable.

The second meaning of which the words "nor shall he receive * * * a greater compensation than twenty cents" is susceptible is this: Section 4387 G. C. shows an intent by the legislature that the marshal shall receive the same fees as sheriffs and constables in similar cases, but as to the service of "guarding, safe-keeping or conducting," etc., the marshal is not to have the *higher* fees given sheriffs and constables for such services, but, on the contrary, said marshal is to receive a compensation therefor no greater than twenty cents. That is, twenty cents and no more.

Whether there is any merit in this second meaning depends, of course, on

(a) whether sheriffs or constables receive any fees for "guarding, safe-keeping or conducting," etc., and if so,

(b) whether such fees are higher than twenty cents.

As to constables, I find no mention in section 3347 G. C. (the statute fixing the fees of constables) of any compensation for the kind of services now being considered. Nor do I know of any other statute giving a fee to the constable for said service.

As to sheriffs, I find in section 2845, G. C. no such words as "for guarding, safe-keeping or conducting * * * any person arrested * * *." I do, however, find in said section this language:

> "Section 2845. * * * jail fees for *receiving*, discharging or surrendering each prisoner, to be charged but once in each case, fifty cents; *taking a prisoner before a judge* or court per day, seventy-five cents."

In my judgment, the services just above referred to are the same as, or at least include, the services of "guarding, safe-keeping or conducting into the mayor's or police court any person arrested * * *," mentioned in section 4387, G. C.

When section 2845 G. C. and section 4387 G. C. are read together, the situation is this:

For receiving the prisoner, the sheriff is to get fifty cents; the marshal, no greater compensation than twenty cents. For conducting the prisoner into court, the sheriff is to get seventy-five cents; the marshal, no greater compensation than twenty cents.

Thus read, I see no uncertainty surrounding the payment of the twenty cents referred to in your letter, and specifically referring to your two questions I am of the opinion:

(1) That the fee of twenty cents mentioned in section 4387 G. C. for guarding, safe-keeping or conducting into court, is legally payable.

(2) That the fee mentioned in said section for said service of guarding, safe-keeping or conducting into court is fixed at twenty cents.

Respectfully yours,
JOHN G. PRICE,
Attorney-General.

144.

BANKS AND BANKING—LIMITATION AS TO AMOUNT ON DEPOSIT BANK CAN HAVE INCLUDING STATE AND INSURANCE FUNDS—NOT MORE THAN PAID IN CAPITAL STOCK—ALSO $300,000.00 LIMITATION FOR INACTIVE DEPOSIT.

No bank may have on deposit at any one time more state funds including insurance funds than its paid in capital stock, and in no event more than $300,000.00 *as an inactive deposit.*

COLUMBUS, OHIO, March 26, 1919.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—You request the advice of this department upon the following question:

> "Section 12 (Section 330-1 G. C.) No bank or trust company shall have on deposit at any one time more than its paid in capital stock and in no event more than three hundred thousand dollars ($300,000) as an inactive deposit.

WORKMEN'S COMPENSATION ACT.

Section 1065-7, General Code. The treasurer of State is hereby author-

ized to deposit any portion of the state insurance fund not needed for immediate use, in the same manner and subject to all the provisions of the law with respect to the deposit of state funds by such treasurer: and all interest earned by such portion of the state insurance fund as may be deposited by the state treasurer in pursuance of authority herein given, shall be collected by him and placed to the credit of such fund. (Ohio Laws, Vol. 103, page 76, section 10.)

Does this mean the State Treasurer can only deposit with bank successfully bidding for state and insurance funds, the amount of their capital stock of both funds combined, or can the treasurer deposit the amount of a bank's capital of both state and insurance funds? For illustration, if a bank has a capital of $125,000 and bids for $125,000 of state funds and $215,000 of state insurance funds, and both bids were high enough to class them as successful bidders, would the treasurer of state be permitted, under this law, to deposit with such bank $125,000 of state funds and $125,000 of insurance funds? In such a case it would have a combined deposit of $250,000, although its paid up capital would be put $125,000."

I find that this question has been considered by this department, and that on April 29, 1914, the then Attorney-General advised the then treasurer of state as follows:

"No bank or trust company is authorized to receive such moneys in the event that the same, either alone or in addition to other state moneys on deposit with such bank or trust company, exceeds in amount the limitations of this section. (Referring to section 330-1 G. C.)"

This statement is somewhat ambiguous, but that it was evidently intended as an answer to your question is indicated by the head notes of the opinion as published in the Annual Report of the Attorney-General for the year 1914, Vol. 1., page 594, as follows:

"No bank shall have on deposit in the aggregate more than its paid-in capital stock, and in no event more than $300,000 as an inactive deposit whether the same be made up of state funds or insurance or both."

With this holding I agree. It is specifically provided in section 1065-7 that deposits of the state insurance fund to be made thereunder shall be "subject to all the provisions of law *with respect to the deposit of state funds* by such treasurer." In other words, the effect of this provision is to constitute the state insurance fund a state fund though of a distinct character for the purpose of the state depository law. The limitation of section 330-1 is applicable to all state funds.

Having regard for the manifest policy embraced in this section, no other conclusion is possible than that reached by my predecessor.

Respectfully,
JOHN G. PRICE,
Attorney-General.

145.

APPROVAL OF BOND ISSUE OF KENMORE VILLAGE SCHOOL DISTRICT, SUMMIT COUNTY, IN SUM OF $140,000.00—TAX LIMITATION OF DISTRICT DISCUSSED.

COLUMBUS, OHIO, March 26, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

> "Re bonds of Kenmore village school district in the sum of $140,000.00 for the purpose of purchasing a site and erecting, furnishing and equipping a grade school building, as follows: 5 bonds of $20,000, 5 bonds of $5,000, and 1 bond of $15,000."

GENTLEMEN:—I have examined the transcript of the proceedings of the board of education and other officers of Kenmore village school district, Summit county, Ohio, relating to the above bond issue and find the same regular and in compliance with the provisions of the General Code. I am of the opinion that said bonds, drawn in accordance with the bond form submitted, will, upon delivery, constitute valid and binding obligations of said school district.

In approving the legality of this bond issue I deem it my duty to call your attention to the financial statement attached to the transcript which reveals a total tax duplicate in said district of $9,700,960 and a total tax rate of 15.2 mills, of which 7.1 mills is for school purposes. There is nothing in the financial statement in the transcript to indicate that there is included in this levy for school purposes of 7.1 mills any levy for interest or sinking fund for the bond issue under consideration. If a further levy must be made to take care of the interest and create a sinking fund for the payment of the bond issue under consideration, the total school levy will of necessity be considerably increased. The district has a total bonded indebtedness of $326,500, of which amount three issues aggregating $275,000 were doubtless issued by a vote of the electors.

From the showing made in the transcript, a part of which is cited above, I am unable to understand how the school district expects to take care of its bonded indebtedness and at the same time properly operate the schools already in existence. So far, however, as the strict legality of the bond issue is concerned that question is not material in view of the provisions of section 5649-1 of the General Code, which reads as follows:

> "In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes, for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

Under the provisions of this section the board of education must first provide for and pay the interest on the principal of the bond issue under consideration before any levy is made for operating expenses of its schools. Therefore, unless the tax duplicate of the district is materially increased, or the tax limitations now in existence are removed, it would seem inevitable that the district will soon be in the position of having school buildings for the accommodation of its pupils but insufficient funds for their operation and maintenance.

Respectfully,
JOHN G. PRICE,
Attorney-General.

146.

APPROVAL OF LEASE FOR FISH HATCHERY PURPOSES IN VILLAGE OF NEWTOWN, HAMILTON COUNTY, OHIO.

COLUMBUS, OHIO, March 26, 1919.

Department of Agriculture of Ohio, Columbus, Ohio.

GENTLEMEN:—This is to acknowledge receipt of three leases (in duplicate), transmitted to me for examination by Mr. David T. Ferris of your department. Said leases are for fish hatchery purposes and are as follows:

"(1) Anna L. Durham and husband, E. S. Durham, to the board of Agriculture of Ohio, covering certain real estate in the village of Newtown, Hamilton county, Ohio.

(2) Robert W. Turpin and Mary P. Turpin, his wife, to the board of agriculture of Ohio, covering certain real estate in the village of Newtown, Hamilton county, Ohio.

(3) Nettie Highlands, Amy Crone and Lulu H. Whitney, to the board of agriculture of Ohio, covering certain real estate in the village of Newtown, Hamilton county, Ohio."

After examination of said lease, I approve the same as to form, and have endorsed such approval upon the duplicate copies of said leases.

Respectfully,
JOHN G. PRICE,
Attorney-General.

147.

APPROVAL OF BOND ISSUE OF CINCINNATI CITY SCHOOL DISTRICT IN SUM OF $440,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, March 27, 1919.

148.

BOARD OF EDUCATION—SECTION 5656 G. C. CONSTRUED—WHEN CERTIFICATE OF CLERK MUST BE ON FILE THAT MONEY IS IN TREASURY OR IN PROCESS OF COLLECTION.

A board of education attempted to create an indebtedness without having on file the certificate of its clerk that the money required to discharge the obligation was in the treasury or in the process of collection, HELD

1. *If such indebtedness consists of unpaid salaries of teachers, officers and other school employes bonds may be issued under section 5656 G. C. for the purpose of funding the same.*

2. *If such alleged indebtedness is of some other character such bonds may not be issued.*

3. *The fact that the rate of taxation in the school district is up to the maximum limit prescribed by law is immaterial as reflecting on the power to issue the bonds.*

4. *The proposition of issuing bonds under section* 5656 *G. C. cannot be submitted to a vote of the people.*

COLUMBUS, OHIO, March 28, 1919.

HON. S. L. GREGORY, *Prosecuting Attorney, Wilmington, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your letter of March 4, 1919 requesting the opinion of this department as follows:

> "I wish to know whether a school board can, either with or without a vote of the people in a taxing district where the rate of taxation is 15 mills, sell bonds under sections 5656, 5658 G. C., to fund a debt of say $1,700.00 created by the board before and without the certificate of the clerk that the money is in the treasury or in process of collection to liquidate the claim."

Sections 5656, 5658, 5660 and 5661 of the General Code provide, in part, as follows:

> "Section 5656. * * * the board of education of a school district * * *, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such * * * district * * * is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said * * * board * * * deem proper, not to exceed the rate of six per cent per annum, payable annually or semi-annually."
>
> Section 5658. No indebtedness of a * * * school district * * * shall be funded, refunded or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such * * * school district * * * by a formal resolution of the * * * board of education * * *."
>
> Section 5660. * * * the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the * * * clerk thereof * * * first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived froml awfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. * * *.
>
> Section 5661. All contracts, agreements or obligations, and orders or resolutions entered into or passed contrary to the provisions of the next preceding section, shall be void, but such section shall not apply to the contracts authorized to be made by other provisions of law for the employment of teachers, officers, and other school employes of boards of education."

Inasmuch as your question relates to a board of education, it cannot be answered

without pointing out that certain obligations incurred by a board of education are valid and binding in law without filing the certificate under section 5660 G. C. If, therefore, the obligations which you have in mind consist of unpaid salaries of teachers, officers and other school employes of the district the answer to your question is in the affirmative. Such contracts of employment were valid in the beginning, and the performance of services under them gave rise to obligations to pay such compensation which became absolute as the periods at which payments were due under the contracts were reached. Such obligations are in all respects "existing, valid and binding obligations of such * * * school district" within the meaning of section 5658 G. C., and may be funded or merged into a loan under section 5656 G. C.

On the other hand, it is equally clear that if the alleged debt which you mention was incurred, for example, in the purchase of supplies or the like, the contrary answer would have to be given. A contract for the purchase of supplies, and in fact any contract other than for the employment of teachers, etc., entered into by a board of education is, as section 5661 G. C. expressly declares, "void" unless section 5660 has been complied with. Therefore, the claim of the person who has furnished such supplies in the face of such void attempt to contract cannot be a "valid and binding obligation" of the district; so that it certainly cannot be the predicate of a borrowing under section 5656 G. C.

You mention the fact that the rate of taxation in the district is fifteen mills. This fact is immaterial. I call your attention to section 5649-1 of the General Code, which provides as follows:

> "In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

This section makes it mandatory to levy the necessary amounts for the sinking fund and interest requirements of all bonds which have been issued. The result is that when a taxing district is up to its limit in the matter of levying taxes, and then issues bonds, the sinking fund levies must be made in full at all events and the levies for current needs, such as, in the case of school districts, the tuition fund and the contingent fund, will have to suffer. Thus, neither the power to borrow money nor the power and duty to levy the taxes necessary to pay the interest and principal of the loan is in anywise impaired by the fact that at the time of the borrowing the limitations on tax levies had been reached, if bonds are issued.

It is, of course, possible to imagine a theoretical case in which the entire fifteen mills, which can be levied under the existing law, will be required to care for the interest and sinking fund needs of the subdivisions levying within a given territory. Then a different question would arise and a different answer would have to be given. But such a case so far as I am advised exists nowhere in fact, and I assume that it does not exist in the district described by you.

You also refer to a vote of the people. You are advised that the issuance of bonds under section 5656 G. C. is not in anywise conditioned upon the vote of the people. In fact there is no authority to refer the question of issuing such bonds to such a vote.

Respectfully,
JOHN G. PRICE,
Attorney-General.

149.

MUNICIPAL CORPORATION—DIRECTOR OF PUBLIC SERVICE—MAY PURCHASE RUBBER BOOTS FOR CITY EMPLOYES IN SEWER WORK—CITY PROPERTY.

The director of public service of a municipality may, within the five hundred dollar limitation, purchase rubber boots and slicker suits for use at necessary times by employes of the city in underground sewer work, and pay for the same out of the appropriation for the maintenance and repair of sewers—such suits and boots to remain the property of the municipality.

COLUMBUS, OHIO, March 28, 1919.

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

GENTLEMEN:—The receipt is acknowledged of your communication of date February 20, 1919, reading as follows:

> "Under date of February 15, 1919, we received a communication from the city auditor of Lima, Ohio, as follows:
>
> 'At various times, it becomes necessary for sewer employees to work under ground, which practically destroys their clothing and causes much dissatisfaction.
>
> Query: Would it be considered a legal expenditure to purchase slicker suit from appropriation for the above use?'
>
> In view of an opinion of the Attorney-General, which may be found on page 2332 of the annual reports for 1917, syllabus No. 2, we respectfully request your written opinion as follows:
>
> Question: May rubber boots and slicker suits necessary for work in digging underground sewers, such boots and suits to remain the property of the municipality and be used only in case it is necessary, be legally purchased as equipment, and may the same be legally paid for from public funds?"

In arriving at the answer to your inquiry, several sections of the municipal code may be quoted, as follows:

> "Section 3797. At the beginning of each fiscal half year, the council shall make appropriations for each of the several objects for which the corporation has to provide, or from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue. All expenditures within the following six months shall be made from and within such appropriations and balances thereof.
>
> Section 4211. The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title. All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon.
>
> Section 4324. The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by

law. He shall keep a record of his proceedings, a copy of which, certified by him, shall be competent evidence in all courts.

Section 4325. The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, play grounds, sewers, drains. ditches, culverts, ship channels, streams and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the department of public safety, or as otherwise provided in this title.

Section 4327. The director of public service may establish such subdepartment as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department.

"Section 4328. The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two or more than four consecutive weeks in a newspaper of general circulation within the city."

These sections indicate an intent to vest in the director of public service quite a broad discretion in the matter of conducting the ordinary and daily affairs of the city placed within the care of his department. He is, however, limited on the one hand by section 3797 as to the total amount he may expend, and on the other hand by section 4328 as to the amount he may expend under a given contract.

In this connection reference is made to the case of State, ex rel. v. Roebuch, City Auditor, 15 Ohio Dec. 400. The court states the facts as follows:

"On the twelfth day of August last, the relator was employed by the board of public service of the city of Bellefontaine, to perform one day's work and labor with his team in repairing south Main street, at $3.50; such work was performed and by direction of the board of public service an order issued by them therefor, upon said defendant, who refused to issue his order upon the city treasury for said sum, for the sole reason that such repair work had not been let out on contract after competitive bids, to the lowest responsible bidder, as provided for in an ordinance passed by the council of said city, July 12, in its appropriating ordinance, whereby $100 had been appropriated for the repair of said street.

From the undisputed facts in the pleadings and the agreed statement of facts filed herein by the parties, it appears that the city council appropriated $100 of the funds in the city treasury for the work and labor necessary in repairing south Main street, under the direction of the board of public service; that said ordinance further provided that such work and labor should, by said board, be let after competitive bidding to the lowest responsible bidder; that no further order, ordinance or resolution, authorizing the board of public service to make such repairs was passed by council; that the board of public service employed the relator to perform labor with his team in making such necessary repairs at the agreed price of $3.50 for one day's work, but did not make such contract after competitive bidding was had therefor."

After referring to a number of sections of the municipal code, among them those relating to the duties of the board of public service, which were along the same lines as those above quoted, the court continues at page 403 of the opinion:

> "After carefully considering all of the foregoing sections of the municipal code, I construe them in the light of and in connection with Lan. R. L. 3131 (B. 1536-679), which reads:
>
> 'The directors of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than ($500). When any expenditure * * * exceeds $500 such expenditure shall first be authorized and directed by ordinance of the council, and when so authorized and directed, the directors of public service shall make a written contract with the lowest and best bidder, etc.'
>
> I think the council, after having made the appropriation aforesaid and having authorized the board of public service to cause the repairs to be made, that the board had the authority to employ the relator to perform the labor for which he claims pay, without first letting the contract for the same to the lowest bidder, the amount of such repairs being less than $500; that when the council authorizes repairs upon streets to be done and makes an appropriation therefor, if such repairs do not exceed $500, the council is without authority to require the board of public service to let such repairs to the lowest competitive bidder. Such board may do so, and in many cases the interests of the public will be best subserved thereby, but it is within their discretion. In all cases, however, where such repairs will exceed $500, the contract must be so let."

Recurring, then, to your inquiry, it is assumed that the city council at Lima includes in its semi-annual appropriation for the service department an amount for the maintenance and repair of sewers. If this be true, it follows that the work of maintenance and repair is intended to, and should be, done in an efficient manner. From the nature of the work, specially designed clothing is almost a necessity.

By the terms of section 4328, the director of public service may as to *any work* under the supervision of his department not involving more than five hundred dollars, make any contract for such work; purchase supplies or material for such work; and provide labor for such work, and by the terms of section 4325 such director is charged with the supervision of the repair of sewers, etc., from which it would seem to follow that if in supervising such repair work, the director finds that rubber boots and slicker suits may be an aid in the efficient performance of the work, he may purchase them as supplies, said articles to be purchased within the five hundred dollar limitation, out of the appropriation for maintenance and repair of sewers, and to remain the property of the city for use at times when necessary by employes of the city in underground sewer work.

The opinion thus expressed is not inconsistent with that which you refer to as having been heretofore rendered by this department. The latter opinion concerned this language:

> "The county commissioners may purchase such machinery, tools or other equipment for the construction, improvement, maintenance or repair of the highway, bridges and culverts * * * as they may deem necessary. * * *"

It was held that the words "or other equipment" were used correlatively with

the words machinery and tools and hence did not authorize the purchase of rubber boots.

Respectfully,
JOHN G. PRICE,
Attorney-General.

150.

MUNICIPAL CORPORATION—STREET RAILWAY COMMISSIONER OF CITY OF YOUNGSTOWN—NOT A MUNICIPAL OFFICER—CITY SOLICITOR NOT REQUIRED TO ADVISE HIM—SAID COMMISSIONER WITHOUT AUTHORITY TO EMPLOY LEGAL COUNSEL.

1. *The street railway commissioner of the city of Youngstown, Ohio, appointed under ordinance No. 2195, by the terms of which he is appointed by the mayor for a term of four years, and subject to removal by the mayor, and performing the supervisory duties defined in said ordinance with reference to the operation of the street railroad referred to in said ordinance, is not a municipal officer entitled to the legal counsel of the city solicitor of said city.*

2. *The terms of sections 8a and 15d of such ordinance, authorizing said commissioner to employ assistants, accountants, clerks and other employes as he shall deem necessary to enable him to inspect and audit receipts, disbursements and other branches of the work of said street railway company, do not confer authority upon such commissioner to employ legal counsel in the discharge of his duties as such commissioner, except as he may be directed or authorized to do so by the city council.*

COLUMBUS, OHIO, March 28, 1919.

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

GENTLEMEN:—Acknowledgement is made of your letter dated February 24, 1919, in which you ask for this department's opinion upon the two questions stated in the communication received by you from the legal department of the city of Youngstown, Ohio, a copy of which communication, enclosed with your letter, is as follows:

> "I am writing you for your opinion upon the following matters which I discussed briefly with you a few days ago while in Columbus.
>
> "On the 16th of January of this year (1919), the Mahoning and Shenango Railway Company started to operate its street car lines under a new franchise known as the 'Service at Cost' plan. Under this franchise there is what is known as a street railway commissioner. He is appointed by the mayor for a term of four years and the appointment confirmed by council. His pay and entire expense of running his office is paid from the receipts of the city lines of the Mahoning & Shenango Railway & Light Company. His duty requires him to report to council from time to time and in so far as he takes instructions from anyone, he takes them from council.
>
> It is clear that from time to time he will require considerable advice of a legal nature, both as to the interpretation of the rights of the parties under the franchise and as to the legal policies to be pursued in conducting his office.
>
> We would like a ruling on the following questions:
>
> Sections 4303 to 4317, General Code, inclusive, enumerate the duties and powers of the city solicitor. Further, the salary of the city solicitor for

the duties enumerated in the foregoing sections is fixed by council for the term of his election, and, of course, cannot be increased or decreased during that period. Inasmuch as the legal work of the street railway commissioner is in addition to those enumerated by the statute, the new situation has arisen since his election.

First: Is the street railway commissioner an officer of the city of Youngstown, and, as such, entitled to the services of the legal department of the city?

Second: If he is not such an officer, and therefore, is not included in the duties of the city solicitor but he desires to have the solicitor of the city represent him in his legal matters, would it be legal for the solicitor to receive compensation from the commissioner out of the funds provided by the ordinance for his expense, in addition to the regular salary of the solicitor.

Under separate cover I am sending you a copy of the ordinance granting the franchise with the sections marked which refer to the street railway commissioner, and also those sections marked which refer to specific duties of the city solicitor in connection with the franchise."

An examination of the supplement to Page and Adams code does not indicate the adoption of a charter by the city of Youngstown and it is assumed that it is a non-charter city. The question of the constitutionality of the ordinance referred to in the letter above quoted is not raised in your letter and therefore that question is not considered in this opinion.

In the order above stated, let us consider whether the street railway commissioner of said city is an officer of said city entitled to the services of its legal department.

Sections 4305 and 4309 G. C. are pertinent. Section 4305 G. C. in part is:

"* * * and shall serve the several directors and officers mentioned in this title as legal counsel and attorney."

Section 4409 G. C. is:

"When an officer of the corporation entertains doubts concerning the law in any matter before him in his official capacity, and desires the opinion of the solicitor, he shall clearly state to the solicitor, in writing, the question upon which the opinion is desired, and thereupon it shall be the duty of the solicitor, within a reasonable time, to reply orally or in writing to such inquiry. *The right here conferred upon officers* shall extend to the council, and to each board provided for in this title."

It may be well to note that section 4308 G. C. provides that the solicitor "shall prosecute or defend, as the case may be, for and on behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits" as he shall by resolution or ordinance be directed to prosecute or defend.

It is to be noted that section 4305, supra, may not include all officers of the corporation in defining the officers to whom the city solicitor shall act as legal counsel, but is limited to the officers mentioned in "this title."

Section 4309 G. C. supplements section 4305 by requiring the rendition of an opinion in writing in addition to the provision in section 4305 for the solicitor to act as legal counsel, and the word "officer," as used in section 4309 G. C., evidently has reference to and means the officers mentioned in section 4305 G. C., as it would appear unreasonable to say that the solicitor shall act as legal counsel and attorney for certain

officers and then to provide that as to other officers he shall render written opinions on matters before them, in their official capacity, and it is therefore concluded that the word "officer," as used in the first sentence of section 4309 G. C., means an officer as defined in section 4305. That such is the meaning is confirmed by reference to the last sentence of section 4309 G. C., which extends the right to written opinions to the council and each board provided for in said title.

It may be seriously questioned if the street railway commissioner, hereinafter referred to as commissioner, is an officer of the corporation. Section 8 of Franchise Ordinance 2195, above referred to, is pertinent. In part it provides:

> "Immediately upon the taking effect of this ordinance, there shall be designated by the city a street railroad commissioner, whose appointment shall be made by the mayor of the city and shall be confirmed by the city council *The city reserves the right at any time, and from time to time, to remove the commissioner so appointed, such removal to be by the mayor.* * * * The city street railroad commissioner shall act as an adviser of the council of the city of Youngstown in all matters affecting the interpretation, meaning or application of any of the provisions of this ordinance, and in all action thereunder affecting the quantity or quality of service, or the cost thereof, or the rate of fare."

Section 8a is also pertinent, a part of which is as follows:

> "The commissioner shall receive a salary at a rate to be fixed from time to time by the council. * * *"

It is to be observed that said commissioner holds his position subject to the will or pleasure of the council and that his salary may be "fixed from time to time by the council."

It has been repeatedly held by the courts of this state that one of the tests in differentiating between employes and officers is that an officer is clothed with some part of the sovereign power of the state which is to be exercised in an independent capacity in the interest of the public, as required by law. It is stated in Klein v. Martin, et al, 24 C. C. (n. s.) 88, in defining a county officer,

> "one whose right, authority and duties are created and conferred by law,"

and in State ex rel. vs. O'Brien, 95 O. S., 172, as determinative of the question whether the county board of revision was a county office.

> "It acts in an independent capacity with authority to do and perform official acts * * *. It is clothed with some part of the sovereign power of the state * * *."

Under section 4411-1 G. C. the health officer is appointed and his salary is fixed by the board of health under provisions similar to those contained in the ordinance above quoted.

In deciding whether such person, so designated as "a health officer" was in law an officer or employe, the court, in State ex rel. Miller vs. Council of Massillon, 2 O. C. D. (n. s.) p. 169, reasoned thus:

> "It will be observed that the duties of the appointee or health officer are not prescribed by statute. He is the servant of the board of health that

makes the appointment. He is under their absolute control and direction and in addition to that they *fix his salary.* His salary is at the will of the board of health. *His term of office is at their will; they may terminate it at their pleasure.*"

The commissioner in the present question holds his office at the will of the city council. The term of his service and his salary are under the absolute control of the council, nor are his duties prescribed by statute, and what was decided in the case above cited, concerning the health officer, is applicable to such commissioner. It is therefore concluded that said commissioner is not a municipal officer. He is certainly not an officer mentioned in the title containing the statutes above referred to, nor is he a member of a board provided for in that title, nor within the provision of the last clause of section 4309, and it is therefore concluded that such commissioner, under section 4305 et seq. G. C., is not an officer of the city of Youngstown and as such entitled under authority of said sections to the services of the legal department of said city. It therefore follows that the answer to your first question is in the negative.

Your second question involves the authority of said commissioner to employ and pay the city solicitor for legal services.

The scope and extent of the commissioner's authority must be found in the ordinance granting his powers and prescribing his duties.

It must be borne in mind that the purpose of said ordinance, as stated in the preamble thereof, is to "secure to the public the largest powers of regulation and control in the interest of public service," and also that the avowed object was to secure "the best street railroad transportation at cost, consistent with the security of the property and the certainty of a fixed return thereof" as also stated in said preamble. The commissioner's duties are defined in section 8, above quoted, and it may be observed that his duties very largely may be described as supervisory. It is provided that he shall keep informed of all matters affecting the cost, quality or quantity, of the services furnished, receipts and disbursements, property and equipment of the company, the rate of fare and the vouchering of expenditures, and it is in the event of his disapproval of methods in such matters that he is empowered to make expenditures, all of which, with the salary of said commissioner, are paid by the company from the proceeds of its business. Sections 8a and 15d are pertinent.

Section 8a in part is that said commissioner:

"shall have the right to employ such assistants, accountants, engineers, clerks and other employes as he shall deem necessary to enable him at all times to *inspect and audit all receipts, disbursements, vouchers, prices, payrolls, time cards, shop cards, papers, books, documents and property of the company, and the cost and expense of all such persons so employed by the commissioner, at salaries fixed by him,* shall be paid by the Company upon the approval of the commissioner, * * * and shall be deemed a part of the operating cost, provided, further, that the sums authorized to be expended by the Commissioner, under the provisions of section 15D hereof, shall be in addition to the amount in this section authorized to be so expended."

Section 15D is entitled "supervision of extensions" and in part is:

"The commissioner shall have the right to employ such assistance as he shall deem necessary for the purpose of checking over estimates of any betterment * * * and also for the purpose of making estimates * * * of any betterment, extension or permanent improvement proposed by the

city. * * * He shall have the right to employ such assistance as he shall deem necessary for the purpose of checking material, labor or other costs in the supplying of such betterments, extensions or permanent improvement, and the company shall pay all bills for such assistance and services approved by the commissioner."

It is to be noted that both in section 8a and 15D, supra, the purposes for which the commissioner shall have the right to employ is indicated to be for purposes of inspection and supervision of the management, quantity and quality, and cost of service, inspection and auditing of receipts and disbursements, and in case of proposed extensions is authorized to employ such assistance for checking over documents, making plans, specifications and checking material, labor and other costs.

In neither of these sections, nor in any other sections of said ordinance, is there express provision for employment of legal counsel and it may be said that the commissioner's power or authority to so employ legal counsel will depend upon the clear implication of such power in said ordinance.

In this connection the purpose of the ordinance is to be considered as well as the character of the powers and functions prescribed therein for the commissioner.

In view of the court's characterization of such a position in the Massillon case, it appears that said commissioner acts as a special agent or employe of the city council in his supervision and control of said street railway company. In this connection it is to be observed that said commissioner is required to report and is subject to the control of the city which, as stated in section 6 of said ordinance, "reserves to itself the entire control of the service, including the right to fix schedules and routes," etc., and that said service shall be rendered "under such rules and regulations as the city may from time to time require."

In view of the decisions of the court applicable to such employment, and in the absence of express provision in said ordinance, authorizing said commissioner to employ legal counsel, considered with the provisions of sections 4305 and 4309 G. C., supra, which amply provide for legal services to the officers of the city, including the city council to whom said commissioner reports, and subject to whose pleasure he holds his office, it is concluded that such commissioner is not in law authorized or empowered to employ legal counsel without authority or direction from the city council, and the answer to your second inquiry is, therefore, also in the negative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

151.

CANAL LANDS—RELEASE OF CINCINNATI FROM PAYING RENT FOR USE OF SAID LANDS.

The legislature having heretofore authorized the leasing by the state of certain state canal lands to the city of Cincinnati (102 *O. L.* 168, 106 *O. L.* 293), *and said leases having been entered into, providing, among other things, for a semi-annual payment of rent by the city to the state:*

Held, that there is no constitutional objection to the enactment by the legislature of a bill providing that said city be released from the payment of said rents during a limited

period to begin hereafter and that in all other respects said leases shall remain in force as originally executed.

COLUMBUS, OHIO, March 28, 1919.

HON. HARRY L. FEDERMAN, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of March 11, 1919, wherein you request my written opinion as to the validity of house bill No. 178. The title to this bill reads:

> "A bill releasing the city of Cincinnati from payment of rental provided for in leases of part of the Miami and Erie canal executed under authority of the act passed May 15, 1911 (102 Ohio Laws 168), and the act passed May 17, 1915 (106 Ohio Laws 293), until such time as it commences operation of the facilities and utilities authorized to be constructed upon, in, under and above the same."

Section 1 of said bill reads:

> "That for and during the period between October 1, 1912, and the time when the city of Cincinnati shall commence the actual operation of the public facilities and utilities which it is authorized to construct in, upon, under and above that portion of the Miami and Erie canal leased by the state of Ohio to the city of Cincinnati by the lease dated August 29, 1912, executed under authority of the act passed May 15, 1911(102 Ohio Laws 168), and by the amended lease dated January 6, 1917, executed under authority of the act passed May 17, 1915 (106 Ohio Laws 293), the city of Cincinnati is hereby released from all its covenants, obligations and agreements for the payment of rent and for and during said period no rent or installment thereof shall be or become due or payable from said city to said state, all provisions in said lease and amended lease, and in said acts of May 15, 1911, and May 17, 1915, to the contrary notwithstanding."

The bill in its printed form is accompanied by a statement, which reads in part:

> "Whereas, By virtue of the act of the General Assembly of the state of Ohio, passed May 15, 1911 (102 Ohio Laws 168), the state of Ohio and the city of Cincinnati entered into an agreement of lease dated August 29, 1912, and pursuant to the act passed May 17, 1915 (106 Ohio Laws 293), said state and city entered into an amended lease dated January 6, 1917, by the terms of which said lease and amended lease, the state of Ohio granted, leased and demised to the said city of Cincinnati for the term of ninety-nine years from the first day of October, 1912, renewable forever, that part of the Miami and Erie canal in said city beginning at a point three hundred feet north of Mitchell avenue, and extending down through said city to the east side of Broadway, as in said lease and amended lease more fully described, for public street or boulevard, and for sewerage conduit, and if desired, for subway purposes, at an annual rental of thirty-two thousand dollars, payable in semi-annual installments on the first days of April and October in each and every year, the first payment of said rental to become due on October 1, 1912, less one-half of the expenses and compensation of the arbitrators incident to the fixing of the valuation of said canal property as in said acts provided; and
>
> Whereas, The city has regularly paid to this date the installments of rent stipulated in said lease and amended lease; and

Whereas, Said city at the dates of said lease and amended lease contemplated the early occupancy and utilization of said leased portion of said canal for the purpose authorized in said acts, but by reason of causes beyond its control has been delayed in carrying out its plans for constructing upon, in, under and above said canal property the public facilities and utilities authorized in said acts."

I am informed that the bill has been or will be amended so as to provide that the beginning of the period during which the city will be released from rental payments shall be a day hereafter, instead of October 1, 1912, as set forth in the original bill, thus making it unnecessary to consider the question whether the legislature might provide for the return to the city of the moneys already paid under the lease. The bill will therefore be considered on the basis of its having been amended as above stated.

Section 1 of Article II of the constitution, reads:

"Section 1. The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives * * *." (The remainder of the section relates to initiative and referendum).

This broad provision vests in the legislature all legislative power except insofar as said power may be limited by other provisions of the state constitution, the federal constitution and the treaties and acts of congress adopted and enacted under it (see 12 Corpus Juris 805).

Or, as expressed by Judge Gholson in Baker vs. Cincinnati, 11 O. S., at page 542 of the opinion:

"The first section of the second article of the constitution declares that 'the legislative power of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives.' The same provision, in very nearly the same words, is found in the former constitution. It will be observed, that the provision is not, that the legislative power, as conferred in the constitution, shall be vested in the general assembly, but that the legislative power of this state shall be vested. That includes all legislative power which the object and purposes of the state government may require, and we must look to other provisions of the constitution to see how far, and to what extent, legislative discretion is qualified or restricted."

No provision is found in the constitution which in any wise prohibits the legislature from enacting a law releasing a person or municipality from an obligation to the state. It will hardly be claimed that in the present instance the bill comes within the prohibition of section 28 of article II forbidding the enactment of laws impairing the obligation of contracts; for the bill does not in the least affect the contract between the state and the city—it merely provides for the waiver by the state itself of a right which it has under the contract. In other words, the state remits the rents for a certain period, in all other respects the contract stands as originally entered into.

On the other hand, if we look at the matter of the leases heretofore entered into as being on a par with a similar transaction between private individuals, no reason is apparent for thinking the bill objectionable on constitutional grounds.

In the case of Railroad Co. vs. State, 85 O. S. 251, the first syllabus reads:

"In conducting transactions with respect to its lands the state acts in a proprietary, and not in a sovereign capacity, and being amenable to all the rules of justice which it prescribes for the conduct of its citizens, it will not be

permitted to revoke a grant of lands made upon a valuable consideration which it retains."

In the same case, it is said in the course of the opinion at page 295:

"Unquestionably the general assembly represented the state in this matter, and in both the original act and in the subsequent act, under wheih the plaintiffs in error expended money for establishing the boundaries of the premises conveyed, its concurrence and acquiescence with the knowledge clearly imputed to it serves to bind the state, for in this respect the state was acting, not in its capacity as a sovereign, but in its proprietary capacity as the owner of lands, and when it acts in that capacity it is bound by the same rules as those which it applies to its citizens. Nothing presented casts doubt upon the correctness of the view thus comprehensively stated by Ranney, J., in State vs. Ext. of Buttles, 3 Ohio St., 309: 'We agree when she (the state) appears as a suitor in her courts to enforce her rights of property, she comes shorn of her attributes of sovereignty, and as a body politic, capable of contracting, suing, and holding property, is subject to those rules of justice and right, which in her sovereign character, she has prescribed for the government of her people.' "

Certainly the state, acting through the legislature, is as much at liberty as is one of its citizens, to waive performance of a given stipulation in a contract. In other words, if in the present instance, the legislature desires to say that the state shall forego for a given period the rents accruing under the lease, no reason is perceived why it may not legally do so.

I am. therefore, of the opinion that the bill amended as above states is not open to objection on constitutional grounds. However, I suggest that if the bill is to be enacted, provision be made therein to the effect that the general assembly may require the city at any time to resume its rental payments as in said lease provided, and that nothing contained in the act shall be construed as in any manner waiving, affecting or impairing any claim or claims which the state of Ohio has or may have against any person, firm or corporation arising out of leases heretofore executed, or otherwise, in connection with said canal lands.

The policy involved in the proposed enactment is of course solely for the legislature to pass upon; hence this opinion is confined to the constitutional features of the bill.

Respectfully,
JOHN G. PRICE,
Attorney-General.

152.

MUNICIPAL CORPORATION—COMPLIANCE WITH SECTION 4556 G. C.—FEES OF MAYORS IN ORDINANCES CASE SHALL BE SAME AS FEES OF JUSTICE OF PEACE IN SIMILAR CASES—SUFFICIENT COMPLIANCE.

An ordinance of a municipal council, which provides that the fees of the mayor in ordinance cases shall be the same as the fees of a justice of the peace in similar cases, sufficiently complies with section 4556 G. C., requiring said fees to be "fixed" by ordinance, and it is unnecessary to list in said ordinance the individual fees taxable in the name of such mayor.

COLUMBUS, OHIO, March 28, 1919.

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

GENTLEMEN:—I have your letter of recent date reading as follows:

"We are respectfully requesting your written opinion upon the following matter:

We are calling attention to section 4556, G. C., as follows:

'Section 4556. The costs of the mayor and other officers, in all cases, shall be *fixed* by ordinance, but in no case greater than the fees for similar services before justices of the peace. In case of conviction the fees of officers, jurors, and witnesses shall be taxed against the parties convicted, and in case of acquittal of the violation of an ordinance, the costs, except the fees of the mayor and marshal, shall be taxed against the corporation.'

We are also calling your attention to a quotation from an opinion of the Attorney-General, under date of April 24, 1914, Annual Report of Attorney-General for 1914, Vol. I, p. 536, at p. 539, as follows:

'It is true that under the ruling of city of Bellefontaine vs. Haviland, 3 N. P. n. s., 99, these officials are not entitled to receive any fees in ordinance cases when council fails to fix such fees by ordinance. Whilst, therefore, the fees for such services may not be said to be fixed by law in the sense that the fees for services in state and civil cases are fixed, for the reason that under the control council has over the same they may not be fixed at all or they may be fixed at such a minimum amount as to be inconsiderable, * * *.'

QUESTION: Is an ordinance of a municipal council, which provides that the fees of the mayor in ordinance cases, shall be the same as the fees of a justice of the peace in similar cases, in compliance with section 4556, or is it necessary to list the individual fees?"

Having regard to the provisions of section 4556 G. C., the precise question for our consideration is whether an ordinance of a municipal council, which provides that the fees of the mayor in ordinance cases shall be the same as the fees of the justice of peace in similar cases, is a *fixing* of those fees under said statute.

The word "fix" has various shades of meaning. One is that of "settle" or "determine" or "establish," which are, I think, the connotation of the word "fixed" as used in section 4556 G. C.

Unless expressly required by constitutional or statutory provision, the council of a municipal corporation is not restricted in the form of the expression of its will. In general, if an ordinance is sufficiently certain and definite as to indicate the matter or thing to which it relates, it is valid. And it is a maxim of law that that is certain which may be made certain: *Id certum est quod certum reddi potest.* Co. Litt. 43.

Even a cursory reference to any volume of statutes will show that it is a universal practice to incorporate into one statute the contents of another statute by apt reference thereto. So far as I am informed, no court has ever criticised this practice as such. In many instances, unless this practice were resorted to, our statute books would be inexcusably cumbersome and prolix.

The fees of a justice of peace in criminal cases are definitely set forth by section 1746 G. C. and other sections that need not be cited here. Furthermore, the function and powers of mayors and justices of peace are, in criminal matters, sufficiently alike to make easy of application an ordinance to the effect that the fees of the mayor in ordinance cases shall be the same as the fees of a justice of the peace in similar cases.

I am therefore of the opinion that an ordinance of a municipal council, which provides that the fees of the mayor in ordinance cases shall be the same as the fees of a justice of the peace in similar cases, sufficiently complies with section 4556 G. C., requiring said fees to be "fixed" by ordinance, and that it is unnecessary to list in said ordinance the individual fees taxable in the name of such mayor.

Respectfully,
JOHN G. PRICE,
Attorney-General.

153.

ROADS AND HIGHWAYS—REPAIR OF HIGHWAY WITH MATERIAL DIFFERENT FROM THAT WITH WHICH SAME WAS ORIGINALLY CONSTRUCTED—STATE HIGHWAY COMMISSIONER MAKES ASSESSMENT—NOT LESS THAN TEN PER CENT AGAINST ABUTTING REAL ESTATE—METHOD PROVIDED IN SECTION 1191 G. C.

1. *If, in making repairs to a highway as required by section* 1224 *G. C., the state highway commissioner uses as the principal material a material different from that with which the highway was originally constructed, it is incumbent on the commissioner to assess a part of the cost of such repairs against abutting or contiguous real estate; and the rule as to the percentage of such cost that may be so assessed is as follows: The state highway commissioner must so assess not less than ten per cent of the cost and expense of such repairs; and may at his discretion so assess any per cent of such cost and expenses between ten and one hundred per cent, provided that the amount assessed against any particular tract of land within the assessment area shall not exceed thirty-three per cent of the value of such tract for taxation.*

2. *The method to be followed by the state highway commissioner in making such assessment is that set forth in section 1191 G. C.*

COLUMBUS, OHIO, March 28, 1919.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Under date February 3, 1919, you wrote to this department as follows:

> "The following is a copy of a communication received by me from Mr. A. E. Hinkle, deputy highway commissioner, bureau of maintenance and repair:
>
> 'Under section 1224 of the General Code of Ohio, when a road is repaired by resurfacing it with some other material, no less than 10% of the cost of repair shall be assessed against the property along the highway.
>
> We have just completed the resurfacing of section B-1 C. H. No. 360

Hocking county, which is 0.88 miles in length. The bookkeeper's books show that there was paid for this work $22,869.41 As to just how this assessment shall be made I am not sure, since this is, so far as I know, the first case of this kind that has come up. I presume that this is a duty for the chief clerk and bookkeeping department to look after, but of course they cannot take care of it until they get a formal statement from the engineering department that this work has been completed. Hence this report to you.'

Inasmuch as this is a new departure in highway maintenance and as the entire work was conceived and carried out by the highway department I will thank you for an opinion as to whether it is possible to levy an assessment against the adjacent property holders or otherwise and if so what per cent. of the cost of this improvement may be placed upon adjacent property holders or beneficiaries within the mile limit?"

Mr. Hinkle adds in a personal interview that in making the repairs referred to, you used as the principal material a material different from that with which the road was originally constructed.

Section 1224 G. C. so far as material to a discussion of your inquiry reads:

"The state highway commissioner shall maintain and repair to the required standard all inter-county highways main market roads and bridges and culverts constructed by the state by the aid of state money or taken over by the state after being constructed. In repairing inter-county highways and main market roads the state highway commissioner shall not be limited to the use of the material with which such inter-county highways or main market roads were originally constructed but may repair such inter-county highways or main market roads by the use of any material which he deems proper. *When in the repair of an inter-county highway or main market road the state highway commissioner* changes the type of such road and *uses as the principal material in making such repair a material different from that with which the road was originally constructed not less than ten per cent. of the cost and expense of such repair shall be assessed against the property abutting on said road* or within one-half mile on either side thereof or within one mile on either side thereof in the manner hereinbefore provided in the case of the construction of a road under the supervision of the state highway department. Nothing in this chapter shall be construed so as to prohibit a county township or municipality or the federal government or any individual or corporation from contributing a portion of the cost of the construction maintenance and repair of said state highways. * * * Inter-county highways or main market roads on which no state aid money has been expended if improved with constructions equal to that specified by the state highway commissioner shall be taken over by the state and shall thenceforth be maintained as prescribed herein for inter-county highways and main market roads. * * *"

Coming then to the question of the percentage of the total cost of the repairs that may be so assessed we have the mandate of said section 1224 in these words:

"* * * not less than ten per cent. of the cost and expense of such repair shall be assessed against the property abutting on said road or within one-half mile on either side thereof or within one mile on either side thereof."

The plain import of this language is that it is mandatory upon the commissioner when he changes the type of construction and uses a material different from that

originally employed to assess against lands abutting or contiguous to the road at least ten per cent. of the total cost of the repairs and discretionary with him to assess any percentage between ten and one hundred per cent. of such cost.

It may be urged that it was not the intent of the legislature to confer any such broad powers upon the commissioner; that the outstanding feature of section 1224 is that it establishes the policy that the state shall maintain and repair such parts of the highways as shall have been constructed or taken over by the state and that inasmuch as the commissioner may not make a special assessment if he uses in making repairs the same material as that originally used it would be unjust to permit the assessment of the full cost of the repairs against adjoining lands simply because of a change in materials especially that the owners of adjoining lands are given no voice in the matter of materials. However it is useless to speculate upon the possible or probable intent of the legislature as against its unambiguous language; for we find that one rule of statutory construction in Ohio has been thus stated by our supreme court in the case of Slingluff vs. Weaver 66 O. S. 621 (first two syllabi):

> "The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it. And where its provisions are ambiguous, and its meaning doubtful, the history of legislation on the subject, and the consequences of a literal interpretation of the language may be considered; punctuation may be changed or disregarded; words transposed, or those necessary to a clear understanding and, as shown by the context manifestly intended, inserted.
>
> But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

Likewise, in the case of Ives v. McNicholl, 12 O. C. C. 297, 5 O. C. D. 555, the circuit court of Hamilton county use the following language, after referring to several decisions of our supreme court:

> "The doctrine of these cases, as we understand, laid down with great force and clearness, is to the effect that it would be highly improper for a court called upon to construe a statute, which in its opinion, as it apparently stands, is inconsistent with its ideas of policy or justice, to distort the language or its evident meaning, in such a manner as to give it a construction consistent with his own ideas of justice or policy. Or, as stated by Judge Nash in announcing the decision in the Bowman case (41 Ohio St., 37): 'If the language used by the legislature in a statute is precise and unambiguous, we conceive it to be our duty to interpret the words in their natural and ordinary sense, although the result may conflict with our ideas of public policy.' "

Recurring to said section 1224, one limitation on special assessments seems to be recognized therein. Said section in making reference to the method to be followed in perfecting the assessment, reads:

> "* * * in the manner hereinbefore provided in the case of the construction of a road under the supervision of the state highway department."

As is hereinafter explained in another connection, this language no doubt refers to the method of assessment described in section 1191 G. C., although if taken literally it might refer either to section 1191 or section 1214. In both of these sections there is the limitation "shall not exceed thirty-three per cent. of the valuation of such abutting property for the purpose of taxation." And while it is true that the language las above quoted from section 1224 is intended to provide a method rather than to fix a limtation, it would seem that where the provisions describing that method make direct reference to a limitation, such limitation is to be accepted as belonging to the scheme of plan of assessment, especially that, as stated in Cincinnati vs. Conner, 55 O. S. 82, 91:

> "The rule generally prevails that, independent of any legislative requirement on the subject, statutes imposing taxes and public burdens of that nature are to be strictly construed; and where there is ambiguity which raises a doubt as to the legislative intent, that doubt must be resolved in favor of the subject or citizen on whom the burden is sought to be imposed."

For the foregoing reasons, the rule as to percentage of cost of repairs which may under section 1224 be assessed against abutting and contiguous real estate, where, in making the repairs there is a change of principal material as compared with that used in the original construction, may be stated as follows:

The state highway commissioner must so assess not less than ten per cent of the cost and expense of such repairs; and may at his discretion so assess any per cent of such cost and expenses between ten and one hundred per cent; provided that the amount assessed against any particular tract of land within the assessment area shall not exceed thirty-three per cent of the value of such tract for taxation.

Coming next to the method to be pursued in making the assessment, it is to be noted that section 1224 provides:

> "* * * not less than ten per cent of the cost and expense of such repair shall be assessed against the property abutting on said road, or within one-half mile on either side thereof or within one mile on either side thereof, in the manner hereinbefore provided in the case of the construction of a road under the supervision of the state highway department."

Two sections of the series of statutes relating to highways come within the description of the last clause of the language quoted—section 1191 and 1214. However, section 1214 comes within the description only when the description is taken in a very literal sense; so that section 1214 is not here quoted. It is sufficient to say that it provides for assessment under the direction of the county commissioners or township trustees, in cases where the improvement has been constructed under the supervision of the state highway department upon application of county commissioners or township trustees and with the financial aid of either or both the county and township and the adjacent property owners. The statute need only be read to show that from a practical standpoint its provisions are not available for use by the state highway commissioner in making an assessment. We are thus reverted to section 1191, which so far as now in point, reads as follows:

> "* * * When a part of the inter-county highway system or main market road system of the state is improved by the state, by contract or force account, without the co-operation with a county or some township thereof, ten per cent of the cost of said construction or improvement shall be assessed against the land abutting thereon according to the benefits, pro-

vided the total amount assessed against any abutting property shall not exceed thirty-three per cent of the valuation of such abutting property for the purpose of taxation. The state highway commissioner shall cause to be made a tentative apportionment of the amount to be assessed and shall fix a time and place for a hearing on such apportionment. He shall give notice to said abutting property owners of the time and place of such hearing by one publication in a newspaper of general circulation in the county in which said improvement is situated, which notice shall be published at least ten days before the date fixed for said hearing. The state highway commissioner shall attend such hearing in person or designate a deputy highway commismissioner or division engineer to attend the same and if any objections in writing are presented to the tentative apportionment the proof offered by the aggrieved parties shall be heard. The tentative assessment shall be confirmed by the state highway commissioner as made, or in case objections are made thereto, with such modifications, if any, as he may deem just and proper and the same shall be certified to the county auditor of the county in which such abutting property is situated to be by him placed upon the duplicate against said land and paid in such number of equal semi-annual payments as may be fixed by the state highway commissioner. Said assessments when collected by the county treasurer shall be paid into the state treasury to the credit of the state highway improvement fund to reimburse the state for the money advanced by it on account of said improvement."

It is quite plain that section 1191, taken in connection with those parts of section 1224 which provide for the assessment of either the abutting property, or that within one-half mile, or that within one mile, affords a complete and practicable scheme of perfecting the details of the assessment by the state highway commissioner and sets forth "the manner hereinbefore provided" which the legislature had in mind in enacting section 1224. Hence, in making the assessment, the method set forth in said section 1191 is to be followed by the state highway commissioner.

Respectfully,
JOHN G. PRICE,
Attorney-General.

154.

JUVENILE COURT—MINOR UNDER AGE OF EIGHTEEN YEARS—COSTS OF JUSTICE OF PEACE AND CONSTABLE—MINOR RESIDENT OF ONE COUNTY WHO VIOLATES LAW OF STATE OF OHIO IN ANOTHER COUNTY MAY BE PROCEEDED AGAINST IN EITHER COUNTY.

1. *When a minor child under the age of eighteen years is arrested and taken before a justice of the peace and the latter transfers the case to the judge of the juvenile court as provided by section 1659 G. C. costs are taxable in favor of the justice of peace and the constable and should be paid as provided in section 1682 G. C.*

2. *Where a minor child under the age of eighteen years is a resident of Warren*

county but while in Clermont county violates a law of the state of Ohio such minor may be proceeded against as a juvenile delinquent person in the juvenile court of Warren county.

COLUMBUS OHIO March 31 1919.

HON. CHARLES G. WHITE *Prosecuting Attorney, Batavia Ohio.*

DEAR SIR:—In your letter of recent date you request my opinion on two questions stated by you as follows:

> "(1) A minor is arrested and brought before a justice of the peace who at the time the affidavit was sworn to had no knowledge that the boy was under eighteen years of age. Upon discovering the fact he certifies the case over to the juvenile judge as is provided for in section 1659 of the General Code of Ohio. Now the question arises how is the justice and his constable to receive his costs. In other words does he and the constable lose them or should they be paid as provided in section 1682 of the General Code or should they be allowed by the county commissioners as other J. P. criminal costs?
>
> (2) The other matter is this: A minor commits a crime in Clermont county Ohio but is a resident of Warren county Ohio. Has the juvenile court of this or Warren county jurisdiction over the delinquent child? Of course I am using the word minor in a restricted sense meaning a child under eighteen years of age."

Section 1659 G. C. (103 O. L. 874) says:

> "When a minor under the age of eighteen years is arrested such child instead of being taken before a justice of the peace or police judge shall be taken directly before such juvenile judge; or if the child is taken before a justice of the peace or a judge of the police court it shall be the duty of such justice of the peace or such judge of the police court to transfer the case to the judge exercising the jurisdiction herein provided. The officers having such child in charge shall take it before such judge who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before the judge in the first instance."

Section 1682 G. C. provides:

> "Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers and the costs of transportation of children to places to which they have been committed shall be paid from the county treasury upon itemized vouchers certified to by the judge of the court."

The above quoted sections were constituent parts of the original juvenile act, found in 99 O. L. 192 being sections 19 and 40 respectively of that act. The words "in all such cases" found in section 1682 G. C. clearly refer to all cases brought or conducted under authority of any of the provisions of the juvenile act.

In opinion No. 502 1915 Atty. Gen. Opinions, Vol. II p. 1022, this department; construing the above quoted sections held that a mayor has no jurisdiction to dispose of a case against a minor under eighteen years of age other than to transfer the case to the juvenile judge; and further that fees and costs made in the mayor's court in such case are to follow the case for allowance and payment under section 1682 G. C. If such a holding is proper as applied to mayors who it will be noticed are not even

mentioned in section 1659 G. C. it would certainly be proper to adopt such construction with regard to justices of peace who are expressly referred to therein.

At all events, it is my opinion that when a minor under the age of eighteen years is arrested and taken before a justice of the peace and the latter transfers the case to the judge of the juvenile court as provided by section 1659 G. C., costs are taxable in favor of the justice of peace and the constable and should be paid as provided in section 1682 G. C. The latter section being a special provision is the authority for the payment of such costs and not the general sections of the code relating to allowance by the county commissioners of cost bills in state criminal cases.

Your second question presents a problem not easy of solution. A careful scrutiny of the entire juvenile act shows no provision of law that expressly makes the authority of a juvenile court of a county to determine the status of an allegedly delinquent juvenile person dependent upon the residence of such juvenile in that county. Nor do I find any provision expressly limiting the juvenile court's jurisdiction to the county in which the juvenile committed the act constituting the delinquency. That the legislature did not more definitely show its intention with respect to venue and residence is to be regretted in view of the importance which these matters sustain to any consideration of the juvenile court's jurisdiction.

It being apparent from your letter of March 12 supplementing your original letter of inquiry, that there is no pending case in the juvenile court of your county raising the question of residence I think it better at this time to consider your second question as though it had been put in the following form:

> "Where a minor child under the age of eighteen years is a resident of Warren county but while in Clermont county violates a law of the state of Ohio may said minor be proceeded against in the juvenile court of Warren county?"

My reason for thus changing the form of your question is this: It is unquestionably the intent of the juvenile court act that the interests of the child itself should be the paramount consideration in all proceedings taken under that act. "That proper guardianship may be provided for the child" is not only the express direction set forth in section 1683 G. C. but is indeed the theme of the whole measure. In most juvenile cases the main subject of investigation is the child's environment and as a general rule the juvenile court of the county of the child's residence is the court best suited to ascertain that environment.

In other words assuming that the law permits a juvenile court in a proceeding against an alleged juvenile delinquent residing in that county to predicate a finding of delinquency upon a violation of law committed by said minor while in another county, good policy in most cases suggests that the juvenile court of the county of the minor's residence be permitted to determine the minor's status.

We must now consider the validity of the assumption just made; that is whether the jurisdiction of the juvenile court to determine the status of an alleged delinquent juvenile person is defeated by the mere fact that the act of delinquency was committed by the minor not in the county wherein the juvenile court is held but in another county.

Section 1642 G. C. (103 O. L. 868) says:

> "Such courts of common pleas, probate courts, insolvency courts and superior courts within the provisions of this chapter shall have jurisdiction over and with respect to delinquent neglected and dependent minors under the age of eighteen years, not inmates of a state institution, or any institution

incorporated under the laws of the state for the care and correction of delinquent neglected and dependent children, and their parents, guardians, or any person, persons, corporation or agent of a corporation, responsible for, or guilty of causing encouraging, aiding, abetting or contributing toward the delinquency, neglect or dependency of such minor, and such courts shall have jurisdiction to hear and determine any charge or prosecution against any person, persons, corporations, or their agents, for the commission of any misdemeanor involving the care, protection, education or comfort of any such minor under the age of eighteen years."

Section 1643 G. C. (103 O. L. 866) provides:

"When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age."

Section 1644 G. C. (106 O. L. 458) says:

" 'DELINQUENT CHILD DEFINED.' For the purpose of this chapter, the words 'Delinquent child' includes any child under eighteen years of age who violates a law of this state, or a city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly visits or enters a house of ill repute; or who knowingly patronizes or visits a policy shop or place where any gambling device or gambling scheme is, or shall be, operated or conducted; or who patronizes or visits a saloon or dram shop where intoxicating liquors are sold; or who patronizes or visits a public pool or billiard room or bucket shop; or who wanders about the streets in the night time; or who wanders about railroad yards or tracks, or jumps or catches on to a moving train, traction or street car, or enters a car or engine without lawful authority, or who uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct; or who uses cigarettes, cigarette wrapper or substitute for either, or cigars, or tobacco; or who visits or frequents any theater, gallery, penny arcade or moving picture show where lewd, vulgar or indecent pictures, exhibitions or performances are displayed, exhibited or given, or who is an habitual truant; or who uses any injurious or narcotic drug. A child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and be proceeded against in the manner hereinafter provided."

Upon the passage of the juvenile act, of which the above quoted sections are a part, the courts of Ohio were quick to declare that delinquency as defined in that act was not in the nature of a crime; that the act itself, so far as the minor child was concerned, was neither a criminal nor penal one, but *reformatory* or corrective; and that while the commission of a crime may set the machinery of the juvenile court in motion the minor proceeded against is not tried by the court as for crime, but for incorrigibility.

In re Januszewski, 196 Fed. 123, 156.
Leonard vs. Licker, 3 Ohio App. 377, 380.
Children's Home vs. Fetter, 90 O. S. 110, 127.

In the Leonard case, above cited, the court quoted, as being particularly apropos

of the commitment of what are now called *delinquent* children the following language used by White, J., in Prescott vs. The State, 19 O. S. 184, at 187:

> "It is neither a criminal prosecution, nor a proceeding according to course of the common law, in which the right to a trial by jury is guaranteed. The proceeding is purely statutory; and the commitment, in cases like the present, is not designed as a punishment for crime, but to place minors of the description, and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they are reformed, or arrive at the age of majority. The institution to which they are commited is a school, not a prison; nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent, who would otherwise be condemned to confinement in the common jail or the penitentiary."

The proceeding in the juvenile court against the juvenile delinquent person not being of a criminal nature, I see no justification for the application of the rule that a person charged with an offense is entitled to be tried therefor in the county in which such offense is alleged to have been committed. What section 1642 G. C., above quoted, gives the juvenile court jurisdiction over, is not *offenses* committed by juveniles, but jurisdiction *"over and with respect to delinquent, neglected and dependent minors."* The order made by the juvenile court under section 1652 G. C. is not a finding of guilt, but rather a determination of *status*. That is, the minor child is found to be in a certain condition which section 1644 G. C. describes as "delinquency," and the effect of the court's order is to make said minor a ward of the court for all necessary purposes of discipline and protection. See section 1643 G. C. To this determination of status, it is immaterial where the acts of delinquency were committed, whether in the county wherein the juvenile court is held, or in another county.

Section 2115 G. C. strengthens this conclusion. The language of that section is as follows:

> "When a girl between nine and eighteen years of age is brought before a court of criminal jurisdiction, charged with an offense, punishable by a fine or imprisonment other than imprisonment for life and who, if found guilty, would be a proper subject for commitment to the school, the court, by warrant or order, shall cause her forthwith to be taken before the judge of the juvenile court of the *proper* county, and shall transmit to him the complaint, indictment, or warrant, by virtue of which she was arrested. Such judge of the juvenile court shall proceed in the same manner as if she had been brought before him upon original complaint."

The first part of section 2115 G. C. refers to a girl who has been brought before a criminal court "charged with an offense." This, under the familiar rule of venue in criminal cases, doubtless refers to a girl who has committed an offense within the county in which said court of criminal jurisdiction is held and wherein the criminal charge is filed. That the place of the commission of the offense is not to control the disposition of such girl, is made clear, however, in the latter part of the section, which says that such girl shall forthwith be taken before the judge of the juvenile court, not of the county wherein the offense was committed, but of the "proper county." The "proper county" may or may not be the county in which the offense was committed. In other words, this section, together with section 1683 G. C., recognizes, by indirection at least, the policy hereinabove stated namely that the juvenile court of the county of which the juvenile delinquent is a resident is, ordinarily, the court best able to carry out the cardinal purpose of the juvenile act, "that proper guardianship may be provided for the child." (Section 1683 G. C.)

The view hereinabove stated agrees with the conclusion reached by the Attorney-General in Opinion No. 1280, rendered on June 17, 1918. It was held in that opinion that the juvenile court of Fayette county, in a proceeding against a minor child residing in said county had the right to predicate a finding of delinquency upon a violation of law committed by said minor while in another county to-wit, Ross county.

What has just been said answers sufficiently I think, your second question, reformed as above noted. Whether, under the second question as your letter states it, the juvenile court of Clermont county would have jurisdiction, will not be considered by this department until the necessity for an opinion on that phase of the matter more clearly appears.

Respectfully
JOHN G. PRICE
Attorney-General.

155.

AGRICULTURAL SOCIETY INCORPORATED FOR PROFIT—NOT ENTITLED TO PER CAPITA TAX FROM COUNTY.

1. *An agricultural society incorporated for profit is not entitled to an order on the county treasurer for the per capita tax provided by sections* 9880 *and* 9880-1 *G. C.*

2. *The fact that an agricultural society incorporated for profit declares by resolution that it will not distribute any profits among the stockholders but will devote all profits if any to the advancement of agriculture does not change its status from corporations for profit to those not for profit and such resolutions being repealable at the will or pleasure of the corporation will not entitle it to such per capita tax.*

COLUMBUS, OHIO, March 31, 1919.

HON. ROBERT B. MCMULLEN, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter dated Febuary 22, 1919, as follows:

> "1. In this county we have three agricultural societies, all incorporated for profit, and each presenting to the county auditor a certificate from the state department of agriculture stating that they have complied with the laws of the state and the rules of the board of agriculture and therefore entitled to an order on the county treasurer for the per capita tax under sections 9880 and 9880-1 General Code.
>
> Being organized for profit, are any of them entitled to this per capita tax?
>
> 2. Two of these societies have passed resolutions declaring they will not distribute any profits among the stockholders, but that all profits if any shall be devoted to the advancement of agriculture.
>
> Does the adoption of these resolutions alter their right to this per capita tax?"

Sections 9880 9880-1 (105 O. L. 273) and section 1092 G. C. (107 O. L. 462) are pertinent. They are as follows:

> "Section 9880 G. C. When thirty or more persons, residents of a county, or of a district embracing one or more counties, organize themselves into an agricultural society, which adopts a constitution and by-laws, selects the

usual and proper officers, and otherwise conducts its affairs in conformity to law, and the rules of the state board of agriculture, and when such county or district society has held an annual exhibition in accordance with the three following sections, and made proper report to the state board, then, upon presentation to the county auditor, of a certificate from the president of the state board attested by the secretary thereof, that the laws of the state and the rules of the board have been complied with, the county auditor of each county wherein such agricultural societies are organized, annually shall draw an order on the treasurer of the county in favor of the president of the county or district agricultural society for a sum equal to two cents to each inhabitant thereof, on the basis of the last previous national census. The total amount of such order shall not in any county exceed eight hundred dollars, and the treasurer of the county shall pay it.

Section 9880-1. When thirty or more persons, residents of a county or of contiguous counties not to exceed three are organized into an independent agricultural society that has held annual fairs for agricultural advancement previous to January 1, 1915, in a county wherein is located a county agricultural society, and when such independent society has held an annual exhibition in accordance with the three following sections, and made proper report to the state board, then upon presentation to the county auditor of a certificate from the president of the state board attested by the secretary thereof, that the laws of Ohio and the rules of the board have been complied with, the county auditor of the county, if the fair board be residents of one county, shall draw an order on the treasurer of the county in favor of the president of the independent agricultural society for a sum equal to the amount paid to the county fair and the treasurer shall pay said order. If the fair board of the independent agricultural society be residents of more than one county, the auditors of such counties shall draw orders on their respective treasurers for their proportionate share of an amount equal to an average amount paid to the several county fair boards to be divided according to population of the counties according to the last federal census. The treasurer or treasurers shall pay such order or orders from the county funds.

Section 1092. On the first Thursday after the second Monday of January of each year, there shall be a meeting in Columbus of the board of agriculture of Ohio together with the presidents or other authorized delegates of agricultural societies organized under the laws of the state and conducted under the rules of the board of agriculture and holding fairs as provided by law, for the purpose of deliberation and consulatation as to wants, prospects and conditions of agriculture throughout the state. The board of agriculture sha provide a uniform method for the election of the directors and officers of all agricultural societies receiving any support whatsoever out of the state or county treasuries and provide general rules and regulations under which such agricultural societies shall be conducted. At such meeting the reports from such agricultural societies shall be delivered to the board of agriculture."

Consideration of these sections and other sections of chapter 2, title 10, bearing upon agricultural societies, their history and decisions construing them, disclose a rather curious situation.

Section 9880 G. C., supra, was originally enacted February 28, 1846, 44 O. L., 70, as section 1 of an act entitled "for the encouragement of agriculture" and was in many respects similar to the section now in force. It, however, contained one requirement which was more consistent with the title than the present act, in this; that it provided that whenever thirty or more persons shall organize themselves into a society "for the improvement of agriculture within said county or district." It is to be noted

in the present statute it is only required that such number of persons organize themselves into an agricultural society.

It is noted that the societies referred to in your letter are described as being "all incorporated for profit." Whether they have complied with all of the provisions of said sections first quoted is not clearly indicated in your letter, but from the fact that they have, as stated in your letter, a certificate from the state department of agriculture, "stating they have complied with the laws of the state, and the rules of the board of agriculture, and therefore entitled to an order on the county treasurer for the per capita tax," it must be assumed, for the purpose of this opinion, that their organization and proceedings have brought them within the provisions of section 9880 G. C., et seq.

The question involved by the facts stated in your letter is not free from difficulty and it may be said that its solution may depend largely upon the construction to be given to the above quoted sections.

If these sections are construed strictly or taken literally without reference to the apparent purpose of the act, it must be concluded that when thirty or more persons form themselves into an agricultural society and otherwise comply with the law, they are entitled as such society to this subsidy from the state, regardless of the fact that such an organization may be for the private benefit or profit of the organizers.

In support of this conclusion it may be said that section 9880 G. C., supra, was originally contained in the act of February 28, 1846, 44 O. L., p. 70, as section 1 of an act entitled "For the encouragement of agriculture," and that in that act the organization which was to receive the county aid was required to be a society more consistent with the title, for it required that they organize themselves into a society for the improvement of agriculture within said county or district, whereas in the present act no such requirements are necessary, and all that is required is that the thirty or more persons must be residents of the county or district and organize themselves into "an agriculture society." It might be argued that while all associations are not corporations, yet a corporation for profit or not for profit is an association, and that section 9880, providing for the granting of a subsidy to an agricultural society, organized in the manner therein provided, whenever such number of persons bring themselves within its terms, either in the form of a corporation or as a formal association, they are "agricultural societies."

This view is somewhat supported by opinion 979, Attorney-General's opinions for 1918, dated January 30, 1918, in which the question of the validity of the regulation of the state board of agriculture was considered and held invalid because it imposed a restriction which was contradictory to section 9880.

While the present question is not exactly the same question considered in that opinion, its conclusion and reasoning are pertinent. In part my predecessor held:

> "The statute in this case says that upon the performance of certain conditions they may receive funds. The conditions substantially are that the societies must comply with the law and with your (state board of agriculture) rules."

And again:

> "These rules may supplement and piece out the statutory provisions, but never set them aside. The rule of the board of agriculture that is contradictory to the statute is, of course, invalid."

So that, if we were to conclude that a corporation, either for profit or not for profit, was an agricultural society, and it otherwise complied with the requirements of law and was, as such, entitled to the county aid, we must necessarily go one step

farther and conclude that any surplus or profits of their enterprise could be divided among its members.

This is exactly what was said in Dunn vs. Agricultural Society, 46 O. S., 101:

> "The income may many times exceed the expenditure, and hence, not only may a corporate fund be acquired, but it may be distributed among the members * * * at the pleasure of the society, and the corporation may thus become one of pecuniary profit with the control and management of property, real and personal;"

The question involved in that case, however, was one of the liability of such company in an action for damages for personal injury sustained by a person attending a fair, and the right of such corporation to the county aid was not involved.

On the other hand, if societies incorporated or otherwise receiving public funds under section 9880, have authority and inherent right to distribute such money, or a part thereof, among its members, then the granting of such subsidy from the public treasury would be offensive to section 6 of article 8 of the constitution, which forbids any county raising money or loaning its credit to, or aiding any joint stock company, corporation or association.

In Lawrence county Commissioners vs. Brown, 14 O. D., 241 in the first branch of the syllabus it is held:

> "County agricultural societies being formed *for the promotion of agriculture and not for private profit* section 3697 R. S. which provides that county agricultural societies may draw sums of money from the treasuries of their respective counties, does not violate either sections 4 or 6, Art. 8, of the constitution, the former of which prohibits the loaning or giving the credit of the state to an enterprise formed for private profit and the latter prohibiting a county, town, or township giving or lending its credit in a like manner."

In this case the constitutionality of the law was attached and sustained apparently on the ground that such incorporated agricultural societies were not for profit. As stated on page 242 of the opinion:

> "If the provision made in the statute under consideration can be said to be a loan to the corporation, or if it is in aid merely of a private enterprise carried on for the benefit of the individual members of the corporation, I should say, as would any one else, that the statute is violative of this section of the constitution. But from the history of legislation on the subject, and in view of the fact that from a very early period in the history of the state, it has been Ohio law to promote and encourage the development of agricultural resources of the state, I *doubt* whether this statute *was intended to or does in effect aid any private enterprise.*"

It may be said that sections 9880-1 G. C. are unconstitutional if their effect is to loan or give the credit of the state to or provide money for a stock company, corporation or association as prohibited in the section of the constitution above referred to, and to maintain the constitutionality of said sections, it is necessary to construe them as not violating the constitutional inhibition in this respect by holding that such money is to be used, not for private profit, but for the purposes of the original act, viz., "for the encouragement of agriculture."

In view of the manifest purpose to encourage and promote agriculture in the state, and in view of the fact that such money is raised by taxation and is a trust fund,

it is concluded that the society referred to in sections 9880 and 9880-1 G. C. is in contemplation of law to be for the benefit of the public for agricultural purposes and not for the private profit of such association nor its members.

This view is further strengthened by a consideration of section 1092, above quoted, wherein it is observed that the "board of agriculture shall provide a uniform method for election of the directors and officers of all agricultural societies receiving any support whatsoever out of the state or county treasuries." This is entirely inconsistent with the provision in the corporation laws of the state for the election of directors and officers of corporations for profit, and further evinces the intention of the legislature to provide such aid for such societies as organize for agricultural purposes, which must and can comply with the statutes and the rules of the state board of agriculture. Obviously enough, under the general corporation laws of the state under which such agricultural corporation for profit would be organized, their method and manner of election of directors and officers are provided for.

From the foregoing considerations, therefore, it is concluded that the societies referred to in your letter being incorporated for profit, are not entitled to the per capita tax money under sections 9880 and 9880-1 G. C.

The fact that two of these societies declare by resolution that they will not distribute any profits among the stockholders, but will devote all profits, if any, to the advancement of agriculture, does not change their status from corporations for profit to those not for profit, and such resolutions being repealable at the will or pleasure of the corporations, will not entitle them to such per capita tax.

Respectfully,
JOHN G. PRICE,
Attorney-General.

156.

APPROVAL OF BOND ISSUE OF XENIA CITY SCHOOL DISTRICT IN SUM OF $15,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 1, 1919.

157.

APPROVAL OF SALE OF PORTION OF CANAL LAND IN JACKSON TOWNSHIP, COSHOCTON COUNTY, OHIO.

COLUMBUS, OHIO, April 2, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of March 28, 1919, in which you inclose, for my approval, a record of certain proceedings leading up to the sale of a portion of canal land in Jackson township, Coshocton County, Ohio.

I have carefully examined said record of proceedings, find the proceedings correct

in form and legal and am therefore endorsing my approval upon the resolution providing for the sale of said property. The resolutions are herewith returned in duplicate.

Respectfully,
JOHN G. PRICE,
Attorney-General.

158.

APPROVAL OF BOND ISSUE OF LAKE COUNTY IN SUM OF $53,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 2, 1919.

159.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY IN SUM OF $18,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 2, 1919.

160.

APPROVAL OF BOND ISSUE OF COSHOCTON COUNTY IN SUM OF $70,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 2, 1919.

161.

JUVENILE COURT—MOTHER, WARD OF ONE COUNTY, AND CHILD BORN IN ANOTHER COUNTY WHERE SAID CHILD BECOMES A DEPENDENT CHILD AND RESIDES THERE—CHILD IS WARD OF LATTER COUNTY.

Where a girl, 16 years of age, a ward of the juvenile court of A. county, gave birth to a child in the maternity hospital in B. county, and with said child is still residing in the latter county, and where said child became a dependent child, as defined in section 1645 *G. C., upon complaint being filed according to law in the juvenile court of B. county, that court has jurisdiction over such child and the juvenile court of A. county is without jurisdiction.*

COLUMBUS, OHIO, April 2, 1919.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter dated March 4, 1919, as follows:

> "We are interested in a case briefly described as follows:
>
> A girl, 16 years of age, a ward of the juvenile court of A. county, gave birth to a child in the maternity hospital in B. county, and is still residing in the latter county. The juvenile court in A. county, for particular reasons, wants to commit this baby to some agency or otherwise make it a ward of the court. Has the judge authority to assume jurisdiction over this baby, even if the mother voluntarily brings the child to the court? Or, can he order it brought to court? It has been held by some that any particular adjudication relative to the baby must be held in the county in which the mother and baby are now residing."

The questions which you raise on the facts above stated may be thus stated and numbered:

> "1. Has the probate judge of A. county the authority to assume jurisdiction over this child?
>
> 2. Would the act of the mother voluntarily bringing the child into the probate court of A. county be sufficient to confer such jurisdiction upon said court?
>
> 3. Can such judge order said child brought into court?"

Your suggestion is also noted that someone has advised that the adjudication relative to the child must be held in the county in which it and its mother are now residing.

Your letter does not state with whom the child is at present living or the circumstances surrounding it in its present location, but from the fact that some action on the part of either or both the juvenile courts of A. and B. counties is imminent, warrants the inference that conditions of dependency are believed to exist.

In the form in which it is stated, your first question is very easy of solution, as no judge has authority to *assume* jurisdiction in the sense that he may take to himself jurisdiction which is not legally conferred upon him or to the office which he is holding, but I am treating your inquiry as one raising the question whether such judge has jurisdiction.

So far as the mother is concerned, being a ward of the juvenile court of A. county, she is under the continuing jurisdiction of the juvenile court of said county under the provisions of section 1643 G. C. The jurisdiction over the mother does not of itself control or decide the matter of jurisdiction over the child.

It must be borne in mind, consistent with the purposes of the juvenile court acts, that dependency is not a crime, but a condition, and that the welfare of the child is the paramount consideration, an object of solicitude in the administration and corrective exercise of police power.

Attention is directed to section 1645 G. C., which defines a dependent child to mean:

> "* * * any child under eighteen years of age who is dependent upon the public for support; or who is destitute, homeless or abandoned; or who has not proper parental care or guardianship; * * * or whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship."

Facts somewhat similar to those stated in your letter were passed upon by the attorney general in 1916, in an opinion rendered to your board dated May 5, 1916, and found in Opinions of the Attorney-General, Vol. 1, 1916, page 777, in which the following conclusion is announced:

> "Nowhere in the juvenile court law is there found any provision which limits the court in the exercise of its power to extend the benefits of the law to a delinquent, neglected or dependent child. On the contrary, the juvenile court law is to be liberally construed to the end that proper guardianship may be provided for the child.
>
> 'Dependency' is a status, and when found to exist is sufficient in itself to vest jurisdiction in the court wherever such dependency may occur. The residence of the parents does not operate to deprive a juvenile court of jurisdiction over a child because such residence may perchance be in a county different from the one in which the act causing delinquency, or dependency, may have occurred. The parent would be subject to prosecution in the county in which the act was committed and no other.
>
> In the case under consideration, it appearing that the child in question is being cared for in C. county, where it was born, while the mother is confined in a state institution and therefore unable to support or care for the child, and there being no known person who can be charged with its support, it is my opinion that it is the duty of the juvenile court of the county in which the child is found to take jurisdiction if a complaint is filed under the provisions of section 1647 of the General Code, supra."

While some of the facts, as stated in your letter, do not appear the same as those on which the above quoted opinion was rendered, yet it is concluded that the principle announced by the attorney-general in the above opinion is applicable, and in my judgment correctly states the law; and this results in a conclusion that the juvenile court of A. county does not have jurisdiction over the child while it resides in B. county.

If the mother voluntarily took the child into A. county, the juvenile court of that county would have jurisdiction over the child, if the conditions of dependency, as defined by section 1645 G. C., existed at the time said child was taken into said court.

The matter involved in your third question is disposed of by the consideration of questions 1 and 2, and from the conclusion therein reached, especially in question 1, it may be said that the juvenile court of A. county cannot order said child to be brought from B. county into said court of A. county.

As a practical suggestion of disposing of this matter, consistent with the conclusion reached in this and the former opinion of the Attorney-General, it may be

well to note that upon complaint of any person bringing the dependency of this child to the attention of the juvenile court of B. county, he would have jurisdiction to make the proper order concerning the custody and commitment of the child.

Respectfully,
JOHN G. PRICE,
Attorney-General.

162.

ROADS AND HIGHWAYS—IMPROVEMENT UNDER PROVISIONS OF SECTIONS 6906 TO 6953 G. C.—ENTIRE IMPROVEMENT PROCEEDINGS SHOULD BE *SEPARATE* AS TO *EACH ROAD.*

Sections 6906 *to* 6953 *General Code, providing for road improvements under the supervision of county commissioners, contemplate that one road, or part thereof, shall be the basis of the improvement proceedings, hence, where it is proposed to improve five different county roads at the expense of the county as provided in section* 6921, *funds to be obtained by the issue of bonds as provided in section* 6929, *the entire improvement proceedings, including the issue and sale of bonds, should be separate as to each road.*

COLUMBUS, OHIO, April 2, 1919.

HON. A. F. ALLYN, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR:—Attention has been given to your communication of March 11, 1919, reading as follows:

> "The commissioners of Ottawa county, Ohio, are considering the proposition of issuing and selling the bonds of the county in the sum of $30,000.00 to provide a fund for the repair of five different county roads which were originally constructed of the same material and in the same manner. They contemplate paying for said improvements under authority of section 6921 of the General Code, and issuing and selling said bonds under authority of section 6929 of the General Code. The contemplated repairs are to be of the same nature, made in the same manner and using the same materials.
>
> I would like to submit to you the following questions with reference to said improvements:
>
> 1. Can those several road improvements be provided for in the same preliminary resolutions, and treated as one improvement; or should there be separate preliminary resolutions for each road improvement?
>
> 2. Can the issue and sale of all of said bonds be provided for in one resolution, with one advertisement and with one issue and sale; or should there be a separate resolution providing for a separate issue of bonds for each road improvement, with separate and independent advertisement, issue and sale of said bonds?"

Said sections 6921 and 6929 to which you make reference, form part of a series of statutes (sections 6906 to 6953) which provide for improvements of county roads under the supervision of the county commissioners. The proceedings may be initiated either by petition of land owners or upon unanimous vote of the commissioners. Section 6907 relating to the matter of the petition, provides that when such petition is filed, asking for the improvement, etc., of *any* public road or *part thereof*, the com-

missioners shall go upon the line of *said proposed improvement* and after viewing th same, determine whether the public convenience and welfare require that such im provement be made. Section 6910, relating to improvements without petition, pro vides that the commissioners may take the necessary steps to improve or repair *a public road* or *part thereof*, etc. Section 6911 begins "When the board of commissioners has determined that *any road* shall be constructed, reconstructed, improved or repaired," etc. Section 6912 relating to publication of notice of the proposed improvement, uses the expressions "such improvement" and "said improvement." These expressions "any road," "said improvement" and "such improvement" are found constantly recurring through the entire series of statutes above mentioned. Nowhere do we find express authority for treating the improvement of more than one road as one improvement; nor do we even find the plural of the word "road."

Quite plainly, therefore, the series of statutes in question contemplates one road as the basis for improvement proceedings. This being true, it follows that the resolution referred to in section 6910 should be separate as to each road, and that all further proceedings, including those relating to the issuing, advertising the sale of, and selling, bonds should be separate as to each road.

This conclusion finds especial support in section 6929 (107 O. L. 101) which reads as follows:

> "The county commissioners, in anticipation of the collection of such taxes and assessments, or any part thereof, may whenever, in their judgment it is deemed necessary, sell the bonds of said county in any amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, costs and expenses of such improvement. Such bonds shall state for what purpose they are issued and shall bear interest at a rate not to exceed five per cent. per annum, payable semi-annually, and in such amounts and to mature at such times as the commissioners shall determine, subject to the provisions however that said bonds shall mature in not more than ten years. Prior to the issuance of such bonds the county commissioners shall provide for the levying of a tax upon all the taxable property of the county to cover any deficiencies in the payment or collection of any special assessments or township taxes anticipated by such bonds. The sale of such bonds shall be advertised once not later than two weeks prior to the date fixed for such sale in a newspaper published and of general circulation within such county, if there be any such paper published in said county, but if there be no such paper published in said county then in a newspaper having general circulation in said county. Such bonds shall be sold to the highest bidder for not less than par and accrued interest. The proceeds of such bonds shall be used exclusively for the payment of the compensation, damages, costs and expenses of the improvement for which they are issued."

Since bonds authorized by said section 6929 are for the purpose of paying the cost of improvements resulting from proceedings initiated as provided in section 6907 (upon petition), or section 6910 (without petition), said three sections should be read together. In sections 6907 and 6910, as above noted, the expressions "any public road or part thereof" and "a public road or part thereof" are respectively employed; hence the expressions in section 6929 "to pay the estimated compensation, damages, costs and expenses of such improvement" and "for the payment of the compensation, damages, costs and expenses of the improvement for which they are issued," should be treated as referring to the improvement of "any public road or part thereof" or "a public road or part thereof."

Another matter may be mentioned as having a bearing upon your inquiry. It

will be noted that the petition provided for in section 6907 is to be signed by at least fifty-one per cent. of the land or lot owners, residents of the county, who are to be specially assessed, and that the petition is to designate one of the methods of paying the costs as set forth in section 6919. Logically, if the improvement of five roads may be treated as one improvement within the contemplation of section 6906 to 6953, the improvement of all the roads in the county may be treated as a single improvement. It is hardly to be presumed that the legislature had any such result in contemplation; for with varying conditions in widely separated districts in the county, it is not likely that the same views would prevail among landowners as to the proper method of paying the cost, or that a petition which might be freely signed in one neighborhood would be equally well received in another.

Furthermore, it should be borne in mind that the policy underlying our statutes relating to the issue of bonds is to provide means for the procuring of a special fund for a specific improvement. Section 5654 (103 O. L. 521), may be quoted in this connection:

> "The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund."

The views above expressed relate to the substance of the improvement proceedings rather than to their form. No doubt as a mere matter of form, the improvement proceedings relating to one road may be carried along with those relating to another, that is to say, that one resolution of the commissioners determining to make the improvement; one resolution to proceed with the same; one advertisement for sale of bonds, etc., may be so drawn as to include more than one road and at the same time to identify and keep separate each road and the proceedings relating thereto. If such form of proceedings is used, care should be taken to observe all statutory steps as to each road, so that when bonds are offered for sale, a prospective buyer who may be interested in the bonds relating to only one of the roads may find the proceedings complete as to that particular road. As illustrating the importance of the matter last mentioned, reference may be had to an opinion of this department dated October 22, 1917 (Opinions of the Attorney-General, 1917, p. 1960), relating to above quoted section 6929 and holding in substance as shown by headnotes:

> "Under the provisions of section 6929 General Code, as amended 107 O. L. 69 (p. 101), the county commissioners are not authorized to issue the bonds therein provided for in an amount greater than the aggregate sum necessary to pay the estimated compensation, damages, costs and expense of the improvement."

Considering the holding just quoted in connection with the situation stated in your letter, it will readily occur to you that if one road or part thereof is to be taken as the basis of improvement proceedings, it should be made plain upon the record of such proceedings that the amount of bonds relating to a particular road is not in excess of the sum necessary to pay the cost of improving that road, as distinguished

from the circumstance that thirty thousand dollar bonds may not be in excess of the amount necessary for the improvement of five roads.

All things considered, the simple, practical and safe course that suggests itself as being in conformity with sections 6906-6953 and with the spirit of our bond enabling statutes generally, is to make use of separate and distinct sets of resolutions, estimates, notices, advertisements, etc., as to each road.

Respectfully,
JOHN C. PRICE,
Attorney-General.

163.

APPROVAL OF LEASE OF CANAL LANDS IN TUSCARAWAS COUNTY TO WALTER WOHLWEND.

COLUMBUS, OHIO, April 3, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of February 28, 1919, in which you enclose for my approval lease of canal lands, in triplicate as follows:

Walter Wohlwend, canal land at Lock 17, Tuscarawas County, Ohio, manufacturing purposes ---------- $250.00

I have carefully examined said lease and find it correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

164.

DISAPPROVAL OF LEASE OF CANAL LANDS AT MASSILLON, OHIO, TO WM. F. & C. W. WAGNER—"ANNUAL RENTAL OF SIX PER CENTUM PER ANNUM OF SAID VALUATION" STATUTE PROVISION.

COLUMBUS, OHIO, April 3, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Referring to your communication with which you sent me for approval proposed lease of State canal lands, as follows:

Wm. F. & C. W. Wagner, for canal lands at Massillon, Ohio---------- $3,333 33

It is noted that the rental clause set out in said proposed lease calls for an annual rental of $150.00 for the first three years; $200.00 for the fourth and fifth years, and $215.00 for the remaining ten years of the fifteen year period covered by the lease. The sum total of these rentals as provided for in the proposed lease equals the amount calculated upon the value of the land at six per cent for fifteen years.

Section 13996 with reference to the rentals of canal lands which are leased provides that said lease shall be made "at an annual rental of six per cent. per annum of said valuation to be paid semi-annually, in advance * * *." The words of the statute would seem to leave no option as to the manner in which such rentals may be paid. I realize that conditions may arise such as you have stated to me, where it is to the interest of the State to arrange the rentals so that the installments be made less in the earlier years than in the later years of the lease period,—in other words, that as a business proposition the State may sometimes procure the entering into of a lease favorable from its standpoint when it cannot do so if the rentals are fixed at the same amount each year. However, considerations of this nature cannot prevail as against the express terms of the statute and the only relief is through the legislature.

The views thus expressed are similar to those set forth in an opinion of this department under date May 1, 1915, Vol. 1, Opinions of the Attorney-General, 1915, p. 612.

For the reasons given, I am constrained to return the proposed lease without my approval.

Respectfully,
JOHN G. PRICE,
Attorney-General.

165.

ANNUAL SALARY PAYABLE MONTHLY OR SEMI-MONTHLY—HOW COMPUTED FOR LESS PERIOD OF TIME.

Under laws fixing the compensation of a given position at a stated annual salary payable monthly or semi-monthly, the gross annual salary is to be apportioned in equal installments in accordance with the stipulated periods of payment, and the number of days in any given month or half month constitute the unit for apportionment of the installment of compensation for services rendered for a portion of such period.

COLUMBUS, OHIO, April 3, 1919.

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

GENTLEMEN:—Under date of March 14, 1919, you submitted for my opinion the following question:

> "In view of the fact that there are various methods of computing the compensation fixed on an annual basis, payable monthly or semi-monthly, and in view of the further fact that the same should be uniform, we respectfully request your written opinion upon the following matter:
>
> *Question:* If the compensation is covered by an annual salary, payable monthly or semi-monthly, and a person quits a position at some point within a certain month, should the amount of the compensation payable to this employe be based upon the number of days, taking the days in the calendar month as a basis, or taking a thirty day month as a basis, or taking a 365 day year as a basis?
>
> In case a 365 day year were taken as a basis would not the compensation

paid for such position from and inclusive of the first day of the year require consideration in making the computation? "

Your inquiry may be summarized as follows:

Under laws fixing the compensation of a given position at a stated annual salary payable monthly or semi-monthly, what is the proper method of calculating the compensation for services for any given number of days within a particular month or half month?

Several considerations are suggested in the determination of your inquiry, among which are the following:

Shall the annual salary be apportioned equally to each of the 365 calendar days of the year; or on the basis of a 30 day month; or on the basis of the actual number of days of the calendar month; or on the basis of the number of working days of the year or calendar month?

In connection with your inquiry you call attention to two opinions of this department, one of which, found at page 221 of the Annual Reports of the Attorney-General for the year 1913 relates to compensation of members of council of municipal corporations in which the conclusion relative to apportionment of salary was as follows:

> "As I construe said section it is the intent thereof that the compensation of members of a city council shall be fixed on an annual salary basis, payable semi-monthly and that if in any half month a meeting of council is held, either regular or special and a member fails to attend such meeting the amount which would be paid to him semi-monthly would be proportionately reduced."

The other opinion to which you refer, appears at page 2123 of the Opinions of the Attorney-General for the year 1915, and relates to compensation of clerks of boards of election, and the following statements were made in the course of the opinion:

> "The calculation of the portion of the monthly compensation which may be paid for a period of less than a month should be based upon the actual number of days in the calendar month in which such service is rendered.
>
> I am, therefore, of the opinion that * * * the compensation of all temporary clerks and assistants of either of such boards is limited to the rate if not to exceed one hundred dollars per month for the time actually employed, to be computed upon the basis of the actual number of days in the calendar month in which such services are rendered."

The provisions of the statutes under consideration in each of the foregoing opinions contained such special provisions that the conclusions reached might be said to have been influenced in large measure by the particular language under consideration, so that the rule announced would not necessarily furnish a guide in case of more general provisions of the character suggested in your inquiry.

However, I am of the opinion that a provision for payment monthly or semi-monthly characterizes the month or half month as the unit for apportionment of a gross yearly salary. In other words, the annual salary is to be due and payable in installments with reference to stated periods of service, whether monthly or semi-monthly, and when services have been rendered for a given calendar month one of the twelve installments of compensation becomes due and payable, and it is not apparent that the compensation so provided is to be calculated upon a daily basis or with reference to any other period than that stipulated for its falling due, which suggests an apportionment in equal installments in accordance with the periods provided for payment.

It therefore follows that in computing the compensation for services for a given number of days during any calendar month, less than the period provided as the

unit for payment, the number of days of the month or half-month shall be taken as the unit for calculation of the apportionment of the monthly or semi-monthly installment of compensation to the period of service.

For example, the rendition of services for ten days in the month of June would determine the employe's compensation as 10-30 of the monthly installment of compensation attached to the position; likewise the rendition of services for ten days in the month of July would determine his compensation as 10-31 of the monthly installment, and similarly for any other period of service.

Respectfully,
JOHN G. PRICE,
Attorney-General.

166.

APPROVAL OF BOND ISSUE OF WAYNE COUNTY IN THE SUM OF $3,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 3, 1919.

167.

APPROVAL OF BOND ISSUE OF WAYNE COUNTY IN THE SUM OF $12,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 3, 1919.

168.

APPROVAL OF BOND ISSUE OF WAYNE COUNTY IN THE SUM OF $20,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 3, 1919.

169.

CATTLE AFFECTED WITH RABIES—KILLED BY ORDER OF HEALTH OFFICER IN 1915—LEGISLATURE HAS DISCRETION OF PROVIDING FUNDS FOR COMPENSATION—TWO-THIRDS VOTE OF GENERAL ASSEMBLY NECESSARY.

The provisions of the act of 1917 *for compensation to owners of live stock injured or killed by dogs are not available for payment for cattle affected with rabies and killed by order of the health officer in* 1915.

There is no provision of law providing funds for the payment for stock killed as aforestated, and the matter of special appropriation of funds therefor by the legislature is one addressed to the discretion of that body.

The payment of claims of the character in question not having been provided for by pre-existing law, an appropriation for that purpose requires a two-thirds vote of the members elected to each branch of the general assembly.

COLUMBUS, OHIO, April 3, 1919.

HON. C. W. KING, *Chairman, Finance Committee, Ohio House of Representatives, Columbus, Ohio.*

DEAR SIR:—Under date of March 25, 1919, you requested my written opinion upon the following inquiry:

> "(1) Is there any law appropriating money to pay claims to owners of animals bitten by a dog suffering from rabies, when such animals were killed by order of the Board of Health, as stated in the accompanying papers?
> (2) Can this claim be put into the Sundries Bill?
> (3) If this claim is not legal as it now stands, how can it be made so?"

With your communication there were also submitted verified claims by a number of persons to the effect that stock belonging to them was killed under order of the health officer of Hocking County during the year 1915; also a verified report of appraisers fixing a valuation upon said live stock and certificate of the health officer to the effect that an order was issued by him for the disposition of said live stock as aforesaid.

Upon consideration of your question I find that provision is made in the act of May 30, 1917, and found in 107 O. L. 534, relating to the regulation of dogs and providing compensation for damages done thereby, which is applicable to a state of facts similar to those involved in your inquiry, and by said act provision is made for making claim to the township trustees and presenting proof of the injury done as well as the value of the live stock injured or killed; it is provided that the trustees shall make a finding on the right to compensation, which finding shall be certified to the county commissioners, and may be affirmed or modified by that board, and an allowance made in such amount as they shall find to be just.

Further provision is made for appealing from the finding of the county commissioners to the probate court for the determination of the matter before that tribunal.

This act is applicable to loss or injury to horses, sheep, cattle, swine, mules and goats occasioned by a dog not belonging to the owner or harbored upon his premises, and would cover the case presented, except for the fact that the law referred to became effective after the injury to the live stock had been done.

It is noted that the cattle were killed pursuant to the order of the health officer of Hocking county during the year 1915, while the law above noted did not become

effective until 1917, and also contains a provision that claims for such injuries shall be presented within six months after the occurrence of the injury, which considerations of course render the provisions of said law ineffective as a remedy for the owners of the stock in question.

I do not find that any specific provision of law for compensation to the owners of live stock other than sheep, injured or killed by dogs was in effect at the time of the injury of the cattle ordered killed by the health officer of Hocking county.

Authority is conferred upon the state board of agriculture to destroy animals affected with or exposed to dangerously contagious or infectious diseases, for the purpose of preventing the spread of such disease, by the act of 1915 prescribing the powers and duties of the board of agriculture, and provision is made for the payment of the value of such live stock to the owners thereof, as follows:

> "Section 1116. When approved by the board of agriculture, all claims of owners of animals killed under the provisions herein relating to the board, shall be paid from the funds appropriated by the general assembly for that purpose."

While there appears to be no specific provision of law authorizing boards of health or health officers to order the killing of live stock, yet by section 1241 G. C. the board of health is authorized to maintain a chemical and bacteriological laboratory for the purpose, among other things, of diagnosing hydrophobia, and under the broad and general powers vested in the board of health, I am of the opinion that where there is a probability of prevalence or spread of rabies on account of live stock being infected therewith, that the board may take such reasonable and necessary steps as shall be found appropriate for eradicating the malady.

When such action has been taken, the general policy of the state in recognition of liability for loss of live stock under such circumstances as evidenced by the legislation above referred to, is such as to suggest an excercise of the legislative discretion in consideration of the claims of the owners of live stock destroyed as set forth in your inquiry.

In short, there appears to be no available remedy for the aforesaid owners of stock except to invoke the appropriating power of the legislature.

It was said in State v. Medbery, 7 O. S. 522, as follows:

> "By virtue of this power of appropriation, the general assembly exercise their discretion in determining, not only what claims against or debts of the state shall be paid, but the amount of expenses which may be incurred. * *
>
> The discretion of each general assembly for the period of two years in respect to the amount of expenditures, except in some special cases relating to salaries, *is without limit and without control.*"

I call attention to the provisions of section 29 of article II of the constitution, which provides as follows:

> "No extra compensation shall be paid to any officer, public agent or contractor. after the service shall have been rendered, or the contract entered into; *nor shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the general assembly.*"

Claims of the character involved in your inquiry should be embodied in the sundries appropriation bill where proper attention will be given to the requirement of

a two-thirds vote of all members elected to each branch of the general assembly for its allowance.

Therefore answering your inquiry specifically, I advise that there is no present provision of the law for payment of claims of the character presented in your inquiry applicable to losses incurred in the year 1915; and the legislature is invested with authority to make such appropriation for compensation of the owners of said stock as in its discretion it shall determine, which appropriation requires a two-thirds vote of the members elected to each branch of the general assembly for its passage.

Respectfully,
JOHN G. PRICE,
Attorney-General.

170.

APPROVAL OF ABSTRACT OF TITLE TO LOT No. 42 WOOD-BROWN PLACE ADDITION, FRANKLIN COUNTY, COLUMBUS, OHIO.

COLUMBUS, OHIO, April 4, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—Under date of March 31, 1919, you requested my examination of abstract of title to lot No. 42, Wood-Brown Place addition to the city of Columbus. With your communication you submit an abstract of title to said lot No. 42 as the same is numbered and delineated on the recorded plat of said Wood-Brown Place, as found in Vol. 5, pages 196 and 197 of the plat records of Franklin county, Ohio, and which abstract is dated March 18, 1919.

Upon examination whereof I find that it evidences title to said lot No. 42 in J. R. Slyh at the date of said abstract, and that on said date said title was free of encumbrance.

I, therefore, approve the title as evidenced by the abstract.

Respectfully,
JOHN G. PRICE,
Attorney-General.

171.

SYNOPSIS OF REFERENDUM PETITION ON ACT AMENDING SECTIONS 12694 AND 13423 G. C. APPROVED.

COLUMBUS, OHIO, April 4, 1919.

RUSSELL H. SKEELS, D. C., *Hotel Columbus, Columbus, Ohio.*

DEAR SIR:—You have submitted to me under date of March 31, 1919, for my certificate, a synopsis to be embodied in a referendum petition, said synopsis in words and figures being as follows:

> "The Act, known as the 'Talley Act,' or 'House Bill 176,' approved by the governor March 18, 1919, and filed with the secretary of state, March 20, 1919, amends sections 12694 and 13423 of the General Code of Ohio, relative

to the illegal practice of medicine and surgery, or any of its branches, and the enforcement of penalties therefor."

I, John G. Price, Attorney-General of the State of Ohio, do hereby certify that the foregoing synopsis is a truthful statement regarding the purpose and contents of said house bill No. 176.

Respectfully,
JOHN G. PRICE,
Attorney-General.

172.

CONSTITUTIONALITY OF SENATE BILL No. 99—DAM FOR CITY OF AKRON.

COLUMBUS, OHIO, April 4, 1919.

HON. H. J. RITTER, *Chairman, Public Works Committee, Ohio Senate, Columbus, Ohio.*

DEAR SIR:—You have requested the advice of this department on the constitutionality of senate bill No. 99, Mr. Whittemore. This bill is entitled:

"A bill to prevent destructive floods and conserve and prevent waste of the waters of the streams, lakes and public waters of the state of Ohio, and to provide for the sale or lease to the public of such water for agriculture, commercial, manufacturing and other public purposes."

The bill seems to be in the form of a series of sections supplementary to section 412 G. C., which relates to the powers and duties of the superintendent of public works. It is to be said, however, that the proper enacting clause is not in the bill and if passed it should be amended to supply this defect.

The first supplementary section authorizes the superintendent of public works to construct reservoirs, dams, canals, raceways and other improvements, or make additions to or alterations of existing works of such character constituting a part of the public works of the state, for the purpose of conserving, impounding and storing the waters of a watershed stream, etc., with a view to the promotion of agriculture, commerce, manufacturing and other public purposes. In so doing he is further authorized by this section to receive by gift, purchase or take by appropriation proceedings the property rights, privileges and appurtenances which would have to be secured in order to make such improvements. Preliminary to any steps looking to this end, the section requires that he prepare plans, specifications and estimates of cost of the works he proposes to construct, submitting them to the governor for approval or rejection.

The second supplementary section is conditioned upon the approval of the governor and declares that the superintendent of public works shall in such event proceed to construct the improvements or to make alterations in those already existing, in accordance with the plans and specifications, and to provide funds therefor by issuing and selling "bonds of the state of Ohio" not in excess of the estimated cost of such improvements. These bonds are to run for not exceeding twenty-five years.

The section further provides that:

"Said bonds shall show, on their face, the purpose for which issued and

shall create no liability upon, nor in any wise be considered an indebtedness of the state of Ohio, but shall be paid, both principal and interest, solely out of the proceeds arising from the sale or lease of the water impounded and conserved or the power generated by the improvements constructed, altered or enlarged * * * in accordance with the terms and provisions of this act, or from the proceeds of the sale, on foreclosure, as hereinafter provided, of the lien, securing said bonds, on such improvement or such part thereof as may be constructed from the money realized from the sale of said bonds."

The section proceeds to set up machinery for the issuance of the bonds and the custody of the funds realized from their sale, their payment when due, etc. Some slight question arises here respecting the custody of the funds, as to whether or not they would be in the state treasury and subject to appropriation. The bill seems to assume that they would be, but no question as to the constitutionality or validity of the act is here involved, and no such question would be raised until an effort were made to expend moneys in the custody of the treasurer, arising from the sale of the bonds after the expiration of two years from the passage of the act, without making an appropriation for that purpose.

Art. II, Sec. 22 of the constitution provides that:

"No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

It is obvious that this constitutional prohibition is directed to the drawing of money from the treasury. A law that might attempt or seem to attempt to authorize the drawing o money from the treasury, without a specific appropriation, would not be invalid on that account; it would be merely ineffectual and a specific appropriation for the purposes of the law would be sufficient warrant for the drawing of the money from the treasury. Instances of this sort have been frequent in the legislative history of the state.

The next two supplementary sections provide for advertising for bids and letting contracts for the doing of the work.

Section 412-5, as set forth in the bill, authorizes the superintendent of public works to sell or lease the water or any part thereof conserved and stored by such improvement or improvements, *or that will be conserved and stored by any such improvement*, as shown by the plans and specifications prepared and approved, to be used for agricultural, commercial, manufacturing or other lawful purposes, for a term not exceeding twenty-five years. He is also authorized by the same section to sell and lease, for the same term, the power generated by any head of water raised or maintained by any such improvements, or the right to such head of water for generating power.

In order to avoid misunderstanding, it may be remarked here that the thing to be sold under the terms of the bill, both with respect to the water itself and with respect to the water power, is a right for a term of twenty-five years. In other words, the bill, fairly interpreted, means, not that he may sell in perpetuity or lease for any term not exceeding twenty-five years. If there is any doubt about this point, the bill should be amended so as to make it clear that the advantages accruing from the construction of the works can not be sold in perpetuity, but the whole bill makes it very clear that this is not its intention.

The next section contains a provision to the general effect that in order to ascertain whether a given project is practicable or not, the superintendent of public works may, before selling bonds and receiving bids, enter into tentative agreements for the sale or lease of such water or power, the execution or carrying out of which shall be conditioned

upon his ability to sell the bonds and secure bids at the estimated cost, including compensation and damages. It may be remarked, as to this section, that contracts so made would seem to be binding if and when the conditions upon which they are made are satisfied.

Section 412-7 provides for the custody, etc., of the moneys derived from the sale or lease of the water. The remarks which I have made respecting the custody and disposition of the moneys arising from the sale of the bonds apply to this section as well.

Section 412-8 provides that if the works constructed or enlarged by the superintendent of public works shall constitute a part of the "Canal System" of the state of Ohio, no waters shall be leased or sold therefrom by the superintendent of public works, excepting the excess over and above that which may be required for navigation purposes.

Section 412-9 provides in part that:

> "The funds derived from the sale or lease of the water impounded and conserved or the power generated by said improvements are hereby expressly pledged for the purpose of maintaining and keeping in repair said improvements and for the payment of the interest and principal of said bonds, as the same fall due and mature, and in addition thereto, the owner or owners of such bonds is hereby given a lien for the payment thereof, both principal and interest, upon such * * * improvement or any part thereof * * * with the funds derived from the sale of such bonds and, if default be made in the payment of the interest on any of said bonds for three (3) or more successive years, or, if any of said bonds, aggregating in par value not less than one hundred thousand ($100,000.00) dollars be not paid at maturity, then all of said bonds, both principal and interest, shall become due and payable, and the owner or owners of any of said bonds, having any aggregate par value of not less than one hundred thousand ($100,000.00) dollars may institute proceedings against the state of Ohio in the court of common pleas of the county in which is located any of said improvements, constructed * * * out of the proceeds of the sale of such bonds, to foreclose such lien, and said court shall have jurisdiction of such action with full power to foreclose such lien, and to make an order to the sheriff of said county * * * directing him to make a sale of such improvements * * * at not less than two-thirds of the appraised value thereof and upon such terms and in manner and form as provided for in said order, and to pay the proceeds of such sale to the clerk of said court, and upon motion * * * the court shall, if the same be found to be regular * * * confirm the same and order the sheriff to execute a deed to such purchaser and his assigns, conveying to him all the right, title and interest of the holders of said bonds and each of them in and to said improvements, and all the right, title and interest of the state of Ohio, for a period of twenty-five (25) years, from the date of such conveyance, in and to the same, with full right and franchise, for said period of twenty-five (25) years, to operate said improvements and dispose of the water conserved, or the power generated thereby, with the further right, for said period of twenty-five (25) years, to * * * convey said water from said improvement or to conduct and transmit power generated thereby through, over and upon any of the lands of the state or channels or beds of any of its reservoirs, lakes, canals, races, aqueducts or water courses; provided, however, that in the exercise of such rights, such purchaser or his assigns, shall in no wise interfere with the navigation of the canals of the state nor the control and maintenance thereof, nor the sale of water by the state from its * * * improvements other than those so constructed, nor shall the state be held to incur any liability on its part by reason of such sale and rights thereunder, to continue to maintain such

canals, races, channels or water courses, or to continue the use thereof, and such conveyance or grant by the sheriff * * * shall contain a clause, giving the superintendent of public works such control of waste gates and wickets, as to regulate the flow of water in state reservoirs, or canals, in such manner as to maintain the proper level of the state's reservoirs and canals and to prevent the flowing into such reservoirs and canals of such quantities of water as might impair any of the property of the state or its lessees.

Upon the foreclosure of said lien and the sale of said improvement * *, all contracts or leases for the sale or lease of water or power then outstanding shall become null and void, and the rights of both of the state of Ohio and the several lessees thereunder, shall cease and determine.

(Here follows a provision for an appraisement in connection with the sale and for certain other matters which might possibly arise during the twenty-five year period to be enjoyed by the grantee of the franchise thereunder.)

At the termination of said period of twenty-five (25) years, all of the rights, and privileges conveyed to said purchaser by the deed and grant of such sheriff * * * shall cease and determine and said improvements * * * shall revert to and become the property of the state of Ohio, free and clear of any and all claims of whatsoever kind or nature against the same."

Section 412-10 provides, by appropriate reference, for the machinery of making appropriations, which is strictly in accordance with the statutory and constitutional provisions relating to the taking of private property for public uses.

Section 412-11 is intended to, and does, safeguard the rights previously acquired by any municipality or other political subdivision of the state in any water or watershed.

A proposed amendment, submitted to me by you with the bill, authorizes the superintendent of public works, in time of severe drought or when from other causes the water supply of any municipality or other political subdivision of the state shall be so reduced or impaired as to endanger the property of the municipality or the health, safety or property of its inhabitants, to grant, under such regulations as he may prescribe, to such municipality, the right, during the continuance of the emergency, to draw or take such quantity of water as may be necessary to protect such property or such health, etc., from any improvement constructed under the provisions of the bill, in preference to the rights of lessees or grantees of the state.

Certain other amendments have also been submitted to me, none of which, however, affect in any way the broad constitutional questions submitted by the committee to me.

The following questions have been raised in my mind:

1. Would the taking of property, for the purpose of impounding water to be used for agricultural, commercial or manufacturing purposes, as well as for other public purposes, be in violation of Art. I, Sec. 19 of the constitution, which provides in part that:

"Private property shall ever be held inviolate but subservient to the public welfare. * * *."

The principle embodied in this section is of course that private property can only be taken for public use. Would a taking of property for the purpose specified be for a public use, in view of the assumed fact that long time leases or sales are to be made of the water impounded, etc., presumably to a limited number of persons? In this connection, of course, it is to be observed that any person, firm or corporation may

be let in by contract as a user of the water or water power; but the point is as to whether that can be a public use which is not continually open to the public at large.

In this connection, Art. II, Sec. 36 of the constitution adopted in 1912 is entitled to some weight, as declaring the policy of the state. It provides that:

> "Laws may be passed * * * to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation district; * * *."

Water power is one of the things dealt with by this bill. It could not be developed by the state and made available for the use of citizens indiscriminately to any considerable advantage. In short, water power is a thing which must be used on a comparatively large scale and by a comparatively small number of members of the public. And it may be remarked that the conservation of the resources of this state, in the form of streams, etc., for any similar purpose, would be within the scope of Art. II, Sec. 36; that is to say, any reasonable, economic use that might be made of conserved waters, other than the development of power therefrom, would seem to be within the fair intendment of the section.

But the difficulty, if any, encountered here, disappears when the question is looked at from another angle. If the state could grant by statute, to a private corporation, the right of eminent domain, for the purpose of impounding water for manufacturing purposes or power purposes, or both, or for agricultural purposes, then certainly the state itself could impound water and exercise the right of eminent domain to that end for similar purposes, for the right of eminent domain, whether exercised directly by the state or delegated to private individuals, is founded upon the same notion of a taking for public purposes.

In this connection it is to be observed that the law has gone through a process of development. We may at once lay on one side the question as to the nature of the purpose when agriculture is the object to be served. Many of the western states have irrigation projects for the construction of which the exercise of eminent domain is necessary. It is now beyond question that such agricultural projects do constitute a public purpose, though it is to be noted here that the number of users of water for agricultural purposes must be necessarily limited and in fact is limited by reference to the location of the lands to be irrigated. What is really done by an irrigation project is to benefit lands within a certain area. The same may be said of drainage projects, such as the construction of county and township ditches, which have always been provided for by the laws of this state. These enterprises benefit the lands within a restricted area and yet private property may be taken for such purposes, and this is no longer an open question.

But as to the taking of property for the purpose of impounding water, with a view to its use in the development of power or directly in the processes of manufacture or the arts, the development of the law has been slower. Originally, the view seems to have been held that this was not a public purpose.

Attorney General vs. Eau Claire, 37 Wis. 400.
Kaukauna Water Power Co. vs. Canal Co., 142 U. S. 254.
Minnesota Canal & Power Co., 5 L. R. A. (N. S.) 638.

The most recent cases, however, show a departure from this view and a clear recognition of the principle which, as we have seen, is almost necessarily implied in Art. II, Sec. 36 of our constitution, that such uses are public.

Thus it is held in Jacobs vs. Clearview Water Supply Co., 220 Pa. 388, that: (syllabus)

"The supply of water to the public for commercial and manufacturing purposes is a public use and the right of eminent domain may be lawfully conferred to secure property for the safe storage and transportation of water for such purposes, where all applicants have a right to service, although at the time of the taking, the principal, if not only, customer, will be a railroad company."

In the opinion the court says:

"The building of reservoirs for the storage of water and the laying of mains for the purpose of supplying and transporting water and water power for commercial and manufacturing purposes would tend to increase the industrial enterprises and promote the productive power of all citizens who desire to avail themselves of water or water power for these purposes in that community. It is conceded that the supply of water to the public for domestic purposes is a public use, but it is denied that the supply of water for commercial and manufacturing purposes is a public use. The distinction is more apparent than real. It rests on a very narrow edge. It is based on the theory that a large number of individual citizens, living in the community where the respondent company transacts its business, will not engage in commercial and manufacturing enterprises and, therefore, will not participate in the use of water and water power for such purposes. An enterprise does not lose the character of a public use because that use may be limited by circumstances to a comparatively small part of the public."

Of similar purport is the case of Hand Gold Mining Co. vs. Parker, 59 Ga. 419.

In Mt. Vernon, Woodberry Cotton Duck Co. vs. Alabama Interstate Power Co., 240 U. S. 630, a recent case, the supreme court of the United States sustained the constitutionality of a state law authorizing the appropriation of property for the purpose of generating power to sell for manufacturing purposes. The court in its opinion uses the following language:

"The principal argument presented that is open here, is that the purpose of the condemnation is not a public one. The purpose of the power company's incorporation, and that for which it seeks to condemn the property of the plaintiff in error, is to manufacture, supply and sell to the public, power produced by water as a motive force. In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is."

This was a departure from the earlier decision of the court cited, in which the same question was involved; for in both cases the generation of water power was the object of the enterprise.

A significant statement is found in the opinion of Clark v. Nash, 198 U. S. 361. This was an irrigation case, in which it was claimed that it was beyond the power of the legislature to authorize the condemnation of land for the purpose of irrigating the lands of one or two persons. Mr. Justice Peckham used the following language in his opinion:

"In some states, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries."

This statement must be regarded as very significant, in the light of the fact that Ohio has by direct constitutional provision recognized the tremendous importance of conserving her natural resources in the development of her industrial enterprises. Such a constitutional provision would be the best of evidence in the supreme court of the United States, as to the situation of the state and the extent of the public need to be served.

In this connection, I refer to sections 10128 and 10132 of the General Code, as further indicating the policy of this state with respect to the generation of power.

On principle, it is difficult to see how the public use, upon which this measure is predicated, can be denied. Water is indeed a natural resource. The conditions of making it available are monoplistic. The supply of it is limited as to quantity and as to location. It necessarily follows that the public has a paramount interest in it and that its conservation by the public would be a public enterprise or utility. Because it is likewise limited with respect to the number of persons who can avail themselves of the advantages of such a supply, instead of being open to practically everybody, like a railroad, it does not therefore follow that the public use is destroyed.

Without arguing the question further, it may be stated as the opinion of this department that the bill is constitutional so far as the condemnation feature of it is concerned.

2. Another question which has been considered is as to whether or not the bill violates any of the provisions of Art. VIII of the constitution. The following may be quoted:

"Section 1. The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed seven hundred and fifty thousand dollars; and the money, arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

"Section 3. Except the debts above specified in sections one and two of this article, no debt whatever shall hereafter be created by or on behalf of the state.

Section 4. The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever."

The last quoted section may, it is believed, at once be dismissed from consideration. In the first place, the state does not pledge its credit at all by this bill, but merely the proceeds of the operation of certain public works and the right to use those public works for a limited period. The ultimate title to the lands and other rights taken

by the state for the purpose of constructing the works, and that of the works themselves, remains in the state, no matter what happens. The general resources of the state are not involved at all. In the second place, neither the lessees or purchasers of water power or water, nor the purchasers of the bonds, could be said to have the benefit of a loaning of the state's credit, or to be joint owners, with the state, of the enterprise. As has been said, the state is to be the sole owner and the credit of any of those who deal with the state under this bill is in nowise enhanced by that of the state.

The real question here involved arises under sections 1 and 3 of the constitution The general assembly, acting for the state, is prevented by these provisions from incurring a debt for a purpose like that involved in the bill. This is sought to be avoided by the provision that the bonds to be issued are not to constitute a general obligation of the state, but are to be regarded as promises of the state to pay from the revenues of a particular enterprise. It is clear that under the terms of the bill the state could never be liable beyond the earnings of the public works constructed under it. Every possible contingency growing out of the failure of such earnings to afford sufficient revenue to provide for the payment of the bonds seems to be guarded against in such a way that the remedy of the bondholders would be limited to the foreclosure of the lien and the sale thereunder of the franchise to operate the works for a period of twenty-five years. After such foreclosure, the contract of the bond holders would be fully discharged, as they would have expressly agreed to look solely to their rights under the bill in payment of the obligations held by them. After the expiration of the twenty-five years last named, the property would revert to the state, free and clear of all incumbrances.

The word "debt," as used in the sections quoted from Art. VIII of the constitution, is clearly limited to general obligations. The bill embodies not an attempt to do indirectly what can not be done directly, but an effort to do something which is not prohibited at all.

State vs. Medbery, 7 O. S. 522.

I do not quote from the decision cited, though the whole opinion is responsive to the point on which I have cited it. The theory of that case was, in short, that where revenue is provided, out of which alone, an obligation created by the state, is payable in other words, where no obligation is created that is not provided for by revenues available at the time, and anticipated by the obligation—no debt is incurred.

3. Another similar question, arising under the sections last above considered, together with Art. II, section 22, of the constitution, above quoted, is as to whether or not these sections of the constitution are violated by the provision for the issuance of bonds, in that the general assembly is called upon to appropriate money beyond two years from the issuance of the bonds, for the purpose of paying them.

This question is more serious. It arises from the opinion of Judge Swan in the case last cited and is not lightly to be disposed of.

While the only promise made by the state is that the revenues of the water power project shall be devoted to the payment of bonds, yet if these revenues are to pass into the state treasury, they could not be paid out of such treasury, except in pursuance of appropriations which could not last for longer than two years. State vs. Medbery decides that the concurrent effect of the sections now under discussion prohibits one legislature or one administrative officer from making a contract which will require for its discharge, on the part of the state, an appropriation beyond two years, except for the current expenses of the state.

(See State ex rel. vs. Donahey, 93 O. S. 414.)

Previously in this opinion, reference has been made to the language of the bill relating to the custody of the funds derived from the sale of water power or the lease

thereof or of water. I refer now more particularly to section 412-7 and lines 197 and 198 therein, where the phrase "unless otherwise lawfully appropriated by the general assembly" is used. In my judgment this provision infers that the treasurer of state has more than mere custody of the "Water Conservation Fund" provided for in that section and would be holding such fund in the state treasury, where it would be subject to appropriation by the general assembly. If so, the bill is unconstitutional, as an attempt to create a debt in the sense of requiring appropriations by subsequent general assemblies to discharge contracts made on behalf of the state.

I think that this defect might be eliminated by striking out the language to which I have called attention and putting into the section, at some appropriate place, words indicating more clearly than those now employed seem to indicate—though their fair purport seems to be in that direction—that the moneys derived from the sale or lease of the water or the power shall, when collected, be held in a fund which shall not be in the state treasury, but may be disbursed without appropriation by the general assembly. Indeed, there is another provision in the bill, relating to the payment of the bonds, which directly so provides.

If this were done, however, and if the bill were made consistent throughout, so as to indicate clearly the scheme of custody and disbursement of the funds arising from the rentals and other receipts which has been described, one more question—which is indeed the ultimate question raised by the bill—would remain to be disposed of.

Can the general assembly provide that revenues from the use of state property shall not be placed in the state treasury and subject to appropriation? This question has never been decided by the supreme court of this state. The legislature of the state has, however, acted for years upon the assumption of an affirmative answer to this question.

Until section 24 G. C. was passed in its present form, which was quite recently, there were numerous funds belonging to the state, but held outside the treasury of the state and therefore not subject to appropriation. At the present time, by virtue of subsequent amendment of another section of the General Code, there is at least one fund which is so held. I refer to the manufacturing fund of the Ohio board of administration, consisting of receipts from the sales of articles manufactured at the institutions under the control of said board, which by virtue of section 1866 G. C.

> "shall not be turned into the state treasury, but shall be credited to said fund, to be used for the purchase of further materials, machinery and supplies for such industries, for payment of compensation to employes necessary to carry on said industries, and for payments to convicts or their families as hereinafter provided, * * *."

I may mention also the original or voluntary workmen's compensation act of 1911, under which the treasurer of state was designated as the mere custodian of the fund which was to be expended without appropriation by the general assembly.

Of course when a collector of revenue for the state receives it into his possession, he is personally chargeable with it until he has accounted for it in such manner as may be prescribed by law. Formerly, many statutes, requiring money to be paid into the state treasury, provided for quarterly or other periodical payments. Section 24 G. C., previously referred to, was amended with a view to having these payments made at shorter intervals. It is obvious, however, that under the former state of the law the moneys, when collected for the state, did not *ipso facto* constitute moneys in the state treasury. It took a positive provision of statute, directing that they be paid into the state treasury, to get them there.

Again, numerous statutes have existed from time to time, and some now exist,

authorizing state officers or boards to receive, and hold in trust, money and property to be applied or used in accordance with the direction of the trust.

Section 24 G. C. itself contains an exception, authorizing the retention of tuitions and fees by the officers of educational institutions, in order to allow the making of refunders.

The cumulative effect of the laws to which I have referred in very weighty. It tends to establish a legislative interpretation of the constitution to the effect that money collected for a state purpose is not in the state treasury in the first instance and does not come into the state treasury save in pursuance of a statute to that effect. As a corollary to this proposition, it necessarily follows that a law segregating the proceeds of a particular enterprise and keeping them outside of the state treasury may be constitutionally enacted. Inasmuch as Art. II, section 22 of the constitution applies only to the expenditure of moneys in the state treasury, it necessarily follows, in the light of all that has been said in this opinion, that a debt would not be created by pledging such segregated revenues for a particular purpose.

From another point of view, it is clear that the state may authorize its officers to hold and administer property in trust.

I am not prepared to say that the bill at present has the form of a declaration of trust. It might easily be altered, however, so that it would take such form. In such event, the obligation of the custodian of the receipts from water rentals and sales of water and water power would be that of a trustee. He and he alone could be reached by the bondholders, for the protection of their interests. In proceeding against him, they would be enforcing the obligations of a trustee and not a personal liability in the nature of a debt.

In view of the legislative history of the state, then, and in view too of the established rule that statutes are to be held constitutional unless their invalidity is established beyond a reasonable doubt, I would be unable to reach the conclusion that the bill before me, if amended in the particular last above suggested, would be unconstitutional, though as a matter of first impression the contrary view might appeal to me.

In this connection, it is to be observed that in so far as the bill is concerned, the bondholders are an entirely different set of parties from the vendees and lessees of water and water power. It is not, therefore, as if the entire arrangement was legally for the benefit of those who may obtain such leases, etc.

4. I have also considered Art. XII, section 11 of the constitution, which provides that:

> "No bonded indebtedness of the state, * * *, shall be incurred * * * unless, in the legislation under which such indebtedness is incurred * * * provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

I have already indicated that in my opinion the bonds to be issued under the bill would not constitute a "debt." The thing to which Art. XII, section 11 relates is not an issue of bonds as such, but a "bonded indebtedness." This section was never intended to have the effect of requiring all bonds to be general obligations; its purpose was to require the due amortization of all such general obligations.

5. I have also considered Art. XII, section 6 of the constitution, which provides that:

> "Except as otherwise provided in this constitution the state shall never contract any debt for purposes of internal improvement."

The previous discussion is sufficient to indicate my view of this section, which is that it has no application to the bill under consideration.

For all the foregoing reasons, I may say that if the amendment previously suggested herein should be made, together with the other amendments which have been considered, I would not feel justified in saying that the bill as submitted would be unconstitutional, though on all the points discussed, save the first one, I am conscious of considerable doubt.

Respectfully,
JOHN G. PRICE,
Attorney-General.

173.

APPROVAL OF BOND ISSUE OF LUCAS COUNTY IN SUM OF $20,700.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 8, 1919.

174.

APPROVAL OF BOND ISSUE OF LUCAS COUNTY IN THE SUM OF $32,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 8, 1919.

175.

MUNICIPAL COURT OF YOUNGSTOWN—CHIEF DEPUTY CLERK AND CHIEF DEPUTY BALIFF—NOT IN CLASSIFIED CIVIL SERVICE—SALARY MAY NOT BE INCREASED DURING TERM OF OFFICE—SAID OFFICERS OR EMPLOYES HAVE A FIXED TERM OF OFFICE.

Under the municipal court of Youngstown, the act, being sections 1579-127 *G. C. et seq., the chief deputy clerk and chief deputy bailiff are appointed "each respectively for a term of two years * * * who shall serve until their successor is appointed and qualified respectively."*

Section 1579-175 *of said act provides that the judges of the Youngstown municipal court "shall have full power and authority to dismiss or discharge * * * chief deputy clerk * * * chief deputy bailiff * * * for any cause, and appoint a successor, and their decision shall be final."*

Section 1579-161 *G. C. also provides that such chief deputies shall be in the classified civil service of the city of Youngstown "subject to the provisions of law."*

HELD—A chief deputy clerk and chief deputy bailiff of such municipal court have a definite term of office and are such officers or employes having a fixed term of office or

employment that their salary may not be legally increased, under section 4213 G. C., during the term of their office or employment.

COLUMBUS, OHIO, April 8, 1919.

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

GENTLEMEN:—Acknowledgement is made of the receipt of your letter dated February 27, 1919, with which you enclose communication from the city auditor of Youngstown, Ohio, as follows:

> "The chief deputy bailiff and the deputy clerk of the municipal court of Youngstown, Ohio, have since the first day of January, 1914, held their positions as members of the classified service of said city. On the 12th day of August, 1918, city council passed an ordinance increasing the compensation of the employes of said court. All employes receiving such increase in compensation have been paid said increase except the two said chief deputies. The judges and all the employes of said court are paid salaries out of the municipal court fund, which fund was and is large enough to maintain said court and leave a balance of many thousand dollars. Has city council legally increased the compensation of said chief deputies by enacting said ordinance, a copy of which I am enclosing? If so, can the city auditor honor vouchers which have been drawn semi-monthly since September 13, 1918, for said salaries which include said increase?"

A copy of ordinance 21724 of said city, fixing the compensation and bonds of judges and employes of a municipal court of said city is attached to said communication.

It is noted that the question upon which you desire the opinion of this department is whether or not, upon the facts stated, the city council has legally increased the compensation of the chief deputy baliff and clerk of said court so as to be effective during the term which they are now serving.

Section 4213 G. C., is pertinent and in part is as follows:

> "The salary of any officer, clerk or employe shall not be increased * * during the term for which he was elected or appointed."

The municipal court of Youngstown was established by sections 1579-127 G. C., et seq., passed April 15, 1913 (103 O. L. 354). Sections 1579-161, 1579-166, 1579-168 and 1579-175 of said act pertain to the appointment, term and salary of such employes. In part section 1579-161 G. C. is as follows:

> "On the fourth Monday of November, 1913, and biennially thereafter, at one o'clock in the afternoon of said day, the respective judges of the said municipal court shall meet and select * * * Second, a clerk, a chief deputy clerk, a bailiff, and a chief deputy bailiff of said municipal court, *each respectively for a term of two years* * * *, who shall serve until their successor is appointed and qualified respectively. *The manner and form of procedure of selecting said officers* shall be determined by the said respective judges of said municipal court, and the manner and form of procedure *may be modified from time to time* as in the opinion of said respective judges may be desirable. * * * Additional deputies to the clerk and bailiff shall be designated as hereinafter provided for in this act. All appointive officers of the municipal court, excepting the clerk and baliff, shall be in the classified civil service of the city of Youngstown, *subject to the pro-*

visions of law, and of any charter which may be hereafter adopted by said city, applying to and applicable to said civil service."

Section 1579-166 G. C. in part is:

"The chief deputy clerk shall receive such compensation payable out of the treasury of the city of Youngstown * * * as the council or other proper legal authority may prescribe."

Section 1579-167 G. C. in part is:

"The * * * chief deputy bailiff shall perform * * * service similar to those usually performed by the sheriff for courts of common pleas * * *. The chief deputy bailiff shall receive such compensation not less than one thousand two hundred dollars, per annum * * * as the council or other legislative authority may prescribe."

Section 1579-168 G. C. in part is:

"* * * the judges of the municipal court shall select such number of deputy clerks, or deputy bailiffs as they may deem necessary * * * who shall serve for such time or term as the judges of said court shall determine."

Section 1579-175 in part is:

"A vacancy in the office of * * * chief deputy clerk * * * chief deputy bailiff shall be filled by the judges * * * for the unexpired term. Said judges shall have full power and authority to dismiss or discharge the * * * chief deputy clerk * * * chief deputy bailiff or any other appointee or officer other than a judge, provided for in this act, *for any cause*, and appoint a successor, *and their decision shall be final.*"

Sections 1579-129, 1579-132 and 1579-172 G. C. were amended March 21, 1917. (Ohio Laws 107, page 687), but the amendments of that date do not affect or change the law in the matters above quoted.

Section 486-13 of the civil service law, as amended in 106 O. L., p. 408, is pertinent and in part is:

"Appointments to all positions in the classified service * * * shall be made only from those persons whose names are certified to the appointing officer * * * and no employment, except as provided in this act, shall be otherwise given in the classified service of this state or any political subdivision thereof."

It is to be observed that the inhibition of section 4213 G. C., supra, is against changing the salary or compensation of an officer or employe "during the term for which he is elected or appointed." Consideration of the numerous decisions under this section and the analogous provision of section 20 of Article II of the Ohio constitution has resulted in the construction of this statute that there must be a term in the sense that the officer or employe holds his office or employment for a definite period.

As held in State ex rel. vs. Massillon, 2 O. C. C. (n. s.) 169, the health officer is

not an "officer" as defined in section 4213 G. C., nor has he any "term" as these words are used and understood in said section.

In State ex rel vs. Painesville, 13 O. C. C. (n. s.) 577, it was held that notwithstanding their tenure of office or employment was made uncertain by being under the civil service, the policemen and firemen were "officers" within the meaning of section 4213 and had terms of office as used and understood in said section.

Later, however, in State vs. Couglan, 12 N. P. (n. s.) 419, and in State vs. Bishop, 12 N. P. (n. s.) 369, the same question was considered and the opposite conclusion reached.

These conflicting decisions were considered in an opinion rendered by the Attorney-General May 18, 1912, construing section 4213 G. C., the conclusion of which was that the reasoning of the later decisions above referred to properly states the rule of law. On page 1739, Attorneys General's Report for 1912, my predecessor held:

> "I am, therefore, of the opinion that those holding under the civil service are not appointed for a 'term' within the meaning of section 4213 G. C., and that, consequently, council has power to increase or diminish their salary after appointment."

From this conclusion I am not inclined to dissent. The question involved in the facts above stated may be stated in this manner: The salaries of such deputies may not be increased during their incumbency if they have in law a fixed term. Then it may be stated that under section 1579-161, supra, such deputies do have a fixed term of two years unless that part of said section last quoted has the effect to place such deputies in the classified civil service of the city of Youngstown and in its last analysis we may say that this question depends entirely upon the construction to be given those sections of the Youngstown municipal court act, above quoted.

It is to be noted that in the section last referred to, the statute is without ambiguity in providing "a chief deputy clerk * * * and a chief deputy bailiff * * * each respectively for a *term* of two years."

It is also to be observed that section 1579-175 is likewise free from uncertainty and, without qualification, it provides:

> "Said judges shall have full power and authority to dismiss or discharge * * * chief deputy clerk * * * chief deputy bailiff * * * *for any cause * * * and their decision shall be final.*"

Yet another provision of section 1579-161 G. C. provides:

> "The manner and form of procedure of selecting such officers shall be determined by the said respective judges * * * and the manner and form of procedure may be modified from time to time as in the opinion of said respective judges may be desired."

It is to be noted that the above provisions as to tenure of employment are utterly inconsistent with the theory and purpose of the civil service law, and if those parts of the sections, above quoted, were all of the act bearing on such officers, there would be little left for construction; but the latter part of section 1579-161 contains this language:

> "All appointive officers of the municipal court, excepting the clerk and bailiff, shall be in the classified civil service of the city of Youngstown."

This provision, however, is "subject to the provisions of law and of any charter which may be hereafter adopted by said city, applying to and applicable to said civil

service," and with these conflicting provisions in the act it is rather difficult to say to what extent the chief deputy bailiff and chief deputy clerk would be in the classified civil service. But we may, for the purpose of determining whether such appointees have a term of office, consider which of these conflicting provisions is so clearly expressed as to show the legislative intention and the rule of construction applicable in such cases of repugnancy and inconsistency, as to give that construction which, other things being equal, will have the effect to harmonize what would otherwise amount to conflicting and repugnant provisions.

It cannot logically be said that such deputies are in the classified civil serivce and subject to all of the provisions of the civil service law and at the same time subject to removal and discharge by the judges of said court, from whose decision there would be no appeal.

In view of the definiteness with which the term of these deputies are fixed, and in view of the discretionary powers vested in the iudges of said courts, in the manner and form of their selection, and their discharge from service, it would seem that it was the intention to include within the civil service law all appointive officers in said court to whom the civil service law would apply, excepting as might be inconsistent with the other provisions of the act establishing the Youngstown municipal court. The effect of this construction would be that all such officers and employes, other than such chief deputies, without a fixed term, are included in the classified civil service, and that the construction of the last clause of section 1579-161 G. C., should be as if it had provided "that all appointive officers of the municipal court * * * shall be in the classified civil service of the city of Youngstown, *except as provided in this act.*"

Reading and considering the whole of the Youngstown municipal court act, this, it seems, is the proper conclusion, and I am therefore of the opinion that said chief deputy clerk and chief deputy baliff have a fixed term of two years, notwithstanding the civil service clause in said act, and that their compensation cannot be increased during the term for which they are appointed. It necessarily follows that the increased compensation provided in said ordinance cannot regularly be paid to such deputies during the term for which they were appointed.

The conclusion reached on the question first stated in your letter necessarily results in a negative answer to the second question stated therein.

Respectfully,
JOHN G. PRICE,
Attorney-General.

176.

COUNTY BOARD OF EDUCATION—WHEN REDISTRICTING BECOMES EFFECTIVE AND ITS EFFECT UPON EXISTING CONTRACTS—DISTRICT SUPERINTENDENT ELECTED FIRST TIME FOR NOT TO EXCEED ONE YEAR—HOW DISTRICT SUPERINTENDENT CHOSEN —COUNTY SUPERINTENDENT MAY BE REQUIRED TO SUPERVISE NOT TO EXCEED FORTY TEACHERS WHOSE DISTRICT SUPERVISION IS SUPERSEDED—ILLEGAL TO REDISTRICT AND ELECT DISTRICT SUPERINTENDENTS ON SAME DATE.

1. *Where a county board of education redistricts the county school district, such redistricting is effective on the first of September following and does not affect existing contracts for the current school year.*

2. *In a newly created supervision district the district superintendent can be elected*

the first time for a period not to exceed one year and a longer term must be by a re-election in the same district.

3. *Following a redistricting of a county school district, the meeting of the presidents of village and rural school boards in any supervision district for the purpose of choosing a district superintendent must be called by the president of the local district having the most teachers in such supervision district, and not less than ten days' notice of such meeting shall be given to all presidents in such supervision district.*

4. *A county board of education may require the county superintendent of schools to assume personal supervision over not to exceed forty teachers, where district supervision is superseded.*

5. *A county school district cannot be redistricted into supervision districts and district superintendents in such new districts chosen on the same day, and the election of district superintendents on the same date as the redistricting, is illegal.*

COLUMBUS, OHIO, April 8, 1919.

HON. GEORGE S. MAY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter requesting an opinion on the following statement of facts:

> "Prior to November 11, 1918, Henry county was divided into three supervision districts with a district superintendent in charge of each of said districts. On said date of November 11th, the county superintendent of this county resigned and Mr. T., formerly a district superintendent, was elected to the position of county superintendent, leaving Mr. S. and Mr. R. sole district superintendents.
>
> On November 19, 1918, on application of three-fourths of the presidents of the village and rural boards of education of said county, said county was redistricted into two supervision districts. On the same date a majority of the presidents of the village and rural districts respectively selected Mr. S. and Mr. R., as district superintendents *of the two districts*, therefore *created, for the term of three years.*
>
> The record of the minutes do not disclose that the meeting for the purpose of electing said district superintendents was called by the president of the board in the village or rural district having the largest number of teachers on ten days' notice and it is claimed that in one instance at least the president of a rural district received no notice of such meeting.
>
> Having in mind the provisions of sections 4739, 4741 and 4742 of the General Code, inquiry is made as to whether the election of such district superintendents was lawfully had.
>
> Your opinion in the matter is desired at the earliest possible moment, so that the status of said district superintendent may be determined with reference to the drawing of their compensation under such election."

Attention is invited to section 4738 G. C., which reads in part:

> "The county board of education shall divide the county school district *any year, to take effect the first day of the following September*, into supervision districts, each to contain one or more village or rural districts * * * The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts."

It will be noted in the above section that the county board of education "shall

divide the county school district *any* year," which seems to contemplate not more than one division in *any school year*, for the school year starting on September first and ending on August thirty-first is what is meant; the statute does not say the county board of education shall divide the county school district any "time," and the use of the words "*any year*" must have been used advisedly by the legislature, having in mind that new divisions made at any time throughout the year, and at frequent or sudden intervals would disturb the school plans of the year. It will be noted, too, that the statute says that such division, when made in "any year, *to take effect the first day of the following September*," that is, the beginning of the next school year.

The reasons for preventing the dividing of the county school district at unusual times, is at once apparent, for aside from disturbing and upsetting plans made for the school year, beginning on September first, it must be remembered that the state itself is involved in such dividing, for part of the salaries of the district superintendents is paid by the state. In the case in question, Henry county had three supervision districts when the school year of September first, 1918, began; such arrangement for taxing and financial purposes was on file with the county auditor, and was so certified to the state authorities, who made the allotment of state aid for district superintendents' salaries for the school year, beginning on September first, 1918. The financial sheet, arranging for the expense of such supervision districts, had been made up, and properly certified to both state and county authorities prior to September first, on the basis that such school year was to be undisturbed, yet, according to the statement of facts given, within eighty days after September first, this plan is radically changed in placing certain village and rural districts in new supervision districts. If such changes can be made at will at any time after the financial arrangements for the school year have been made and certified, then it is pertinent to ask whether a county board might not again change the districts at the end of another eighty days or a lesser period, thus disturbing proper supervision as well as the financial unit of the school year, as arranged prior to September first, by officers in charge of funds, for that school year. Surely the law does not contemplate promiscuous changes at will, after September first, to be effective at once, as in this case, or it would not say that such changes shall "be effective the first day of the *following* September," as appears in section 4738 G. C.

It may be said that the language of section 4738 G. C., which says "the county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, *redistrict* the county into supervision districts," gives power to the county board of education to "redistrict" at *any* time such petition is filed, to be effective at once, as was done in this case. However, this language is a part of the same section 4738 G. C., which says the dividing of the county school district may be done "any year, to take effect the first day of the following September," and the provision that three-fourths of the presidents may make application for a redistricting in any year, and the county board *shall* redistrict upon receipt of such application, is a mere saving clause to force a county board to act in any year upon a redistricting where such board might be out of harmony with a proposition that had the support of three-fourths of the presidents of the village and rural boards in the county, but in any event, whether such board did the redistricting voluntarily and without application, or made such new districts because of proper application, it would "take effect the first day of the following September" and not at a time during the current school year for which arrangements had been made prior to September first.

Attention is also directed to the closing language of section 4738 G. C., under discussion, which says:

"The county board of education may at their discretion require the

> county superintendent to personally supervise not to exceed forty teachers of the village and rural schools of the county. This shall supersede the necessity of the district supervision of these schools."

It will thus be seen that the legislature has wisely provided for the contingency of the overseeing of a portion of the county schools where occasion might demand, through a vacancy in a district superintendency, as in this case where Mr. T, a district superintendent, leaving a vacancy in the territory over which he formerly had charge prior to November 11, 1918, as such district superintendent. It cannot be said, then, that the supervision district of Mr. T. would be without supervision, for even if a district superintendent were not elected in such district, covering the vacancy, section 4738 G. C. provides, as stated, that the county board can direct the county superintendent to supervise such territory up to forty teachers. So there were two avenues which the Henry county board of education did not use in providing supervision for the superintendent's district left vacant by the promotion and election of Mr. T. to the county superintendency on November 11, 1918. We find that eight days thereafter they eliminated the T. district entirely, November 18, 1918, and made the three districts into two, possibly increasing the compensation of the two district superintendents, as is inferred from your closing paragraph, which says that an opinion is desired because of "drawing their compensation under *such election.*"

Coming now to the question of electing the two districts superintendents in the two new supervision districts, we find that Mr. R. and Mr. S. were elected for the *term of three years* at their first election as district superintendents in such newly created territory. Attention is invited to section 4741 G. C., which says:

> "The first election of any district superintendent shall be for a term not longer than one year, thereafter he may be *reelected* in the *same district* for a period not to exceed three years."

On November 11, 1918, two new districts were created in Henry county by the county board of education; districts composed of territory that before such date were the integers of three districts; the personnel of presidents of village and rural boards of education, whose duty it was to elect district superintendents, was an entirely new board as compared to any existing in such county prior to November 11, 1918. Thus these districts, newly created, were holding their *"first election of any district superintendent"* and the statute limits such first election of any district superintendent to "be for a term not longer than one year" and to get a three year term in such district it must come from a *re-election in the same district,* as provided in section 4741 G. C., for it is clear that certain presidents thrown into a new district on November 11, 1918, were voting in their *first election* of Mr. R. as *their* district superintendent, and other presidents were voting in the *first election* for Mr. S. as *their* district superintendent and an election for a three year term would be void in a newly created district.

You say further in your statement that "the minutes do not disclose that the meeting for the purpose of electing said district superintendents was called by the president of the board in the village or rural district having the largest number of teachers on ten days' notice" as is required in section 4742 G. C. in the matter of electing district superintendents. You further say that "it is claimed in one instance at least the president of a rural district received no notice of such meeting." It has been frequently held that a board of education speaks only through its minutes, and such minutes should show that "pursuant to the call" of the proper authority, such board met to transact its business. What the minutes show governs in board meetings, else any group could meet clandestinely and attempt to do business for the whole board.

Section 4742 G. C. is mandatory that the president of the board having the largest number of teachers shall issue such call for the purpose of electing a district superintendent, and at *least ten days' notice shall be given.* You say the two new districts were created on November 19, 1918, and on the *same day* a majority of the presidents in the respective two new districts selected Mr. R. and Mr. S. as the district superintendents in such new districts for the term of three years. Both actions having taken place on November 19, 1918, it is pertinent to ask how any president in the newly created district could receive the legal notice of "at least ten days" when such ten days would first expire on November 29, 1918. Surely no one knew, prior to November 19, 1918, what presidents composed each new district board or which one was the "president of the board having the most teachers," that is to say, the one to issue the call, which could not issue earlier than November 19, 1918. So it would seem that there was no legal call at all for such meeting to elect district superintendents in the two new districts, but rather a meeting of certain members by an understanding, since both redistricting by the county board and the electing by the district boards took place the same date, which the law does not contemplate since each president must have at least ten days' notice, and it could not issue before November 19, 1918.

Based upon the facts stated and the sections of the law quoted, it is the opinion, therefore, that the entire proceeding was irregular; that while the county board could re-district upon application of three-fourths of the village and rural district presidents, and did so, such re-districting is not effective till the first of the following September; that at the present time Henry county has three supervision districts as on September first, 1918, and for which provision was made prior thereto; that R. and S. are superintendents of the districts in which first legally elected and until September first, 1919; that there is a vacancy in the district formerly supervised by T., the new county superintendent, which can be filled by the presidents of such district; that the county board of education can assign supervision work to the county superintendent up to forty teachers, where supervision by district superintendent is to be superseded; that no district superintendents have been legally chosen in the two newly created districts, which become effective on September 1, 1919, because proper notice to all the presidents concerned was not given ten days in advance of such meeting to elect district superintendents; that when such district superintendent is chosen in a new district, the first election must be but for one year, and the election of R. and S. for three years in the new districts is invalid.

Respectfully,
JOHN G. PRICE,
Attorney-General.

177.

COUNTY BOARD OF EDUCATION—WHEN AND HOW MEMBERS ARE TO BE CHOSEN—SUCCESSORS, HOW CHOSEN—VACANCIES—REMOVAL OF MEMBER CHOSEN IRREGULARLY BY QUO WARRANTO PROCEEDINGS.

1. *The statute which confers upon the presidents of the boards of education of he various village and rural school districts of each county authority to elect a member of the county board of education each year, does not authorize the election of a member of such board for a term which does not begin until after the expiration of the terms of office of such presidents.*

2. *A person elected in June, 1915, as member of a county board of education for*

the term beginning the third Saturday in January, 1916, has no valid title to such office; like wise the election of a person in June, 1916, to succeed the member whose term expires the third Saturday in January, 1917, is invalid.

3. *Members of boards of education regularly chosen, hold their office till their successors are legally elected and qualified.*

4. *Where a member of a board of education is holding beyond his term and until his successor is legally elected and qualified, such successor can be elected for the unexpired term at any time after such vacancy has occurred through failure to properly elect for the regular term.*

5 *A member of a county board of education chosen irregularly in the year prior to the third Saturday in January, when such regular term begins, can be removed through quo warranto proceedings.*

COLUMBUS, OHIO, April 8, 1919.

HON. W. R. WHITE, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of February 28, 1919, in which you request an opinion on the following statement of facts:

> "On December 19, 1917, the then Attorney-General rendered an opinion No. 877 that a member of the county board of education, who is elected to succeed a member whose term expires on the day preceding the third Saturday in January, 1918, must be elected by the presidents of the various boards of education of the county school district, who are elected on the first Saturday, 1918, or who are serving until their successors are duly elected and qualified. I desire to ask if the above opinion still holds good.
>
> We have two members of the county board of education, one of whom was elected in the month of June, 1915, and the other was elected in the month of June, 1916, and while both members are qualified and acting, I write to ask if in your opinion they are legally elected and if not could they be ousted from their office by proceedings in quo warranto?"

In opinion No. 877, 1917, above referred to, the Attorney-General held that:

> "A member of the county board of education who is elected to succeed the member whose term expired on the day preceding the third Saturday in January, 1918, must be elected by the presidents of the various boards of education of the county school district who are elected on the first Monday in January, 1918, or who are serving until their successors are duly elected and qualified. That is to say, it will be for the new electing body and not the old, to elect such successor."

In your statement of facts you say that one member of your county board of education was elected in the month of June, 1915, and another was elected in the month of June, 1916; that is to say, the presidents of the village and rural districts met in June, 1915, and elected a member of the county board of education whose term was to legally begin the third Saturday in January, 1916, or at a time after their own terms might expire with January first, 1916; and in similar manner the presidents of the village and rural boards of education met in June, 1916, and elected a member of the county board of education, whose term was legally to begin on the third Monday in January, 1917, or after the expiration of their own terms on January first, 1917.

Section 4729 G. C., as amended in 104 O. L., 136, provides in part as follows:

> "On the second Saturday in June, 1914, the presidents of the boards of

education of the various village and rural school districts in each county school district shall meet and elect the five members of the county board of education, one for one year, one for two years, one for three years, one for four years and one for five years, and until their successors are elected and qualified. The terms of office of such members shall begin on the fifteenth of July, 1914, and each year thereafter on the third Saturday of January. Each year thereafter one member of the county board of education shall be elected in the same manner for a term of five years."

Attention is invited to an opinion of the Attorney-General, (no. 1266) rendered on February 14, 1916, construing the above section and in which he says:

"While it is difficult to construe the above provisions of section 4729 G. C., in view of the patent ambiguity as to when said term (that for one year) expires, I think it was the intention of the legislature in providing for the first election of the members of the county board of education on the second Saturday in June, 1914, for the term of one, two, three, four and five years, respectively, and until their successors should be elected and qualified, and by further providing that in each year after 1914 one member of said county board of education shall be elected for a term of five years to begin on the third Saturday of January, that the member elected on the second Saturday in June, 1914, for the one year term should hold over until the third Saturday in January, 1916, and that *the terms of office of the members elected for two, three, four and five years respectively, should expire on the third Saturday of January in the respective years*, 1917, 1918, 1919 and 1920."

It will thus be seen that there was no vacancy to be filled in 1915 at all and hence there could have been no valid election, for the one year term incumbent held till the third Saturday in January, 1916, at which time *his* successor should have been chosen by the presidents of the village and rural boards who themselves took office as such presidents, beginning with January, 1916; and the presidents in office in June, 1915, were without authority to elect any member of the county board of education for no vacancy occurred during 1915, and an election so held in June, 1915, was invalid and the person holding such membership in the county board of education, dating as of an election held in June, 1915, holds office through an irregular procedure.

As you have submitted no names, for the purpose of elucidation we will refer to the members and the terms involved, as follows:

The member of the county board of education elected in June, 1914, for the one year term, will be called Mr. A; the member elected in June, 1914, for the two year term, will be called Mr. B; the person elected in June, 1915, will be called Mr. C; and the person elected in June, 1916, will be called Mr. D., as more than likely four separate persons are involved, or at least there were four elections, or presumed elections.

The former Attorney-General, in his opinion No. 1266, 1916, held there was no vacancy during 1915, and there being no vacancy there was no office to fill by the presidents of the village and rural boards in office during 1915, hence Mr. A, elected in June, 1914, for the one year term, did not retire until the third Saturday in January, 1916; the statutory time for the election of a successor to Mr. A was after January 1, 1916, and if Mr. A.'s successor was not specifically elected after January 1, 1916, then Mr. A is still a member of the county board of education because no successor has been legally elected and qualified, and under the statute (section 4729 G. C.) the members chosen in June, 1914, serve "until their successors are elected and qualified." And since his term has expired and he is merely holding over "till his successor is elected and qualified," it is for the properly elected presidents of the village and rural

boards to elect his successor for the term ending the third Saturday in January, 1921, that is to say, five years from the third Saturday in January, 1916.

And so, in electing Mr. C. in June, 1915, to succeed Mr. A., whose term expired the third Saturday in January, 1916, the presidents were holding an election that was without authority, there being no vacancy during their tenure as such presidents. Mr. C. did not succeed Mr. A. legally because he was chosen at the wrong time and was elected by the wrong personnel of presidents, that is, those in office in June, 1915, and not those in office as the proper electing authority, in January, 1916, the time of the ending of the term of Mr. A. So Mr. C., chosen in June, 1915, as a member of the county board of education, was not legally elected and qualified as such for the reasons given.

Coming now to the person chosen in June, 1916, as member of the county board of education, and who has been designated as Mr. D., it must follow that the presidents elected Mr. D. as the successor of Mr. B., the member elected in June, 1914, for *the two-year term*, for they had already elected the successor of Mr. A. at their meeting in June, 1915. That is to say, the board presidents met again in June, 1916, and elected a successor to the two-year term member (Mr. B.), whom the former Attorney-General said held his office *till the third Saturday in January' 1917*, or after the expiration of the tenure of the 1916 presidents as then made up. Clearly the successor of Mr. B., elected in June, 1914, for the two year term, should have been chosen by the presidents after January 1, 1917, and not by the presidents in office in June, 1916.

Sustaining the view that a board or an officer cannot make a valid appointment to take effect at a time beginning after the tenure of such officer or board has expired, attention is invited to the following language in the case of State vs. Sullivan, 81 O. S., 79-92, that:

> "It is admittedly the well-established rule of law that an officer clothed with authority to appoint to a public office, cannot, in the absence of express statutory authority, make a valid appointment thereto for a term which is not to begin until after the expiration of the term of such appointing officer. Mechem in his work on public offices and officers, at section 133, states the general rule as follows: 'The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to office expiring after their power to appoint has itself expired.' The author than quotes with approval the language of Buchanan, J., in Ivy vs. Lusk, 11 La., 486, where he says: 'That an appointment thus made by anticipation has no other basis than expediency and convenience, and can only derive its binding force and effect from the supposition that there will be no change of person, and consequently of will, on the part of the appointing power, between the date of the exercise of that power by anticipation, and that of the necessity for the exercise of such power by the vacancy of the office.' Throop on his treatise on public officers, section 92, says: 'But it has been held that where an office is to be filled by appointment by the governor, with the advice and consent of the senate, the governor and senate cannot forestall their successors, by appointing a person to an office which is then filled by another, whose term will not expire until after the expiration of the terms of the governor and senators. And that an outgoing board of freeholders of a county cannot lawfully appoint a person to an office which will not become vacant during their official terms.' The correctness and soundness of the rule and doctrine as above enumerated, so far as investigation has disclosed to us, is not opposed by any of the authorities, but is supported by many, among which are State ex rel. Bownes v. Meehan, 45 N. J. L., 189; The People ex rel. Sweet vs. Ward, 107 Cal. 236; Ivy vs. Lusk, 11 La. An., 486."

This view is further sustained in the case of State ex rel. Attorney-General vs. Thompson, 6 O. C. D., 106-110, and also in Commissioners vs. Ramek, 9 O. C. C., 301.

This view is further sustained in the quo warranto proceedings in the case of The State ex rel. Scott vs. Ryan, 95 O. S., 405, where the Ohio Supreme court held in construing section 4729 G. C. that in 1915 there was no member to be elected because there was no vacancy until 1916, and applying the same principle as announced in the Sullivan case (81 O. S., 79-92), the 1915 board could not usurp the duties and prerogatives of 1916.

Subsequent to the above decision, the court of appeals of the fourth district in Hocking county, in the case of the state of Ohio ex rel. John F. Harsh, realtor, vs. Charles White, respondent, passed upon this very same question in their opinion in that case, using the following language:

> " 'Each year thereafter' means each year after the year beginning July 15, 1914, but the statute did not require an election in 1915, as shown by Scott vs. Ryan, 95 O. S., 405."

It was held here that the only vacancy and appointment that the board could have made in 1916 was for the successor to *the one year term member*. In the case at bar it seems that your presidents of village and rural boards, meeting in June, 1916, elected the successor to *the two-year term member*, but whose term did not expire till the third Saturday in January, 1917, or when a new personnel of presidents was in office, or at a time after they themselves were out as an electing body. It is apparent, therefore, that the alleged elections held in the summers of 1915 and 1916 to cover vacancies that came up in the following years, were irregular and the persons elected in such manner, heretofore referred to as C. and D., received no valid title to the office of member of the county board of education; and A. and B., elected in June, 1914, are the members of such board, under section 4729 G. C., until their successors are chosen and qualified for the unexpired terms; that is to say, the term of A., expiring first in January, 1916, would again expire five years thereafter, or in January, 1921, and similarly that of B., elected first in June, 1914, until January, 1917, would expire the third Saturday in January, 1922, had elections been properly held by the presidents of the village and rural districts in January, 1916, and again in Januray, 1917, as contemplated in the law and later decided by the courts.

And so we now come to the question as to the electing of the successors of A. and B., whose places in the county board are irregularly held by C. and D., irregularly chosen in June, 1915, and June, 1916, respectively. This has been elaborately treated in opinion No. 1496, Vol. 1, 1916, rendered by the then Attorney-General on matters similar to the one herein discussed, the following two questions being propounded:

> "1. Inasmuch as no election (of member of county board of education), was had as required by the statutes, can this board, composed of the several presidents, be called together again, and an election held at this time?
>
> 2. If this can be done, and the county superintendent of schools refuses to call such meeting, can a majority of the several presidents issue a call for such meeting, notifying the remainder of such meeting in writing?"

After quoting section 4729 G. C. (heretofore quoted in this opinion) the Attorney-General quotes sections 4730 and 4731 G. C. as follows:

> "Section 4730 The county auditor of each county shall issue the call for the first meeting giving at least ten days' notice of the place where such meeting will be held. The call for all future meetings shall be issued by the

county superintendent. The meeting shall organize by electing a chairman and a clerk. The vote of a majority of the members present shall be necessary to elect each member of the county board. The members of the county board so elected, may or may not be members or officers of any village or rural boar l of education. The result of the election of members of the county board of education shall be certified to the county auditor by the chairman and clerk of the meeting

Section 4731. Each member of the county board of education shall within ten days after receiving notice of his election, take an oath that he will perform faithfully the duties of his office. Such oath may be taken before any one authorized by law to administer oaths. If any person so elected shall fail to take such oath within the time prescribed, the office to which he was elected shall be considered vacant. Any vacancy on the board shall be filled in the same manner as is provided in section 4748 of the General Code."

after which he answers the questions as follows:

"The facts submitted by you being identical with those submitted by Mr. Scott, and considered in the aforesaid opinion, I have deemed it necessary to briefly set forth the holding of said opinion preliminary to the consideration of the questions submitted by you.

You first inquire whether the presidents of the boards of education of the various village and rural school districts of your county school district may meet at this time for the purpose of electing a member of the county board of education to succeed the member whose term expired January 14, 1916, but who is holding over because of the failure of said presidents to elect a successor at their meeting on said date.

"While section 4729 G. C., as above quoted, required that the first meeting of the presidents of the boards of education above referred to should be held on the second Saturday in June, 1914, for the purpose of electing the members of the county board of education as therein provided, section 4730, G. C., required the county auditor to issue the call for said meeting, as in said section provided, it will be observed that as to all subsequent meetings of said presidents for the purpose of electing a successor to the member whose term, by the above provision of section 4729 G. C., expires on the third Saturday in January of any year, no time is fixed for said meeting, and the only provision of the statute relating thereto is the provision of section 4730, G. C., that:

'The call for all future meetings shall be issued by the county superintendent.'

Section 4745 G. C. (103 O. L., 275) provided that:

'The term of office of members of each board of education shall begin on the first Monday in January after their election, and each such officer shall hold his office for four years, except as may be specifically provided in chapter 2 of this title (relating to city school districts), and until his successor is elected and qualified.'

Where, under the provision of the latter part of section 4745 G. C., as above quoted, a member of the board of education of a school district holds over because of the failure of the qualified electors of said district, at the regular election for said purpose, to elect a successor to said member, no vacancy exists within the meaning of section 4748 G. C., and said member holds

over until the electors of said district at a subsequent regular election for said purpose, elect a successor to said member and until said successor qualifies in the manner provided by law. If said successor should fail to qualify within the time prescribed in section 4748 G. C., then a vacancy would be created which could be filled in the manner provided in said section.

As has already been stated, it was held in the opinion heretofore referred to that the member of the county board of education whose term expires on January 14, 1916, holds over because of the failure of the presidents of the boards of education of the village and rural school districts, above referred to, to elect a successor, and no vacancy exists within the meaning of the provision of the latter part of section 4731, G. C., which could be filled in the manner provided in said section 4748 G. C.

In view of what has been said as to the holding over of the members of the board of education by virtue of the provision of the latter part of section 4745 G. C., as above quoted, until the election of his successor at a subsequent regular election for that purpose and until said successor is duly qualified, it may be argued that a meeting of the presidents of the boards of education above referred to may not be called at this time for the purpose of electing a successor to the member of the county board of education in question, and that said member is entitled to hold over for another year, in view of the fact that said presidents are required to meet at the call of the county superintendent for the purpose of electing a successor to the member of your county board whose term will expire on the day preceding the third Saturday in January, 1917, or it may even be argued that in view of the fact that if a successor to the member in question had been elected at the meeting held on January 14, 1916, and had qualified in the manner provided by law, said successor would have held office for a term of five years from January 15, 1916, and until the election and qualification of his successor, said member is entitled to hold over for the full term of five years and until his successor is elected and qualified. It seems clear to my mind, however, that inasmuch as no time is fixed for holding said meeting in any year, there is no practical difference in the operation of the statute between the calling of a meeting of said officials for the purpose of electing a successor to said member, and the calling of a meeting of the members of the county board of education under authority of the latter part of section 4731 G. C., as above quoted to fill a vacancy in said board in the manner provided in section 4748 G. C. In fact, there is nothing in the statutes above set forth to prevent said presidents from holding a meeting at this time for the purpose of electing such successor and for the further purpose of electing a successor to the member whose term will expire on the day preceding the third Saturday in January, 1917. I am of the opinion, therefore, that your first question must be answered in the affirmative.

While, as before noted, the county superintendent is charged with the duty of issuing the call for said meeting but the above provision of section 4730 G.C.,I do not think it can be said that this authority vested in said official is exclusive and that upon his refusal to perform this duty said meeting may not be held at this or any other time during the year, with any more reason that it could be said that upon the refusal of said county superintendent to issue a call for a meeting of said presidents for the purpose of electing a successor to the member whose term will expire on the day preceding the third Saturday in January, 1917, said meeting could not be held for said purpose. Such a holding would defeat the manifest purpose of section 4729, G. C., which provides the opportunity to effect a gradual change in the personnel of the county board of education in the manner therein prescribed.

I am of the opinion, therefore, in answer to your second question, that if the county superintendent refuses to call said meeting, the same may be called in the manner suggested in your inquiry, provided the written notice served upon each of the several presidents above referred to sets forth the time when, the place where, and the purpose for which said meeting is to be held.

Permit me to add further that I have just been informed that the questions presented by the prosecuting attorney of Adams county, in answer to which the aforesaid opinion was rendered, were presented to the court of common pleas of said county and the holding in said opinion was sustained by that court. A copy of said opinion is enclosed."

From the foregoing discussion it will be seen that this department has held in several former opinions that a board or officer cannot elect or appoint a person to any office which began its tenure after the appointing power itself had retired and these opinions were later sustained by the courts, but the most recent decision covering the matter at bar, and very completely so, is the case of State ex rel. Moulton vs. Myers, and State ex rel. Schlott vs. Myers, 99 Ohio State, decided November 19, 1918, and reported in the Ohio Law Reporter for March 3, 1919, the opinion of the court, all judges concurring, reading as follows:

"The statute which confers upon the presidents of the boards of education of the various village and rural school districts of each county authority to elect a member of the county board of education each year, does not authorize the election of a member of such board for a term which does not begin until after the expiration of the terms of office of such presidents. The general rule of law, well established, which is recognized, and applied in the case of State ex rel. Morris vs. Sullivan, 81 O. S., 79, is applicable and precludes the election of members of the county board of education, whose terms of office do not begin until the third Saturday of January, by the presidents of village and rural school district of the county, whose own terms and power to appoint expire on the preceding first Monday in January. The election of each of the relators was, therefore, invalid. * * *"

These were cases in quo warranto where the relator, Schlott, was elected in December, 1917, as a member of the county board of education for the term beginning in January, 1918, and the realtor, Moulton, was similarly elected in December, 1916 for the term beginning the third Saturday of January, 1917, and, as indicated in the decision, "the election of each of the relators was, therefore, invalid," for the reasons given in the decision.

You ask whether opinion No. 877, holding that the member of the county board of education must be chosen by the presidents in office in January, just prior to the beginning of the member's term on the third Saturday of January, and not by those who retire as presidents on January first, still holds good, and you are advised that it does, for the decision of the supreme court, published March 3, 1919, in the Ohio Law Reporter, as quoted, sustains such opinion in full.

Following the discussion here given and the citations made, it is the opinion of the attorney-general that no member of the county board of education was to be elected in 1915, and an election in that year by the presidents of the village and rural boards of education was irregular and the person so elected has no title to the office; that the only election that could have been held in 1916 would be the successor of the one-year term member, expiring in the third Saturday in January, 1916; that the election of a successor to the two-year term member (dating from June, 1914), if made in June,

1916, was irregular for such two-year term member did not retire until the third Saturday in January, 1917, and his successor should have been chosen prior thereto, but in January, 1917, by the then existing presidents of the village and rural boards, and such person elected in June, 1916, as the successor of the two-year term member, has no title to such office, as the successor should have been chosen by the personnel of presidents existing after January 1, 1917, his term ending the third Saturday in January, 1917; that the true members of the county board of education are A. and B., elected in June, 1914, for one and two year terms, because their successors have never been legally elected and qualified; that A. and B. hold until their successors are legally elected and qualified for that part of their terms yet to run, that is to say, till the third Saturday in January, 1921, and the third Saturday in January, 1922, respectively; that under the previous opinions of the attorney-general, including the late opinion of June 6, 1918 (wherein he says "the presidents of the various village and rural district boards of education * * * may be called together at this time to elect such member whose term will end on the day preceding the third Saturday in January, 1923," basing such opinion on the case of Scott vs. Ryan, 95 O. S., 405, wherein Scott was elected on the third day of April, 1916, and seated by the court, for the term ending in January, 1921), the presidents of the rural and village boards can meet at a later time after such failure to regularly elect and proceed to elect in legal manner for the unexpired terms; that the persons so elected have remedy in quo warranto, based on the proceedings in the cases of Scott vs. Ryan, 95 O. S., 405, and State ex rel. Moulton vs. Myers, and State ex rel. Schlott vs. Myers (99 O. S.), decided by the supreme court, November 19, 1918, and the decision above quoted; and that the persons alleged to have been elected in June, 1915, and in June, 1916, as members of the county board of education are without legal title to such offices.

Respectfully,
JOHN G. PRICE,
Attorney-General.

178.

COUNTY COMMISSIONERS—HAVE AUTHORITY UNDER SECTION 2434 G. C. TO BORROW MONEY FOR SUPPORT OF POOR—LIMITATION 5649-2 G. C.

Subject to the limitations of sections 5649-2 et seq. G. C., the county commissioners have authority ,under section 2434, to borrow money for the relief or support of the poor.

COLUMBUS, OHIO, April 8, 1919.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter of March 11, 1919, as follows:

> "At the request of the superintendent of the county infirmary I write to ask if there is any provision in law whereby the commissioners can borrow money to run the infirmary. The distribution made the first of this month for that purpose is practically exhausted by reason of the fact that the increased cost of edibles, etc., made the expense run much higher than had been contemplated.
>
> I have given it as my opinion that there is no provision of law whereby the commissioners can borrow money for this purpose and I am frank to

confess I do not know what we will do unless money is borrowed. If it is at all possible, the commissioners would doubtless borrow money to supply said institution, but if same is not legal, are you able to suggest to the superintendent any relief from his present dilemma. I presume that this situation confronts you in the majority of the counties of the state as the same expense was necessarily incurred by them and we would certainly appreciate any enlightenment you can give."

Sections 2434, 5656 and 5649-2 G. C. are pertinent to your inquiry. In part section 2434 is:

> "For the relief or support of the poor, the commissioners may borrow such sum * * * of money as they deem necessary * * * and issue the bonds of the county to secure the payment of the principal and interest thereof."

The second paragraph of this section then follows with provision in the matter of the purchase of land for a detention home, infirmary or county children's home, upon the advice and recommendation of the judge therein referred to, without submission of the question of such purpose to a "vote of the county."

Section 5656 G. C. in part is:

> "The commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits of taxation such * * * county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change but not increase the indebtedness in the amounts, for the length of time * * * that said * * * commissioners deem proper, not to exceed the rate of six per cent. per annum."

It is to be observed that the last quoted section confers authority only to extend the time of payment of an indebtedness already incurred.

As to any indebtedness already incurred by the commissioners in the discharge of their official duties to the poor relief, this section provides for the borrowing of money subject to the limitations of what is known as the Smith one per cent. law, and sections 5649-2 G. C. et seq. may be utilized.

However, direct authority is given the county commissioners in section 2434, supra, to borrow money "for the relief or support of the poor" without the condition precedent to borrowing under section 5656 G. C., viz., that the money which may be borrowed under this latter section must be for an already existing indebtedness.

The latter part of section 2434 G. C., as above noted, which provides for levying a tax for the purchase of land for certain purposes, without the submission of the question of such purchase to a vote, and which limits such levy to two-tenths of one mill, must be construed in connection with section 5638 G. C., which provides a flat limitation on the amount which county commissioners may expend for such lands without an affirmative vote of the county.

It is concluded that the effect of this latter part of section 2434 is not to require that the question of borrowing money and issuing bonds for poor relief shall be submitted to a vote, but that in acquiring lands for the purposes referred to and upon the certificate of the judge, the commissioners in such acquisition are freed from the limitations of section 5638 G. C. It is, therefore, my opinion that, subject to the limitations of sections 5649-2 et seq., the county commissioners may borrow money for the relief or support of the poor.

Respectfully,
JOHN G. PRICE,
Attorney-General.

179.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN FAIRFIELD, CLINTON, OTTAWA, PORTAGE AND SCIOTO COUNTIES.

HON. CLINTON COWEN, *State Highway Commission, Columbus, Ohio.*

COLUMBUS, OHIO, April 8, 1919.

180.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN SCIOTO COUNTY.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, April 8, 1919.

181.

APPROVAL OF BOND ISSUE OF CITY OF WARREN, OHIO, IN SUM OF $9,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 8, 1919.

182.

MUNICIPAL CORPORATIONS—CHARTER CITIES MAY LEVY OCCUPATIONAL TAXES FOR GENERAL REVENUE PURPOSES—NON-CHARTER CITIES MAY EXERCISE AUTHORITY TO REGULATE OCCUPATIONS UNDER POLICE POWER AND EXACT ONLY LICENSE FEE.

The power to raise revenue being an essential attribute of government, it follows that charter cities exercising the powers of local self-govenment under authority of the constitution are invested with authority to levy taxes for local governmental purposes, including excise taxes on occupations, subject to such restraint as may hereafter be imposed by the general assembly pursuant to section 13 *of Article XVIII of the constitution.*

The adoption of a charter being the indispensable mode of exercising the constitutional powers of local self-government, a municipality which has not adopted a charter may only exercise powers delegated by the general assembly, which do not include the authority to levy occupational taxes.

All municipalities, however, are empowered to regulate occupations in the proper

exercise of the police power, within the scope of the statutory enumeration of powers of municipal corporations, and in the exercise of such power may exact license fees commensurate with the expense incident to the regulation and the special benefit conferred on those following the occupation, or the special burdens occasioned thereby to the public.

COLUMBUS, OHIO, April 9, 1919.

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

GENTLEMEN:—Under date of January 2, 1919, you submitted to this department the following question, requesting a written opinion thereon:

> "In view of the loss of revenue from liquor tax, a number of the municipalities of this state are considering occupational or business licenses in the way of police regulation.
>
> Question: Has a municipality legal authority to assess occupational licenses in the form of police regulation?"

About the time of receiving your inquiry there was pending in the supreme court an action involving the power of a municipal corporation to impose occupational taxes, and inasmuch as an early determination of the case was expected, it was deemed advisable to delay the answer to your inquiry pending the decision of the supreme court.

I have just been able to secure a copy of the supreme court's opinion in the aforesaid case, being the case of State ex rel Zielonka, City Solicitor, v. Carroll, Auditor, in which case the court considered the validity of an ordinance of the city of Cincinnati, imposing an annual tax upon all persons, firms and corporations pursuing certain occupations and professions in said city, among which were the manufacture of bottles and glassware articles and the practice of osteopathy. It is determined by the supreme court in said cause, not only that the state possesses unquestionable power to impose such occupational taxes, but also that the city of Cincinnati, under its charter, is equally invested with such power.

The court said:

> "The right to impose taxes, by a long line of decisions, both state and federal, is within the conceded powers of sovereignty.
>
> In our own state it has been decided in numerous cases that this grant of power is conferred upon the legislative branch of the state government by section 1, article II, of the constitution.
>
> It has been likewise held that this authority is full, adequate and complete, limited only, if at all, by other sections of the same instrument."

The court in its reference to section 10, article 12, of the constitution, as amended in 1912, which section provides for imposition of excise and franchise taxes, makes the observation that:

> "No express grant of power was required in order to sustain either excise or franchise taxation.
>
> A majority of this court are of the opinion that there is no constitutional limitation resting upon the authority of the general assembly to levy tax on property of every kind and character, except that it must be uniform and according to its true value in money. Nor is there even this limitation on its power to provide for the levy of taxation on incomes, inheritances and franchises, including the imposition of *excise taxes.*

We are likewise of the opinion that the power to levy taxes on these several subjects comes from the grant in section 2, article XII, and that there was no necessity for the inclusion in the constitution of new sections 7, 8 and 10, except for the purpose of providing for the graduated method of levying such taxes and for the permissive feature of exemption of the lesser inheritances and incomes."

The last aforesaid statement of the court appears to be somewhat in conflict with a previous statement of the court in the same opinion, as follows:

"Section 2 of the same article (article 12) provides for the method and manner of levying taxes, being the well known uniform rule section and has application to taxes on property only."

It is also determined by the court that a tax on occupations is an excise tax, and it is said:

"An occupational tax is in no sense a tax upon property, but is well understood to be a tax on the right to carry on trade or to transact business."

After determining the authority of the state to impose such an occupational tax, which the court says "rests with the general assembly, both by general and special grant," the court then points out that the power of a municipal corporation, in respect to imposing occupational taxes "comes in the first instance not from the general assembly but from the constitution itself. Section 3, article XVIII, provides that municipalities shall have authority to exercise all powers of local self-governmnent." The court further says:

"We find in section 3, article XVIII, as complete a grant of power as the general assembly has received in section 1, article II. There can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation, for without this power local government in cities could not exist for a day."

The authority of the city of Cincinnati to exercise the power of imposing excise taxes was specifically upheld by the language of the second branch of the syllabus, as follows:

"Under the grant of power of local self-government provided for in section 3, article XVIII of the state constitution, the city of Cincinnati, as long as the state of Ohio, through its general assembly does not lay an occupational tax on businesses, trades, vocations and professions followed in the state, may raise revenue for local purposes, through the instrumentality of occupational taxes."

This decision will furnish a complete answer to your inquiry, at least in the case of charter cities, and while the question was not directly involved in the case before the supreme court as to the power of non-charter cities, in this regard, the following language of the opinion is considered significant.:

"Whatever power the city of Cincinnati possesses in this respect comes in the first instance not from the general assembly but from the constitution itself."

If such power might be exercised by municipal corporations under any grant or delegation of power by the general assembly, it is probable that such source of authority would have received notice by the court in the foregoing case, and it is perceived that the reference to the constitutional grant imports a suggestion that it is the exclusive source of authority under the present state of the law, and in fact an examination of the statutes fails to disclose any general delegation of authority to municipalities to exercise the power here in question, except in the limited sense of licensing and regulating various enumerated occupations and vocations, which authority, in the light of judicial decisions, may be said to extend in the direction of employing the power as a revenue measure only to the extent of the special benefits conferred or special burdens imposed upon the public and the expense incidental to the regulation, and as thus limited is not to be regarded as strictly a tax or revenue measure, but more especially an exercise of the police power for regulatory purposes.

While your question specifically relates to the authority of municipalities to assess occupational licenses in the form of police regulations, yet the question is prefaced by reference to loss of revenue from liquor tax and the contemplation of municipalities of adopting occupational licenses apparently as a source of revenue, in lieu of liquor tax, and therefore the subject has been considered in both phases.

In the more limited phase as to imposing occupational licenses as police regulations, you are advised that municipalities have that authority, without reference to the fact of their having adopted a charter or the contrary, by virtue of section 3670 G. C., and upon the authority and within the limitations of the doctrine of the case of Marmet v. State, 45 O. S., 63, of which decision the first branch of the syllabus is as follows:

> "The general assembly has power (except as limited by section 18 of the schedule to the constitution) to regulate occupations by license, and to compel by imposition of a fine, payment of a reasonable fee, where a special benefit is conferred by the public upon those who follow an occupation, or where the occupation imposes special burdens on the public, or where it is injurious to or dangerous to the public."

In the broader aspect of your inquiry as to the power of municipalities to adopt occupational taxation as a source of revenue, and having determined upon authority of the supreme court decision in the Cincinnati case, supra, that charter cities may exercise such power, it remains to be determined to what extent non-charter cities may exercise the same power, and from what has been said it follows that certain observations of the court in the Cincinnati case, supra, raise very grave doubt as to the existence of said power.

This doubt is further augmented by the observation of Shauck, J., in the case of State ex rel v. Lynch, 88 O. S., 71, with reference to the method by which municipal corporations may exercise the powers of local self government, as follows:

> "1. The provisions of the eighteenth article of the constitution as amended in September, 1912, continue in force the general laws for the government of cities and villages until the 15th day of November, following, and thereafter until changed in one of the three modes following: (1) by the enactment of general laws for their amendment, (2) by additional laws to be ratified by the electors of the municipality to be affected thereby, (3) by the adoption of a charter by the electors of a municipality in the mode pointed out in the article.
>
> 2. Whether a municipality acquires authority "to exercise all the powers of local self-government" by adopting a charter, or adopts a charter as an indispensable mode of exercising the authority, the powers to be exercised,

being governmental, do not authorize taxation to establish and maintain moving picture theaters."

This observation of Shauck, J., with reference to the method for exercising the powers of local self government, was adopted by Johnson, J., in Fitzgerald vs. Cleveland 88 O. C., 338, with the further observation as follows:

"In that case it was held that no municipality was entitled to exercise the powers referred to in section 3 *until it had adopted a charter.*"

Again, in State ex rel. vs. Edwards, 90 O. S., 305, in an opinion by the court, the same language of Shauck, J., in the Lynch case, was again adopted and approved.

From the observations of the court in the foregoing cases, the conclusion would clearly follow that the power to exercise local self government, which was considered by the supreme court in the Cincinnati case, supra. as the source of authority for imposing the occupational tax, is not effective as an authorization to cities which have not adopted a charter.

This conclusion, however, is disturbed to some degree by the holding of the supreme court in the case of Fremont vs. Keating, 96 O. S., 468, where an ordinance of the non-charter city of Fremont was upheld as a valid exercise of power conferred by section 3 of article XVIII of the constitution, and the state law purporting to restrain the city from the exercise of the particular powers was held to be unconstitutional with the following observation:

"It is sufficient to say that the general assembly of Ohio cannot deprive a municipality of its constitutional rights. This section is clearly in violation of section 3, article XVIII of the constitution of Ohio, and void."

However, the ordinance in question was in the nature of a police regulation, and in view of the repeated declarations of the supreme court in the cases above referred to, that the adoption of the charter is the essential vehicle for the exercise of all powers of local self government and the obvious necessity of reconciling said cases with the Fremont case, it is presumed that the power to adopt local police, sanitary and other similar regulations is distinguished from the general authority to exercise all powers of local self government, and that it is only the latter that is dependent upon the adoption of a charter.

Being of the opinion, therefore, that, except as provided in section 3, article XVIII of the constitution, there is no general delegation of taxing powe· to municipalities, other than to impose property taxes, for local purposes, and that an excise or occupational tax is not a property tax, and that in order to exercise the powers of local self government essential to the imposition of an excise tax, under authority of arti le XVIII, section 3, supra, the adoption of a charter is a necessary prerequisite, it follows that a non-charter city is not invested with the power to impose such occupational taxes as a revenue measure, or in any respect whatever, except as hereinbefore referred to, in regard to licensing and regulating particular occupations within the authorization found in the enumeration of powers of municipal corporations.

Respectfully,

JOHN G. PRICE,

Attorney-General.

183.

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—WHEN SUBJECT TO TEN PER CENT. PENALTY—COUNTY TREASURER CANNOT ACCEPT DELINQUENT INSTALLMENT WITHOUT PENALTY WHEN SO CERTIFIED—CANNOT REMIT PENALTY.

1. *When special assessments are made for municipal street improvements, in anticipation of the collection of which bonds, notes or certificates of indebtedness are issued, and such assessments are certified to the county auditor for collection by the county treasurer, such installments, if not paid when due, are subject to a penalty of ten per cent. thereof. Former Attorney General's opinion on this point approved.*

2. *The county treasurer has no authority to accept the amount of such delinquent installment and interest, when the same is unaccompanied by the amount of the penalty, nor has the county treasurer the authority to accept the amount of such installment, together with interest and penalty, and then remit the penalty.*

COLUMBUS, OHIO, April 9, 1919.

HON. ROY R. CARPENTER, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Acknowledgment has heretofore been made of your letter reading as follows:

> "Assessments for street improvements against various properties located in the village of Toronto, Jefferson county, Ohio, have been duly certified by the clerk of said council of said village to the auditor of our county for collection. These assessments are now delinquent.
>
> I have written the owners of the properties against whom these special assessments have been levied to make payment. Many of them are willing to make payment of the assessment and interest, providing the penalty could be remitted. Our county auditor and county treasurer are willing to accept the assessments and interest. without the penalty, if it would be legal.
>
> Therefore, I would like an opinion from you as to whether it would be legal for the treasurer to accept the assessments and interest without the penalty, or with the penalty, and then remit the penalty, making it so that the property owners would have to pay then only the assessments and the interest to date."

In response to my request for further information, you advise that the assessments in question are assessments in anticipation of the collection of which, bonds of the village of Toronto were issued, and that a ten per cent. penalty had been charged against such delinquent assessments. In a subsequent letter you also say:

> "I wish to submit one other question in this matter to you. To whom is the penalty payable? Or put the question another way. Does the county or the village get the penalty after it is paid? "

The statutes relating to the questions above stated are far from clear, and their interpretation has given considerable difficulty to this department under former administrations.

Under date of July 21, 1915, the Attorney-General, in opinion No. 632 (1915 A. G. O., Vol. 2, p. 1291) held that (a) where bonds, notes or certificates of indebtedness have been issued in anticipation of the collection of assessments for street and sewer improvements, no penalty may be added or collected for default in payment of such assessments; but that (b) where bonds, notes or certificates have not been

issued in anticipation of the collection of such assessments, the municipal officers have the option, in the event such assessments are unpaid and delinquent, of collecting the same by suit together with interest and a penalty of five per cent. added, as provided in section 3898 G. C., or of certifying the same to the county auditor for collection as taxes, with a penalty of ten per cent. added to cover interest and the expenses of collection, as per section 3905 G. C.

Under date of December 17, 1917, the Attorney-General in opinion No. 874 (1917 A. G. O., Vol. III, p. 2380) held that: (1st Syll.)

> "When special assessments are made for municipal street improvements, etc., and bonds, notes or certificates of indebtedness are issued in anticipation of the collection thereof, the several installments of such assessments, if not paid when due, bear interest until the payment thereof at the same rate as the bonds, and when such assessments are certified to the county auditor for collection by the county treasurer on the tax duplicate, such installments, if not paid when due, *are subject to a penalty of ten per cent thereof.*"

The gist of the reasoning for the above conclusion is stated on p. 2383 of the opinion in the following language:

> "However, section 3817 itself directs that a penalty be charged, and as there is no authority for charging any penalty other than the ten per cent penalty referred to in section 3905, and as section 3905 was expressly continued in force by the provisions of section 94 of the municipal code of 1902, I incline to the view that as a general proposition the ten per cent penalty provided in section 3905, together with interest at the rate carried by the bonds, is properly chargeable upon due and unpaid installments of assessments certified to the county auditor under section 3892 of the General Code."

The task of properly construing the various statutes is made still more difficult by the language used by the circuit court of Lucas County in the case of State ex rel vs. Sanzenbacher (1910), 13 C. C. (N. S.) 356. The opinion is in full as follows:

> "This is an action in mandamus brought in this court to require the county treasurer to accept the assessments that are due without collecting the penalty on the assessment. There is no occasion to review all the statutes that were mentioned by counsel here in argument. We have gone over the situation very thoroughly and we are satisfied there is no authority in the statutes of Ohio for affixing the fifteen per cent on the assessments the same as it is fixed upon taxes. The statute, General Code 2608 (Revised Statutes 1052), provides that such penalty must be placed upon delinquent taxes; must be audited, I should say, on delinquent taxes. We find no statute so directing as to assessments, and for that reason we think the placing of it there is not warranted, and the relief prayed for here must be granted. We do not find any authority, I should have said, for the placing of any penalties on such assessments such as are placed for taxes."

Upon consideration I favor the conclusion on this point reached by the Attorney-General's opinion second above noted, and therefore advise you that when special assessments are made for street improvements, in anticipation of the collection of which, bonds, notes or certificates of indebtedness are issued, and such assessments are certified to the county auditor for collection by the county treasurer on the tax duplicate, a ten per cent penalty shall be added thereto and collected therewith.

We now come to the real question submitted by you, namely, whether the county treasurer has authority to accept the amount of such an assessment, and interest, when unaccompanied by the amount of the penalty; or, stating the question in a slightly different way, whether the county treasurer may accept the amount of such assessment, together with interest and penalty, and then remit the penalty?

Section 3905 G. C. says of the ten per cent penalty that it—

> "* * * shall be placed upon the tax-list by the county auditor, and shall, with ten per cent penalty to cover interest and cost of collection, be collected with and in the same manner as state and county taxes, and credited to the corporation. * * *."

I regard the word "shall" in this connection as mandatory, and know of no other statute that authorizes any opposite conclusion—that is, I find no statute, except as hereinafter noted, which gives any discretion to the county treasurer in the matter of waiving penalties, or of remitting same after they have been once imposed. The exception just referred to is section 5721 G. C. (107 O. L. 739), which says:

> "If the taxes and assessments charged on land or lots are regularly paid, and such land erroneously returned delinquent, and the land is listed on the delinquent tax certificate record, the auditor shall correct the duplicate issue an abatement for penalties and interest added to such land on account of such error, the same as provided for in making errors on the tax duplicate."

The very fact, however, that the legislature has made special provision for the abatement of penalties imposed through error is an indication that the penalties properly imposed are not to be abated or remitted. I am therefore of the opinion that it would not be legal for the county treasurer to accept payment of the assessments and interest referred to in your letter, without the penalty nor would it be legal for him to accept same with the penalty and then remit the penalty.

Your last question is: To whom is the penalty payable, the county or the village? The answer to this question is found in the last part of section 3905 G. C., which says that the penalty, when collected, shall be "credited to the corporation." This means, of course, the corporation whose clerk or other officer has certified the assessment to the county officers for collection.

Respectfully,
JOHN G. PRICE,
Attorney-General.

184.

DISAPPROVAL OF BOND ISSUE OF HENRIETTA TOWNSHIP, LORAIN COUNTY, OHIO.

COLUMBUS, OHIO, April 9, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

> RE: Bonds of Henrietta township, Lorain county, Ohio, in the amount of $12,000.00, for the improvement of I. C. H. No. 286.

I have examined the transcript submitted to me in connection with the above bond issue, and although it is apparent from the proceedings set forth and referred to

therein that only an incomplete and partial record of the proceedings relative to this improvement and bond issue has been submitted, yet I am satisfied that the township trustees are without authority to issue the bonds in question, and therefore advise your commission not to purchase the same.

The letter of the prosecuting attorney of Lorain county, which is attached to the transcript, recites that the road improvement for which said bonds are issued is receiving state aid upon application of the county commissioners and township trustees, "and is being conducted pursuant to sections 6910, 6919, 6921 and other sections of the General Code applicable thereto."

If this improvement was undertaken under the state aid road law, the provisions of sections 1191 to 1223 G. C., inclusive, are applicable and the bonds for said improvement should be issued under the provisions of section 1223 G. C. by the county commissioners, if application for state aid was made by them, or by the township trustees, if application for state aid was made by the trustees.

If the proceedings are under sections 6910 et seq. the bonds should be issued by the county commissioners under section 6929 G. C.

If the improvement is being made by the township trustees under the township road law, the bonds must be issued by them under sections 3298-15d and 3298-15e G. C.

In any event, the township trustees are attempting to issue bonds in excess of the limitations referred to and made applicable to townships by section 3295 G. C. This section by reference makes the limitations of the Longworth act (sections 3939 G. C. et seq.), applicable to bonds issued by township trustees. Section 3940 G. C. (being a part of the so-called Longworth act), limits the amount of bonds which may be issued by a municipal corporation upon the vote of council alone for purposes named in the Longworth act to one-half of one per cent. of the total tax duplicate of such municipality. Under this limitation, which, as stated above, is made applicable to township trustees by section 3295 G. C., Henrietta township can by a vote of its trustees issue bonds for only $7,253.50.

Although, as stated above, the transcript is evidently incomplete, I am convinced that the proceedings of the trustees were not authorized by the provisions of the sections of the General Code referred to in the transcript, and that the amount of the bond issue is in excess of the limitations fixed by law.

Respectfully,
JOHN G. PRICE,
Attorney-General.

186

APPROVAL OF BOND ISSUE OF HENRY COUNTY IN THE SUM OF $42,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 9, 1919.

185.

APPROVAL OF BOND ISSUE OF CITY OF FINDLAY, OHIO, IN THE SUM OF $13,000.00

Industrial Commission of Ohio, Columbus, Ohio.

April 9, 1919.

187.

POOL ROOM IN PUBLIC PLACE WHERE MINOR UNDER EIGHTEEN YEARS IS PERMITTED—KEEPER OF SAME AMENABLE TO SECTIONS 12962 AND 12963 G. C.

The keeper of a pool table in a pool room at a public place where no billiard tables are kept, who permits a minor under the age of eighteen years to be and remain in such pool room, is amenable to criminal prosecution under sections 12962 *and* 12963 *of the General Code of Ohio.*

COLUMBUS, OHIO, April 10, 1919.

HON. HARRY A. SMITH, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of March 10, 1919, in which you ask my opinion on the following question:

> "Would the keeper of a pool table in a pool room where no billiard tables are kept, who permits a minor under the age of eighteen years to be and remain in his pool room, be subject to the provisions of section 12962 of the General Code of Ohio?"

While you do not expressly so state, I am assuming that your question refers to the keeper of a pool room *at a public place.*

Sections 12962 and 12963 of the General Code read thus:

> "Section 12962. Whoever, being the owner or keeper of a billiard saloon, or the owner or keeper of a billiard table at any other public place, permits a minor under the age of eighteen years to play billiards or pool, or be and remain in such saloon or other public place, shall be fined twenty dollars, and for each subsequent offense shall be fined fifty dollars.
>
> "Section 12963. For the fine and costs in a prosecution under the next preceding section, the billiard table and fixtures shall be liable on execution without exemption."

So far as I am informed, neither of the above statutes has been the subject of judicial construction in this state. It is necessary, therefore, to determine their meaning by the application of general legal principles.

The most familiar, perhaps, of all the rules of criminal statutory construction is this: That penal statutes must be strictly construed; that is to say, strictly construed as against the state. Yet this rule of strict construction is not applied as vigorously

as the mere statement of it would suggest, for, as has been frequently declared by the courts, penal provisions are to be fairly construed according to the *expressed legislative intent*, and mere verbal nicety or forced construction is not to be resorted to in order to exonerate persons plainly within the terms of the statute.

Barker vs. State, 69 O. S. 68.
Conrad vs. State, 75 O. S. 52.

What, then, is the legislative intent found in the above quoted statutes? Is it an intent to punish the owner or keeper of a *billiard* saloon, as distinguished from the owner or keeper of a *pool* saloon? Is it an intent to punish the owner or keeper, at a public place, of a *billiard* table, as distinguished from the owner or keeper, at such place, of a *pool* table?

At the very outset one is struck by the thought that the main purpose of this law is to protect minors from improper environment, and that one should be slow to interpret the legislature as in effect saying that the game of *billiards* produces a bad environment, whereas *pool*, a very similar game, is free from such approbrium.

The question before us can not, however, be decided by any such general consideration as that just stated. Something more than the presumption of legislative consistency is necessary to overcome the ancient rule of strict construction of penal statutes.

"Pool," as a game, is thus defined in the Century Dictionary:

"A game played on a billiard table with six pockets by two or more persons."

The same authority defines "billiards" and "billiard table" as follows:

"*Billiards:* A game played by two or more persons on a rectangular table of special construction (see *billiard table*), with ivory balls, which the players, by means of cues, cause to strike against each other. Formerly in the United States the game was played with four balls on a table having six pockets, the players scoring both for caroms and for driving the balls into the pockets. (See *carom*). This is nearly the present *English game*. Since, however, expert players could continue an inning at the game thus played almost without limit, the pockets were dispensed with and counting was made to depend entirely upon caroms. Later, professional players adopted what is known as the *French game*, in which only three balls are used, and this was modified to the *champions' game*, in which a line, called a *balk-line*, is drawn crossing each corner of the table diagonally, within which two counts only can be made. Experts now play also *cushion-caroms*, in which the cue ball must touch the cushion before hitting the second object ball, or hit the second ball again on a return from the cushion; the *balking game*, which is the same as the champions' game, but with balk lines 14 inches from the cushion all around the table; and the *bank game*, in which the cue ball must hit the cushion before touching any other ball. (The singular form, *billiard*, is occasionally used, and is always employed in composition.)"

"*Billiard Table:* A table on which the game of billiards is played. It is made of mahogany or other hard wood, of strong and heavy construction, and has a raised cushioned ledge all round, the area thus formed consisting of a bed of slate or marble covered with fine green cloth. The size varies, the smallest common size being 10 by 5 feet, and the largest 12 by 6 feet. Some tables are provided with six pockets, one at each corner and one in the middle of each of the long sides; others have four pockets; but billiard

tables are now, except in England, commonly made without pockets."

According to the New Standard Dictionary, "pool" is—

"any one of various games played on a six pocket *billiard table*, in which the player's object is to get certain balls into and keep the cue ball out of the pockets."

A "billiard table," says the New Standard, is—

"a table on which to play billiards, having an oblong rectangular surface covered with billiard cloth over a smooth and hard foundation, and edged with rubber cushions that form a rebounding foil from which the balls may be deflected; sometimes made with a pocket at each corner, *and for pool playing one additional at the middle of each side.*"

That the absence of "pocket" or "nets" is not an infallible sign that a table is a "billiard" table, also appears from the definition of "billiards" given in Websters' Dictionary (1874 Ed.):

"*Billiards:* A game played on a rectangular table, covered with a cloth, with small ivory balls, *which the players aim to drive into hazardnets or pockets at the sides and corners of the tables,* by impelling one ball against another, with maces or cues, according to certain rules of the game."

The same work defines "pool ball" thus:

"One of several ivory balls about two inches in diameter, *used in playing a kind of billiards.*"

It is apparent from these definitions that the word "billiards" has two meanings—one *inclusive*, the other *exclusive*. In one sense, and in some localities, "billiards" includes "pool." In another sense, and in other localities, "pool" is a game distinct from "billiards," one of the main distinctions being that "pool" is played on a table with pockets, whereas "billiards" is played on a table without pockets.

Which of these two meanings must be given to sections 12962 and 12963 G. C.? Our answer to this question would be much easier if the legislature had seen fit to leave the section in the form in which it was originally enacted. In that form (59 O. L. 65), it read as follows:

"That if any owner or keeper of a billiard saloon, or any owner or keeper of a billiard table at any grocery or other public place, shall permit or suffer any minor under the age of eighteen years to play at the game of billiards in such grocery, saloon or public place, or upon such billiard table, or to remain or be in or upon the premises so occupied by him as such billiard saloon, or in which shall be such billiard table as aforesaid, every such person or persons shall forfeit and pay a fine of twenty dollars for the first offense, and of fifty dollars for each and every succeeding offense, to be recovered with costs of suit by indictment on information in any court having competent jurisdiction to try the same; and in default to pay such fine and costs, all billiard tables that shall be on said premises in or upon which such offense shall have been committed, shall be liable to seizure and sale on execution to satisfy the same, any exemption or other law to the contrary notwithstanding."

The statute just set forth was passed April 26, 1862. In view of the fact that it

wholly omits the word "pool", and in view of the 1874 Webster definition of "billiards," which we might call an almost *contemporaneous* definition, I am inclined to think that such statute used the word "billiards" in the broad, inclusive sense hereinabove mentioned, and would have included within its prohibition the game known as "pool."

The case of Sikes vs. State, 67 Ala. 77, aids me to reach the conclusion just referred to. That case construed section 4213 of the Alabama Code of 1876, which read thus:

> "Any person who is the owner or keeper of a saloon * * * having a *billiard* table connected therewith * * *, on which the public can play, * * * who shall knowingly permit any minor to play thereon, is guilty of a misdemeanor," etc.

The court said (p. 80):

> "In interpreting statutes, we must endeavor to arrive at the meaning and intention of the legislature, to be gathered from the words they have employed. Words are but the vehicle of thought; and if, since they were employed by the legislature, they have undergone change, or, if the subject they refer to has undergone modification since their employment, we must search for and enforce the sense they bore when the statute was enacted; for such, we must presume, was the intention of the law-making power. If when this statute was enacted—March, 1875—as the testimony shows billiard table embraced both classes, those with, and those without pockets, then both classes are within its prohibition. We think the legislature intended, in the employment of the term billiard table, to include all tables on which the game of billiards was played at the time; and the language will also embrace billiard tables under any modification they may undergo. The legislature intended to regulate and restrain the demoralizing effect on the youth of the country, of having a billiard table and a drinking saloon connected together. Giving to the phrase its popular signification, it then embraced tables with or without pockets; all tables on which the game of billiards could be, and was played."

In the case of Clearwater vs. Bowman, 72 Kan. 92; 82 Pac. 526, the same holding prevailed. On p. 93 the court says:

> "The second objection to the ordinance is that the authority for the prohibition of public pool tables must be found, if at all, in section 1129 of the General Statutes of 1901, which gives the city council power to suppress billiard tables, but makes no reference to pool tables by that name. Evidence was introduced to show that the game of pool is not the same as that of billiards, and that a pool table differs from a billiard table in having pockets. The argument is made in behalf of the defendant that the ordinance is broader than the statute, that the term 'billiard table' does not include a pool table, and that, consequently, the city was without authority to restrict the use of the latter.
>
> This contention derives some support from *Squier* vs. *The State*, 66 Ind., 317, where a conviction under a statute forbidding the owner of a billiard table to permit a minor to play thereon was set aside because the evidence showed that the game played was pool. The present question is affected, however, by a consideration which, if applicable to the Indiana case, does not appear to have received the attention of the court. Evidence was introduced that billiard tables were formerly made with pockets. The

same fact is shown by the standard dictionaries and encyclopedias. Just when the change took place may not be clear, but the testimony indicated that it was about thirty or thirty-five years ago. The statute in question was passed in 1871, but is a re-enactment of the fifth subdivision of section 29 of chapter 26, Laws of 1869. The statute must be construed in the light of the approved usage of words at the time of its enactment, notwithstanding any subsequent changes."

To the same effect is the case of State vs. Johnson, 108 Ia. 245; 79 N. W. 62, construing a statute in this form:

"No person who keeps a *billiard hall* * * * shall permit any minor to remain in such hall * * *."

In 1886, however, the legislature of Ohio (83 O. L. 202) changed the above-quoted statute to read as follows:

"Whoever, being the owner or keeper of a billiard saloon, or the owner or keeper of a billiard table, at a grocery or other public place, permits or suffers a minor under the age of eighteen years to play at the game of billiards, or *pool*, in such saloon, grocery, or other public place, or upon such billiard table or to be or remain in such saloon, grocery, or other public place, shall be fined, for the first offense, twenty dollars, and for each succeeding offense fifty dollars; and for the fine and costs adjudged in any prosecution under this section, the billiard table and fixtures shall be liable to be seized on execution, and sold, without exemption."

The codifying commission left out the word "grocery" and the statute now reads (Section 12962 G. C.):

"Whoever, being the owner or keeper of a billiard saloon, or the owner or keeper of a billiard table at any other public place, permits a minor under the age of eighteen years to play billiards or pool, or be and remain in such saloon or other public place, shall be fined twenty dollars, and for each subsequent offense shall be fined fifty dollars."

With the amendment of 1886, the word "pool" came into the statute and is now there.

I can see how it might with some plausibility be argued that the amendment of 1886, read in the light of the prior history of the statute amended, evinced an intention on the part of the legislature to take cognizance of the techinical distinction between "pool" and "billiards"; and that by the insertion of the word "pool" in the phrase:

"permits a minor under the age of eighteen years to play *billiards or pool*",

the legislature deliberately gave the words "billiard" and "billiards" their technical, exclusive meaning throughout the entire section.

Upon reflection, however, it seems to me that such a view is not tenable. Rather would it seem that by the insertion of the word "pool" the legislature desired a less technical, rather than a more technical application of the statute. That is to say, the very thing the legislature wished to avoid was the possibility of a defense against prosecution on the mere ground that the minor was playing, at a public place, the game of "billiards" as distinguished from the game of "pool". In other words, referring to

sections 12962 and 12963 G. C., it seems to me that the word "billiard", as an adjective modifying the noun "saloon", and the word "billiard", as an adjective modifying the noun "table", still retains the double meaning which it had in the statute found in 59 O. L. 65; that is, a meaning which includes therein the word "pool".

Answering your question specifically, I am of the opinion that the keeper of a pool table in a pool room at a public place where no billiard tables are kept, who permits a minor under the age of eighteen years to be and remain in such pool room, is amenable to criminal prosecution under sections 12962 and 12963 of the General Code.

As being a further means of controlling the situation disclosed by your letter, section 1644 G. C. (106 O. L. 458) and section 1654 G. C. (103 O. L. 873) are also suggestive.

Section 1644 G. C. regards as a juvenile delinquent a person or child who "patronizes or visits a public *pool or billiard room*".

Section 1654 says:

> "Whoever abuses a child or aids, abets, induces, causes encourages or contributes toward the dependency, neglect or delinquency, as herein defined, of a minor under the age of eighteen years, or acts in a way tending to cause delinquency in such minor, shall be fined not less than ten dollars, nor more than one thousand dollars or imprisoned not less than ten days nor more than one year, or both. Each day of such contribution to such dependency, neglect or delinquency, shall be deemed a separate offense. If in his judgment it is for the best interest of a delinquent minor, under the age of eighteen years, the judge may impose a fine upon such delinquent not exceeding ten dollars, and he may order such person to stand committed until fine and costs are paid."

Respectfully,
JOHN G. PRICE,
Attorney-General.

188.

COUNTY COMMISSIONERS—WITHOUT AUTHORITY TO MAINTAIN OR SUPPORT EMPLOYMENT BUREAU.

There is no authority for the county commissioners to maintain or support an employment bureau or to contribute to the maintenance and support of a municipal employment bureau.

COLUMBUS, OHIO, April 10, 1919.

HON. CLAUDE J. MINOR, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter dated March 18, 1919, as follows:

> "The county commissioners of Erie county, Ohio, would like to assist the city of Sandusky, Ohio, in maintaining the employment bureau which has heretofore been maintained by the government and which is now to be closed soon. Do you know of any way in which the county commissioners could lawfully pay out money to help maintain an employment bureau?"

An examination of the statutes relative to the powers and duties of county commissioners does not disclose any law conferring authority upon the county commis-

sioners to maintain or support, in whole or in part, an employment bureau of a municipality. In the absence of express or clearly implied authority, the county commissioners could not legally expend money for such purposes. As for purposes of taxation and expenditure of public funds, such commissioners are subject to the limitations of section 7, article 10 of the constitution of Ohio, which in part is:

> "The commissioners of counties, * * * shall have such power of local taxation, for police purposes, as may be prescribed by law."

Section 5 of the same article reads:

> "No money shall be drawn from any county * * * treasury, except by authority of law."

Under these limitations it has been repeatedly held that the commissioners must have authority, either express or clearly implied, for the expenditure of any money from the county treasury and there being no authority for the commissioners to expend money for the purposes stated in your letter, it follows that the same cannot be legally done.

Very respectfully,
JOHN G. PRICE
Attorney-General.

18

AMENDMENTS TO CONSTITUTION OF OHIO—WORDS "PRESENT SESSION" IN SECTION 5123-3 G. C., APPLICABLE TO 80TH GENERAL ASSEMBLY—RATE OF PAYMENT IN SECTION 5123-4 APPLICABLE TO 1913 ELECTION.

1. *The words "present session" in section* 5123-3 *G. C., apply only to the sessions of the* 80*th General assembly.*

2. *The rate of payment fixed in section* 5123-4 *G. C., applies only to the publication of proposed amendments to the constitution of Ohio, submitted at the November,* 1913, *election.*

COLUMBUS, OHIO, April 10, 1919.

HON. W. A. EYLAR, *Supervisor of Public Printing, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter dated March 21, 1919, in which you inquire if the "words present session in section 5123-3 apply only to the 80th General Assembly, or is the section continuous and applicable to future sessions of the General Assembly of Ohio?" Also, "is the rate of payment fixed by section 5123-4 the present rate to be paid for the publication of proposed amendments to the constitution, or does it apply only to the amendments submitted to the 80th General Assembly of Ohio?"

Sections 5123-3 and 5123-4 G. C., referred to and quoted in your letter, are parts of an act passed April 28, 1913, 103 O. L., 724, "relating to certain proposed amendments to the constitution of Ohio and the publication thereof according to the title of the act."

The key to the question submitted by you is found in section 1 of that act, which is section 5123-1 G. C., the first part of which is:

> "*That at the election to be held* on the first Tuesday *after the first Monday of November*, 1913, the judges and clerks of election * * * shall * * * make return * * * of the vote cast for and against any proposed amendments to the constitution of Ohio that may be submitted * * * at such election."

The next section, 5123-2 G. C., provides for the certification of the return of the votes cast, as provided therein, "within ten days after said election."

Section 5123-3 G. C., provides for the publication of the amendments to the constitution referred to in section 5123-1 G. C., to be proposed at the then "present session" of the General Assembly.

This section is followed by sections 5123-4 and 5123-5 G. C., which fix the rate of charges for such publication and for the appropriation to cover the expense thereof.

This act is without ambiguity and clearly evinces the legislative intent to provide not for amendments generally, nor for the publication of amendments to the constitution proposed at all sessions of the General Assembly, but only for one certain election and session, viz.: in November, 1913.

In Hockett vs. State Liquor License Board, reported in 25 O. D., 117, Judge Kinkead, considering this act, came to the same conclusion, in these words:

> "It is argued that an act 'relating to certain proposed amendments to the constitution of Ohio and the publication thereof' passed April 28, 1913, 103 O. L., 724, relates only to the election to be held on the first Tuesday after the first Monday of November, 1913. That is the fact, but that act was a mere temporary one for that year alone, so we are not the least concerned with it on the questions involved."

This case was decided at the December, 1914, term of court. So it may be said with certainty that the sections quoted in your letter are a part of a temporary act which was applicable only to certain conditions and events in 1913.

Although not referred to in your letter, the amendment to section 5123-1 is pertinent to your inquiry.

After the decision in the Hockett case, supra, on May 27, 1915, section 5123-1 was amended and provided for the return of votes cast for and against constitutional amendments in this more general language:

> "Whenever any amendments to the constitution are proposed to be submitted to the people, said amendments shall be submitted at the regular election to be held on the first Tuesday after the first Monday of November of the same year."

So that in its present form the section last above quoted applies to all amendments proposed after it became effective.

It is to be observed, however, that sections 5123-3 and 5123-4 were not so amended and still remain in their original form. It might be said that it was the intention of the legislature, in making the amendment of 1915, to make the whole of said original act applicable to all subsequent proposed amendments, but such would require a construction on sections 5123-3 and 5123-4 as would do violence to the meaning which is clearly expressed in the term "present session" of the original act, passed in 1913,

It could be said with greater force that, by the amendment of section 5123-1. which removed the temporary character of that section and made it to provide for all subsequent proposed amendments, the legislature advisedly declined to change the character of the original act as to the publication of such amendments.

On the strength of this theory, re-enforced by the well established general principle that authority to expend money from the public treasury must be found by express or clearly implied grant in law, you are advised that section 5123-3 applies only to amendments proposed at the 1913 session of the general assembly.

The consideration and conclusion as to your first inquiry also disposes of your second question and logically results in the conclusion that the rate of payment fixed by section 5123-4 applies only to the amendments submitted to the session of 1913.

Respectfully,
JOHN G. PRICE,
Attorney-General.

190.

APPROVAL OF BOND ISSUE OF SOUTH NEWBURGH VILLAGE SCHOOL DISTRICT IN SUM OF $65,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 10, 1919.

191.

DISAPPROVAL OF BOND ISSUE OF CITY OF MIDDLETOWN, OHIO, IN SUM OF $10,000.00—STREET IMPROVED MUST BE SPECIFIED.

COLUMBUS, OHIO, April 11, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

Re bonds of Middletown, Ohio, in the amount of $10,000.00 for the purpose of resurfacing, repairing and improving existing streets of said city.

GENTLEMEN:—I have examined the transcript of proceedings of council and other officers of Middletown relating to the above bond issue and herewith decline to approve the same.

The ordinance authorizing the issuance of said bonds cites that they are for the purpose of "resurfacing, repairing and improving existing streets of said city" and nowhere in the bond ordinance or any other proceedings of the council set forth in the transcript are the names or identity of the streets given or indicated.

In the case of Heffner vs. Toledo, 75 O. S., 413, the following language is used in the fourth branch of the syllabus:

> "A city is not authorized to issue bonds to provide a fund from which to pay its part of the cost of improvements that may from time to time be made, but it may, under section 53 of the Municipal Code of 1902, section 1536-213,

Revised Statutes, (now section 3821 G. C.), or under section 2835, Revised Statutes (now 3939 G. C.), issue bonds to pay its part of the cost of specific improvements."

On authority of the decision in the above entitled case I advise that you refuse to accept said bonds.

Respectfully,
JOHN G. PRICE,
Attorney-General.

192.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS FOR ROSS COUNTY.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, April 11, 1919.

193.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN SCIOTO COUNTY.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, April 11, 1919.

194.

DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS—WHEN SAID BOARD IN MONTGOMERY COUNTY CAME INTO EXISTENCE—WHEN SECRETARY OF STATE SHALL APPOINT

1. *Montgomery county became entitled to a board of deputy state supervisors and inspectors of elections commencing May* 1, 1911, *by reason of the fact that it had been previously ascertained from the* 1910 *Federal census that it contained a city wherein annual general registration of electors is required by law. See sections* 4788, 4789 *and* 4871 *G. C.*

2. *The terms of office of the members of the Montgomery county board of deputy state supervisors and inspectors of elections must begin on May first in the odd numbered years.*

COLUMBUS, OHIO, April 12, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of March 18, 1919, requesting my opinion as to your authority to appoint a member of the board of deputy state supervisors and inspectors of elections of Montgomery county for a term beginning May 1, 1919, and ending April 30, 1923, to succeed Mr. William K. Boda, one of the present members, was duly received.

The history of the Montgomery county board is set forth in your letter, as follows:

> "In the record showing the appointment of members of the board of deputy state supervisors of elections of Montgomery county, I find in the office of Secratary of State, among other things the following:
>
> 'Columbus, Ohio, April 29, 1911. The official census bulletin for 1910 having shown the city of Dayton, Montgomery county, Ohio, to be a city of more than 100,000 inhabitants, or 116,577, it becomes necessary under sections 4788 and 4871 of the General Code to appoint a board of deputy state supervisors and inspectors of elections to replace the board of deputy state supervisors of elections now in office. The following board has this day been duly recommended and appointed by Charles H. Graves, state supervisor and inspector of elections—Edward J. Bundenthal, term begins May 1, 1911, ends April 30, 1915. Clarence M. Greer, term begins May 1, 1911, ends April 30, 1913. W. K. Boda, term begins May 1, 1911, ends April 30, 1915. Franklin Winch, term begins May 1, 1911, ends April 30, 1913.'
>
> Further, I find that William K. Boda was appointed for a term beginning May 1, 1915, such term to end April 30, 1919, and again I find William K. Boda appointed for a term beginning May 1, 1918, and ending April 30, 1922.
>
> I find upon inquiry that William K. Boda was appointed for the term beginning May 1, 1918, upon the motion of the Secretary of State and that he has been commissioned for the term beginning May 1, 1918, and ending April 30, 1922.
>
> The regularly organized Republican committee of Montgomery county under date of March 8, 1919, endorsed C. B. Zell for a member of said board of elections for the term beginning May 1, 1919, and ending April 30, 1923, to supplant Mr. Boda.

The contention of the committee is that the appointment of Mr. Boda to take effect May 1, 1918, was without authority of law and they claim no vacancy existed at that time and that the regular term being served by Mr. Boda expires April 30, 1919, and that under the laws of Ohio they have the authority at this time to recommend for the position to which Mr. Boda claims to have been appointed."

It thus appears that the Montgomery county board was established in 1911. The board could not have been established prior to that year, because Montgomery county was only entitled to such a board when it could be ascertained from the last Federal census that it contained a city wherein annual general registration of electors is required by law, etc., and that fact was not so ascertained until after the completion of the 1910 Federal census which disclosed that Dayton contained a population of over 100,000. See sections 4788, 4870 and 4871 G. C.

Mr. Boda was one of the board's first members, having been appointed for a four year term beginning May 1, 1911, and ending on April 30, 1915, and he was also reappointed to succeed himself for a new term of four years beginnning May 1, 1915, and ending on April 30, 1919.

It will thus be seen that your authority to appoint a member of the Montgomery county board for a term of four years beginning May 1, 1919, to succeed Mr. Boda depends upon the legality of the action of the state supervisor and inspector in appointing him for a term of four years beginning May 1, 1918. The question narrows itself down to the proper construction to be given section 4789 G. C., whose origin dates back to the Act of April 23, 1904 (97 O. L. 185, 218) creating the offices of "deputy state supervisors and inspectors of elections." After creating these offices, it was further provided (p. 219) that:

"On or before the first day of May, 1904, the state supervisor and inspector of elections shall appoint four deputy state supervisors and inspectors of elections, in each county in the state which contains a city wherein annual general registration of electors is required by this act, who shall be qualified electors of the county for which they are appointed.

For the first appointments, two members shall be appointed for the term of two years, and two for the term of four years from the first day of May, 1904. One member so appointed for two years, and one for four years, shall be from the political party which cast the highest number of votes at the last preceding November election for governor or secretary of state. The other two members shall be appointed from the political party which cast the next highest number of votes for such officer at said November election. Thereafter, appointments shall be made biennially for two deputy state supervisors and inspectors of elections for each such county, for the term of four years, which appointments shall be from the two political parties which cast the highest and the next highest number of votes at the last preceding November election for governor or secretary of state."

The act was subsequently amended by the act of April 2, 1906 (98 O. L. 288) but not with respect to the provisions above quoted. On the contrary, the provisions referred to were retained verbatim in the amendatory act, and so continued in force without change until both the original and amendatory acts were expressly repealed by the general assembly by the act entitled "An act to revise and consolidate the general statutes of Ohio," passed February 14, 1910, and now designated and known as "The General Code." (For the repealing provision just referred to, see General Code of Ohio, 1910, Vol. 3, p. 2938.)

The original and mandatory acts above referred to were revised by the codifying commission appointed under the act of April 2, 1906 (98 O. L. 221), and as revised

were enacted in their new form by the general assembly by the act of February 14, 1910, supra, and the provisions involved in the present inquiry are now embodied in section 4789 G. C. which reads as follows:

> "On or before the first day of May, biennially, the state supervisor and inspector of elections shall appoint for each such county two members of the board of deputy state supervisors and inspectors of elections, who shall each serve for a term of four years from such first day of May. One member so appointed shall be from the political party which cast the highest number of votes at the last preceding November election for governor, and the other member shall be appointed from the political party which cast the next highest number of votes for such officer at such election."

Section 4789 G. C. has continued in force without any change or alteration whatever, since its enactment in its present form by the general assembly on February 14, 1910.

It will thus be seen that the clauses "On or before the first day of May, 1904," and "Thereafter, appointments shall be made biennially," which appeared in the original and mandatory acts of April 23, 1904, and April 2nd, 1906, were omitted not only by the codifying commission in their revision, but also by the general assembly when it enacted section 4789 G. C. in its present form.

It may be contended that because the original and mandatory acts provided that the terms of the original appointees should commence on May 1, 1904, and that thereafter appointments should be made biennially, the terms of office of all appointees must necessarily begin on May first in even numbered years. This raises the question as to the force and effect to be given to the action of the general assembly in omitting the portions of the original and amendatory act hereinbefore referred to, from the act of February 14, 1910.

A comparison of the General Code with the provisions of the original and amendatory acts referred to discloses material omissions of language which affect the operation of the law, in this, that if the original and amendatory acts had been re-enacted by the general assembly without change, the terms of office of members of the board of deputy state supervisors and inspectors would begin on May first in the even numbered years, whereas under the provisions of the General Code the language employed requires that the terms of office of members of boards whose creation is based upon the 1910 Federal census, must begin in the odd numbered years. This latter construction finds support in section 4789 G. C., which provides that members shall serve for a term of four years from the first day of May, and shall be appointed from the two political parties which cast the highest number of votes at "the last preceding November election for governor."

While the presumption is that although the phraseology of a statute has been changed in a revision or codification, it has the same meaning or application as before the revision or codification where the change is not of a substantial character, and while courts are slow to change such constructions except when required in order to conform to the manifest intention of the legislature, I am inclined to the opinion that the changes made by the general assembly in this case were substantial ones and provide a different rule for determining the year in which the terms of members shall begin in those counties which were not entitled to a board of deputy state supervisors and inspectors while the original and amendatory acts were in force, such, for instance, as Montgomery county, which first became entitled to such a board after it had been ascertained by the Federal census of 1910, that it contained a city having a population of 100,000 or more.

While, as stated above, there is a presumption (and it is only a presumption, and does not have the effect of destroying the application of other rules of statutory

construction) that a statute means the same after its revision as it did before, yet when the general assembly, by an independent act complete in itself, has expressly replaced it by the enactment of a new one which omits material and substantial provisions of the old one, it is my opinion that the new statute should be considered from the viewpoint of an original or amended statute, and that the presumption in such a case is, not that it means tha same as the old statute, but rather that the general assembly, having deliberately and intentionally changed the statute itself, it also intended to change its former construction. In such cases the presumption first referred to is, in my opinion, overcome, and the decisions announcing the rule also recognize and embody therein an exception to its application when a change of construction is required in order to conform to the legislative intent. Some of these cases are:

State vs. Bushnell, 95 O. S. 203, 209;
Meyers vs. Institute, 92 O. S. 238, 247, 248;
Insurance Co. vs. McBee, 85 O. S. 161, 173, 174;
Cincinnati vs. R. R. Co., 88 O. S. 283, 291;
City vs. Wiehle, 78 O. S. 41, 44, 45;
Doll vs. State, 45 O. S. 445, 448, 449;
Collins vs. Millen, 57 O. S. 289.

In the latter case (Collins vs. Millen) the court had under consideration the effect of a general revision of the statutes by a revising commission, which introduced for the first time a clause which on its face qualified the former operation of the original law. In the opinion (page 295) the court very clearly stated that clauses and provisions brought into a statute by a codifying commission cannot, in all cases, be disregarded, and the fact that it was introduced by the commission instead of the legislature afforded but slight if any ground for ignoring it. On the contrary, the court said that:

> "Whatever the rule may be as to a mere change of phraseology thus accomplished, the mere circumstances that an entire and clearly qualifying clause has been brought into a statute in the course of a general revision of the statutes of a state, or in a revision of those upon some particular subject, affords but slight, if any ground, for treating it as surplusage. Notwithstanding that its insertion in the statute may have been the act primarily, of the commission appointed to make the revision, yet, its subsequent enactment into a law, should be regarded as the deliberate act of the general assembly. One of the objects sought through a revision of statutes, is in all instances doubtless, simplicity of language. * * * The statutes as revised by the commission appointed for that purpose, were, when reported to the general assembly, passed by that body with such amendments as it chose to make. It is quite reasonable to infer, as we have before shown that this court has done, that mere changes of phraseology made by the commission and adopted by the general assembly, do not change the meaning previously borne by old statutes, unless the difference between the language of the two statutes evinces an intent to do so. But it seems quite clear to us, that where a new clause has been added to a statute during the course of its revision, which plainly changes and qualifies its former meaning, and the clause is retained by the general assembly when it re-enacts the statute, its operation upon the construction of the statute should not be affected on this account. The whole statute, as thus qualified, should be given that meaning which the words ordinarily bear when employed in that connection and upon that subject."

That the general rule that where a statute has undergone revision the same construction will generally prevail as before revision, is not applicable where there has been a substantial change in the phraseology of the two statutes, is supported by the case of State vs. Commissioner, 36 O. S., 326, 330, which is frequently cited in support of the general rule.

While the change in the statute under consideration in Collins vs. Millen, supra, was one of addition, and not of omission, the doctrine of the case is equally applicable to changes of the latter character. That this is true is shown by the case of Hough vs. Mfg. Co., 66 O. S. 427, which presented a situation where certain words and clauses contained in the original act, were omitted from the amended act, and it was argued with much force that the words and clauses referred to were "omitted by oversight, or through some mistake, and that the legislature did not intend, when enacting the amendment to omit these words," and the court was asked to construe the statute "as if the words had been retained in the amendment." But the court overruled the contention, saying:

> "Can this court legislate * * * on the mere presumption that it was omitted by the mistake of the general assembly? A mistake in legislative judgment, or a mistake in drawing the bill constituting the amendment? The only method known to us by which such mistake could be shown would be to hear parol evidence—a thing not permissible."

That the act of February 14, 1910 (commonly called General Code), was introduced in the general assembly and enacted, approved by the governor and filed with the secretary of state as a new, original and independent act, cannot be denied, for the act itself evidences these facts. As was aptly stated in the Donnellan case, 49 Wash. 460, at page 466:

> "It was an entirely new act. The mere fact that it embraced a portion of the act of 1866 upon the same subject need not be considered now, for the new act took the place of the old, * * *. That the act of 1881 under consideration is a new and independent act complete within itself is evidenced by the section next to the last,"

which section was, in substance and effect, the same as the last paragraph of the General Code, which provides that

> "all sections, parts of sections, acts and parts of acts, inconsistent with this act, and not included herein are repealed."

And when it is borne in mind that both the original and amendatory acts of April 23, 1904, and April 2, 1906, creating the offices of deputy state supervisors and inspectors of elections, were expressly repealed by the General Code (3 General Code 1910, p. 2938), the conclusion cannot be escaped that the act known as the General Code is a new, original and independent act.

In State vs. Burgess, 101 Texas, 524, it was contended that a statute in a code of revision should receive the same construction as the repealed statute out of which it was framed, but the court answered the contention, as follows:

> "This argument is persuasive and the principle of construction there invoked should control in the interpretation of the revised statutes where, in the revision, no substantial change has been made from the pre-existing law. But it is never conclusive, for the reason that these codes were adopted

by the legislature and have the force of law; and when they differ from the previous statutes, they must control."

The same doctrine has been announced and applied in other jurisdictions. For example, in State vs. Towery, 143 Ala. 48, it was said with respect to the Alabama Code that it

"is not a mere compilation of laws previously existing, but is a body of laws, duly enacted, so that laws which previously existed, ceased to be laws when omitted from said code, and additions, which appear therein, become the law from the approval of the act adopting them."

Recurring again to the rule that the re-enactment of a statute in a code or revision does not necessarily change its meaning, except where the change is substantial, or unless the language in the statute as revised manifests the intent of the legislature to make a change, the inquiry becomes pertinent: What is meant by legislative intent and how is it to be ascertained?

In State vs. Roney, 82 O. S., 376, the court held that legislative intent

"must be derived from the legislation and may not be invented by the court. To *supply* the intention and then give the statute effect according to *such* intention would not be construction but legislation."

And in Slingluff vs. Weaver, 66 O. S. 621, the court held that:

"The intent of the law makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

The foregoing case is also authority for the proposition that it is only in cases where a statute is ambiguous and its meaning doubtful, that courts consider the history of the legislation, and if that be true the right of the attorney-general or the courts to inquire into the history of section 4789 G. C., or of any other statute may not be warranted, unless the statute actually belongs to the ambiguous class. After stating the general rule that where the provisions of an act are ambiguous, the history of legislation on the subject and the consequences of following a literal interpretation of the language may be considered, the court, at pages 626 and 627, said:

"But is is equally the law, we suppose, that the court does not possess, and should not attempt to exercise, the power of introducing doubt or ambiguity not apparent in the language, and then resort to verbal modifications to remove such doubt and conform the act to the court's supposition with respect to the intent of the legislature, for it seems well settled, as expressed by Story, J., in Gardner vs. Collins, 2 Pet., 58: 'What the legislative intent was can be derived only from the words they have used; we cannot speculate beyond the reasonable import of those words. The spirit of the act must be extracted from the words of the act, and not from conjectures *aliunde*.' The principle is expressed in different form by Allen, J., in McClusky vs. Cromwell, 11 N. Y., 593: 'It is beyond question the duty of courts in construing statutes to give effect to the intent of the law-making power and seek for that intent in

every legitimate way. But in the construction, both of statutes and contracts, the intent of the framers and parties is to be sought first of all in the words and language employed, and if the words are free from ambiguity and doubt, and express plainly clearly and distinctly the sense of the framers of the instrument, there is no occassion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. Courts cannot correct supposed errors, omissions or defects in legislation, or vary by construction the contracts of parties. The office of interpretation is to bring sense out of the words used and not bring a sense into them."

If the contention be sustained that the terms of office of all members of all boards of deputy state supervisors and inspectors of election must begin on May first in the even numbered years, the effect will be (although this is not necessarily controlling) that all the counties which were not entitled to such a board prior to the enactment of section 4789 G. C. in its present form on February 14, 1910, (but which only became entitled to a board thereafter by reason of the Federal census of 1910 having disclosed that they contained a city or cities having a certain population), would be without a board for the period of time beginning May first in an odd numbered year and ending on April thirteenth in the succeeding even numbered year, notwithstanding the clear and express provisions of sections 4788 and 4789 G. C. that the latter counties are entitled to a board to be composed of members appointed from the two political parties casting the highest number of votes at "the last preceding November election for governor," who shall serve for a term of four years from the first day of May. The mere fact that the terms of office of members of boards in counties having boards established while the original and amendatory acts referred to were in force, may commence in the even numbered years, and in the other counties in odd numbered years, will not justify the state supervisor and inspector in either shortening or lengthening the statutory term of four years in any case for the purpose of making the beginning and ending of all terms uniform.

Mr. Boda has been holding the office continuously from May 1, 1911, and at no time has there been a vacancy. Had any vacancy occurred through resignation or otherwise, it could only have been filled by the appointment of a successor to serve for the "unexpired term" (see 4792 G. C.), and not for a new term of four years. Mr. Boda's second or new term of office began May 1, 1915, and this term will not and cannot end until April 30, 1919. Consequently, the action of the state supervisor and inspector of elections in attempting to appoint him to the office for a socalled term of four years from May 1, 1918, was, in effect, an attempt to create a new, distinct and different term from that created by the statute. The general assembly having created the term, it is not within the power of the state supervisor and inspector to disregard it and substitute another in its place, and his attempt to do so in 1918 was without authority of law. If his action is to be sustained it can only be on the theory that he is vested with the power to either declare a vacancy which does not in fact exist, or to shorten or lengthen the duration of an existing statutory term, and the effect in the present case would be either to shorten Mr. Boda's second term from four to three years, or to increase ir from four to seven years. No such power has been conferred upon the state supervisor and inspector, but on the contrary, such exercise of power would be in conflict with the clear and express provision of section 4789 G. C, that the term of office shall be four years.

It may be contended that if I am correct in my opinion that the state supervisor and inspector is without authority to shorten or lengthen the statutory term of four years, etc., then the state supervisor and inspector was in error when in 1911 he appointed two members of Montgomery county's first board for two years. And proceeding with the development of the contention, it may be urged that if the statute is to be construed without incorporation into it the words and clauses contained in the previous and repealed legislation on the subject, all four members of the first board should have been appointed at the same time and for four year terms. These contentions, however, did not present insurmountable barriers to the state supervisor and inspector in office at the time the appointments were made, or to the political executive committees which recommended the appointees, or to the appointees themselves. After all, the only appointment directly involved in the present inquiry is one which was made for a four year term.

But, notwithstanding all this, it is not for the attorney-general or the courts to depart from the obvious meaning of the statute when its language is plain, explicit and unequivocal. In 36 Cyc, IIII, the law is stated as follows;

> "It is the rule for which there is an abundance of authority that the mere fact that a certain construction of a statute will cause inconvenience or failure of justice will not affect the judicial determination of a case involving its construction."

In Gorham v. Steinau, 7 N. P. 478, the court said:

> "It is not the province of courts to relieve against the mistakes or omissions of the legislature, however unwise or unjust may be the consequences."

In Woodbury vs. Berry, 18 O. S. 456, the court held that:

> "Where the words of a statute are plain, explicit, and unequivocal, a court is not warranted in departing from their obvious meaning, although from considerations arising outside of the language of the statute, it may be convinced that the legislature intended to enact something different from what it did in fact enact."

In the opinion, at pages 462 and 463, the court said:

> "The langauge as it stands is clear, explicit, and unequivocal. It leaves no room for interpretation, for nothing in the language employed is doubtful. We are satisfied, by considerations outside of the language, that the legislature intended to enact something very different from what it did enact. But it did not carry out its intention; and we can not take the will for the deed. It is our legitimate function to interpret legislation, but not to supply its omissions. When the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislation, and not judicial action. Where the law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Sedgwick on Statutory and Constitutional Law, 231.
>
> Courts must not, even in order to give effect to what they may suppose to be the intention of the legislature, put upon the provision of a statute a construction not supported by the words, even although the consequences

should be to defeat the object of the act. Smith's Com. on Statutory Construction, Sec. 714."

In King vs. Association, 67 O. S. 240, the court, at page 244, said:

"We have no power to amend the legislative enactment. If the legislature made the mistake suggested, it alone can amend and correct it. The intent of the legislature is determined from what it says, and if its language is clear and unambiguous, the courts have no authority to change it."

For the reasons above stated, I am of the opinion that the action of the state supervisor and inspector of elections in attempting to appoint Mr. Boda for a term of four years from May 1, 1918, was without authority of law, and that his present term of office commenced on May 1, 1915, and ends on April 30, 1919, and that it will be your duty, as the state supervisor and inspector of elections, to appoint a successor in office for the term of four years beginning May 1, 1919. My opinion is supported by the practical construction which has been placed upon these statutes by the respective state supervisors and inspectors of election from the time of their enactment in their present form down to April, 1918. As soon as the result of the 1910 Federal census was made known, and it was ascertianed therefrom that Montgomery county contained a city wherein annual general registration of electors is required by law, the state supervisor and inspector then in office (Hon. Charles H. Graves) appointed the members of the first board, one of the appointees being Mr. Boda, who was appointed for the term beginning May 1, 1911, and ending April 30, 1915. In 1915 the state supervisor and inspector then in office (Hon. Charles Q. Hildebrant) reappointed Mr. Boda to succeed himself in office for the term beginning May 1, 1915, and this latter appointment was recognized and acquiesced in by Mr. Hildebrant's sucessor in office, Hon. W. D. Fulton, from the time he took office on January 8, 1917, until April, 1918. As I have already said, my opinion in this matter is supported by the contemporaneous and practical construction placed upon these laws by several state officers whose special duty it was to execute them, and this construction has also been acted upon by the Republican and Democratic county executive committees who were and are entitled under section 4790 G. C. to recommend persons for the appointments, and also by the appointees themselves, including Mr. Boda, and I see no cogent reason for holding the contrary.

In 36 Cyc. p. 1140, it is said that:

"The construction placed upon a statute by the officer whose duty it is to execute it is entitled to great consideration," etc.

And in 26 Am. & Eng. Ency. of Law, p. 635, the law is stated as follows:

"The contemporaneous and long-continued practice of officers required to execute or take special cognizance of a statute is strong evidence of its true meaning and should not be disregarded except for cogent reasons."

The practical construction placed upon these statutes by the respective state supervisors and inspectors, and others, during these years has never been disturbed by the general assembly, although seven sessions of that body have been held commencing with Janauary 1, 1911; but on the contrary, such construction was perhaps at least impliedly recognized and acquiesced in as correct, for on May 2, 1911 (102 O. L. 98), after the Montgomery county board had been appointed, the general assembly amended one of the statutes (Sec. 4788 G. C.) so as to extend its provisions to counties containing "two or more cities in which registration is required."

The conclusion at which I have arrived is also supported by State ex rel Brower vs. Graves, 89 O. S. 24, in which the supreme court issued a peremptory writ of mandamus compelling the state supervisor and inspector then in office (Hon. Charles H. Graves) to appoint the relator a member of the Montgomery county board for a term of four years from May 1, 1913.

Respectfully,
JOHN G. PRICE,
Attorney-Geueral.

195.

COUNTY TREASURER—COUNTY COMMISSIONERS WITHOUT AUTHORITY TO REIMBURSE SAID OFFICER FOR POSTAGE EXPENDED IN MAILING OUT TAX BILLS.

The county commissioners are without authority to reimburse the county treasurer for postage expended by him in mailing out the tax bills to taxpayers, whether delinquent or not.

COLUMBUS, OHIO, April 12, 1919.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date in which you request the opinion of this department relative to the power of the county commissioners to reimburse the county treasurer for the expense of postage in connection with the mailing out of tax bills.

The facts as stated by you require the consideration of two questions, as follows:

> "(1) May the county commissioners reimburse the county treasurer for the expense of postage incurred in mailing out delinquent personal tax bills?
>
> (2) May the county commissioners reimburse the county treasurer for the expense of postage incurred in mailing out non-delinquent tax bills, both real and personal?"

In connection with these questions you say that you have been unable to find any express statutory authority for either of these expenditures, but submit that the mailing out of tax bills works a great saving of time and conduces to the convenience of the public and of the treasurer's office and that it promotes economy, in that it tends to diminish the size of the clerical force necessary to be maintained when the taxpayers are required to call in person at the office in order to procure their tax bills. You therefore suggest the desirability, from a practical standpoint, of permitting these expenditures to be paid out of the public treasury.

Section 2749 of the General Code is a part of an act authorizing the county treasurer to open not to exceed one office in each township for the receiving of taxes. It authorizes the county treasurer to be reimbursed for certain expenses so incurred, as follows:

> "On or before the tenth day of January and the tenth day of July of each year, the county treasurer shall file with the county commissioners

an itemized statement of expenses incurred in the receiving of taxes, as herein provided, as follows: Transportation to and from the place of collection, office rent, and publishing, printing and posting of notices. When allowed by the county commissioners, such expenses shall be paid from the county fund, but the total expense so paid in any year shall not exceed one hundred dollars."

The only other section expressly authorizing the incurring of expenses payable out of the public treasury in the collection of taxes of any kind is section 5696 G. C., which relates to the collection of delinquent personal taxes, and provides as follows:

"The county commissioners, at each September session, shall cause the list of persons delinquent in the payment on personal property to be publicly read. If they deem it necessary, they may authorize the treasurer to employ collectors to collect such taxes or part thereof, prescribing the compensation of such collectors which shall be paid out of the county treasury. All such allowances shall be apportioned ratably by the county auditor among all the funds entitled to share in the distribution of such taxes."

Your statement that there is no express statutory authority for the making of such allowances as are described in the two questions submitted by you, as they have been stated, is therefore correct.

The following statutes may be quoted to show the outline of the statutory machinery for the collection of taxes and the duties of the county treasurer in connection therewith:

"Section 2648. Upon receiving from the county auditor a duplicate of taxes assessed upon the property of the county, the county treasurer shall immediately cause notice thereof to be posted in three places in each township of the county, one of which shall be at the place of holding elections in such township, and also be inserted for six successive weeks in a newspaper having a general circulation in the county. Such notice shall specify particularly the amount of taxes levied on the duplicate for the support of the state government. the payment of interest and principal of the public debt, the support of state common schools, defraying county expenses, repairing of roads, keeping the poor, building of bridges, township expenses and for each other object for which taxes may be levied on each dollar valuation.

Section 2649. The office of the county treasurer shall be kept open for the collection of taxes from the time of delivery of the duplicate to the treasurer until the twenty-fifth day of January and from the first day of April until the twentieth day of July.

Section 2650. When any tax is paid, the county treasurer shall give to the person paying it a receipt therefor, specifying therein the land, lot or property on which the tax was assessed, as described on the duplicate or in other sufficient manner, which receipt shall be ruled in columns setting forth in the first a description of each item of property, in the second, the value thereof, in the third, the rate of the tax upon each item expressed in mills and fractions, if any, and in the fourth, amount of taxes on each such item.

Section 2651. Such form of receipt may be departed from when necessary as to assessments and special taxes and where the tax due on any item embraces a penalty or delinquency. As to personal property, the receipt shall be of like form. omitting the description of the property. If a penalty is added, and charged by the treasurer, it shall be included in the receipt,

and the amount thereof and the fact that it is a penalty shall be fully, plainly and separately stated in writing upon the face of the receipt."

Section 2656. When one-half of the taxes charged against any entry on a tax duplicate in the hands of a county treasurer is not paid on or before the twentieth day of December next after being so charged, or when the remainder of such tax is not paid on or before the twentieth day of June next thereafter, the county treasurer shall proceed to collect it by distress or otherwise together with the penalty of five per cent on the amount of tax so delinquent, which penalty shall be paid into the treasurer's fee fund."

"Section 2658. When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued. * * *.

Section 2660. If the county treasurer is unable to collect by distress taxes assessed upon a person or corporation or an executor, administrator, guardian, receiver, accounting officer, agent or factor, he shall apply to the clerk of the court of common pleas in his county at any time after his semi-annual settlement with the county auditor, and the clerk shall cause notice to be served upon such corporation, executor, administrator, guardian, receiver, accounting officer, agent or factor, requiring him forthwith to show cause why he should not pay such taxes. * * *.

Section 2664. For the collection of all taxes, penalties, and costs, mentioned in the preceding section, the county treasurers shall have the same powers given by any law for the collection of taxes. All taxes collected by any county treasurer pursuant to the provisions of such section shall be by him transmitted, in the safest and most convenient way, to the treasurer of the county to which such taxes belong. At the same time he shall forward a statement to the auditor of the county of the amount so collected and from whom. If he is unable to collect such taxes, he shall return the original statement to the auditor of the county from which it was sent, with his official certificate why they could not be collected.

Section 2665. If a person charged with a tax has not sufficient property which the treasurer can find to distrain to pay such tax, but has moneys, or credits due, or coming due him from any person within the state, known to the treasurer, or if such tax-payer has removed from the state or county, and has property, moneys, or credits due, or coming due him in the state, known to the treasurer, in every such case, the treasurer shall collect such tax, and penalty by distress, attachment, or other process of law. * * *.

Section 2667. When taxes or assessments, charged against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced.

Section 5694. Immediately after each semi-annual settlement in August, the county auditor shall make a tax list, and duplicate thereof, of all the taxes on personal property remaining unpaid, as shown by the treasurer's books, and the delinquent record as returned by him to the auditor. Such tax list and duplicate shall contain the name, valuation, and amount of personal property taxes, with ten per cent penalty thereon, due and unpaid. He

shall deliver the duplicate to the treasurer on the fifteenth day of September, annually.

Section 5695. The county treasurer shall forthwith collect the taxes and penalty on the duplicate by any of the means provided by law, and the funds so collected shall be distributed in proper proportions to the appropriate funds.

Section 5697. When personal taxes stand charged against a person, and are not paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of personal taxes, shall enforce the collection thereof by a civil action in the name of such treasurer against such person for the recovery of such unpaid taxes. * * *."

Under these sections it will be seen that the county treasurer is to publish a notice as to the rates of taxation and then to open his office for the collection of taxes. He has various remedies which he may enforce for such collection. He is obviously under no duty, however, to inform any given taxpayer of the amount due from him. In fact, save for his own convenience, he is neither required nor authorized to make up what is called a set of "tax bills" at all. It is his duty to furnish receipts, and in point of fact the tax bill is merely a receipt drawn in advance and, of course, not valid as a receipt until signed or stamped by the treasurer or his deputy. In other words, the theory of the statute is that the taxpayer will find out for himself, at the treasurer's office or otherwise, what the taxes charged against him on his property may be.

As you suggest, this process involves considerable confusion in the large counties if it necessitates the appearance of each individual taxpayer at the office of the treasurer. Of course, the taxpayer can write in for his tax bills, furnishing return postage, and procure them without any such inconvenience, and this is very extensively done throughout the state. The policy advocated by your county treasurer, however, is to mail the unsigned receipts or "tax bills" to the taxpayer without request by him and at the expense of the county.

At this point it may be worth while to recall a bit of legislative history: Formerly the treasurer, in common with other county officers, was entitled to retain his fees for his own use. The fees were allowed him to compensate him for all services and expenses. He was entitled to no allowance for expenses except such as might be expressly authorized by law. See—

Jones vs. Commissioners, 57 O. S. 189;
Richardson vs. State, 65 O. S. 108.

In that state of the law the county treasurer might well have incurred the expenses described in your letter,but he would have had to pay them out of his own pocket.

At the present time the fees of the county treasurer are for the use of his fee fund, out of which he pays what formerly were expenses which he would have had to pay himself, viz: compensation of deputies, assistants, clerks and other employes. I need not describe in detail the operation of the county officers' salary law, as it is doubtless familiar to you. Suffice it to say that no provision is found therein for allowance of expenses other than deputy hire, etc., to the county treasurer, though other officers, such as the sheriff, are allowed certain expenses.

When the general assembly passed the county officers' salary law it had the whole subject in view. It was then putting all county officers on a straight salary basis and depriving them of the personal use of the fees of their respective offices. At the same time it undertook to relieve them of some of the expenses which they formerly would have had to pay out of their own pockets. If the general assembly had intended to

allow reimbursement for expenses of the character now under discussion, it would have done so as a part of the county officers' salary law. Its omission to do so then cannot be supplied by implication now.

It would be only fair to allow the treasurer such expenses as those described by you, though to do so would involve, of course, somewhat of a change in the theory of the tax collection statutes. But if such an allowance were made it should come out of the fees allowed the treasurer on the duplicate the same as the compensation of the deputies and assistants who aid the treasurer in making the tax collections. In other words, from the viewpoint of legislative policy it would be a charge on the collections themselves. To allow it out of the county treasury would be to burden one taxing district with expense incurred for the benefit of others as well These considerations emphasize the impropriety of attempting to find implied authority for the doing of the things inquired about in your letter.

For all the foregoing reasons, I am of the opinion that the county commissioners are without authority to reimburse the county treasurer for postage expended by him in mailing out the tax bills to taxpayers, whether delinquent or not.

Respectfully,
JOHN G. PRICE,
Attorney-General.

196.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN IN ASHLAND, COSHOCTON AND RICHLAND COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, April 18, 1919.

197.

MUNICIPAL CORPORATIONS—EXPENSES OF OFFICERS ATTENDING LABOR CONFERENCE AT WASHINGTON D. C. NOT PAYABLE FROM PUBLIC FUNDS.

The expenses of municipal officers incurred in attending a conference of governors and mayors held at Washington D. C. in March, 1919, *which conference was called by the U. S. Department of Labor for the purpose of discussing questions and subjects affecting the general industrial situation, cannot be paid from the public funds.*

COLUMBUS, OHIO, April 15, 1919.

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

GENTLEMEN:—Your letter of recent date requesting my opinion as to whether or not the expenses of the mayor of Lorain incurred in attending a conference of governors and mayors held at Washington, D. C. may be paid from the public funds, was duly received.

With your letter you enclosed a communication dated February 28, 1919, from the city solicitor to your department, and also copy of a letter dated February 12, 1919,

from Mr. R. W. Babson. It appears from Mr. Babson's letter that the conference was called by the United States Department of Labor "to discuss the industrial situation." It was also suggested in Mr. Babson's letter that "the question of resuming public and private construction, and the stimulation of business in general should also be fully discussed, including price tendencies, and the attitude of labor."

The attitude of the city solicitor at Lorain with respect to the payment of the mayor's expenses is set forth in his letter of February 28, 1919, as follows:

> "I have noted that the attorneys-general have heretofore ruled that cities have no legal authority to pay the expenses of city representatives to conventions and conferences throughout the country, and with this in view, it would be my opinion that the meeting in question would come within that rule, and consequently the city would be without authority to do this."

Questions kindred to the one under consideration have been before this department and the courts on several occasions, and the rule on the subject may be said to be reasonably well settled. In 1910-1911 Annual Reports of the Attorney-General, page 942, the rule was announced that the expenses of officers or employes of municipal corporations incurred in attending conventions of municipal officers cannot be paid from the public funds, except where the authority to attend such meeting is conferred either expressly or by necessary implication.

With respect to the right to attend for the purpose of acquiring general knowledge relating to official duties and the problems of employment, such as was contemplated by the Washington conference, it was said:

> "As a matter of law it cannot be said that the city would gain anything by sending any of its representatives to such a convention for no specific purpose but merely for the acquisition of general knowledge relating to the duties of officers and the problems of employments. To say that the municipality is justified in expending its money for the purpose of permitting its employes and officers to acquire information of this sort, is to say that the public money may be expended for the education of public servants. This, it seems to me, is fallaceous and the power to make such an expenditure must be denied. Putting it in another way, the possible good that might result to the department and to the municipality from the acquisition of such general information, is too remote and indefinite upon which to found a public expenditure; the real and direct benefit accrues to the officer or employe and the city is not justified in paying for this. From still another viewpoint, officers are required to qualify and to continue to be qualified, and employes, likewise, are presumed to be cognizant of the matters within the scope of their employment. It is in each case for the individual, at his own expense, to make and keep himself qualified,—not for the city."

In 1912 Annual Reports of the Attorney-General, Vol. I, page 432, it was held that municipal officers cannot be allowed expenses incurred in attending conventions for the purpose of general education, but that where such visit is the most economical and efficient method of promoting a purchase in immediate contemplation by the city, the payment of such expenses was proper. In the opinion, at page 433, it was said with respect to attending for general educational purposes, as follows:

> "In view of the well established principle that municipalites and statutory officers possess only such powers as are conferred by statute, and those which are necessary to carrying into effect the powers so conferred, I am

unable to find any provision of the General Code from which, by any implication, the expenses incurred, by the officers named, of attending national conventions for the purpose of merely general instructions or information with reference to the duties of their offices, could be made a charge against the city. The acquirement of a knowledge of the general affairs and detailed working of his office is a responsibility resting upon the officer himself, not upon the city; and the possession of requisite skill and information is to be presumed.

The power to incur expense for the general education and enlightenment of its officers is not expense conferred upon municipalities by any statute nor is such a power anywhere granted to any of the officers named in your inquiry, and such a purpose is too remote as regards the powers conferred * * *, to be regarded as a power actually necessary for the carrying into effect of those functions.'

And with respect to the promotion of a purchase in immediate contemplation, it was said:

"For as regards the necessary visits to other localities for the immediate purpose of acquiring information with reference to a definite presently contemplated undertaking, such as the purchase of machinery, the decisions permit of a modified application of the above rules, holding that such visits may be regarded as of sufficient necessity to the performance of a fixed duty to justify an allowance of the cost so incurred as an expense incurred for the benefit of the municipality in the performance of a duty enjoined by law."

In State vs. Wright, 17 C. C. (n. s.) 396, the building inspector of Cleveland under direction of the director of public safety attended a convention of municipal building inspectors at Columbus. The city auditor refused to allow the expenses of the trip, and it was sought by mandamus to compel him to do so. In that case the court held:

"A municipality is not liable for the traveling expenses of one of its officials incurred in attending a convention of like officials of other municipalities."

In the opinion the court said:

"We hold that in the absence of any specific statutory provision for such cases, the test of the city's liability must be deemed to be: is the trip or journey in which the expenses were incurred necessarily implied in or reasonably and directly incident to the prescribed duties of the municipal officer who undertake such journey?

It has been pointed out in argument that a municipal officer may properly undertake a journey at the city's expense to inspect material or supplies for the purchase of which, on behalf of the city, he is authorized to negotiate, if such journey is reasonably necessary for that purpose. This is upon the ground that the object of the journey is directly related to the duties of his office.

Here, however, the purpose of the journey was to acquire such information in regard to the duties of his office as the building inspector might reasonably acquire while in attendance upon a convention of officials holding like positions, in various cities. We are unable to see how such an object relates itself either directly or with reasonable necessity to the duties of the relator's office."

In my recent opinion No. 85, dated March 1st, 1919, the power or authority of cities to pay the expenses of mayors and city solicitors in attending a meeting of municipal officers at Columbus for the purpose of drafting legislation for the financial relief of cities was denied. In that opinion the decisions and statutes of Ohio were reviewed at length for the purpose of showing the long and consistent policy of the state against the allowances of claims of public officers for expenses incurred in the discharge of official duties, except where the incurring and payment of such expenses is clearly authorized by law, and after stating that

> "No statute has been found imposing a duty upon or authorizing municipal officers generally, or mayors and city solicitors, to attend meetings or conventions held for the purpose of discussing and drafting legislation for the relief of municipalities, or making the expenses of such attendance a burden on the public funds. As was well said in Richardson vs. State, supra, 'An intention to do so will not be implied.' If it had been intended to permit the expenditure of public funds for such purposes, it is reasonable to presume that the legislature would have spoken on the subject, as it has done in the numerous instances hereinbefore referred to,'

the conclusion was reached that

> "In view of the settled public policy of Ohio, as announced by the decisions and disclosed in the statutes hereinbefore referred to, I am of the opinion that public funds cannot be used for the purpose of paying the expenses of municipal officers of non-charter cities in attending meetings of mayors and city solicitors held for the purpose of discussing and drafting legislation for the relief of cities, nor of the officers of charter cities whose charters contain no valid provision warranting such payment."

The doctrines announced in the foregoing opinions and decisions are, in my opinion, applicable to the claim of the mayor of Lorain for reimbursement for expenses incurred by him in attending the Washington conference, and I am therefore of the opinion that these expenses cannot be paid from the public funds.

Respectfully,
JOHN G. IRICE,
Attorney-General.

198.

CHILD NOT COUNTY CHARGE—COUNTY COMMISSIONERS WITHOUT AUTHORITY TO PAY CLAIM OF HOSPITAL FOR MEDICAL SERVICES.

The county commissioners are without authority to allow and pay the claim of a hospital for medical and surgical services furnished to a little child living with its parents, and who has not become a county charge.

COLUMBUS, OHIO, April 15, 1919.

HON. CHARLES M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Your letters of March 28 and April 3, 1919, requesting my opinion as to whether or not the county commissioners have the authority to pay the bill of

the St. Clair Hospital Company, Columbus, Ohio, for services rendered to Hilda Miller, a resident of Pike county, was duly received.

The facts and circumstances connected with this case are set forth in your letter of March 28th, which reads as follows:

> "Some time ago the board of education of the Waverly village school district employed a specialist to treat children for trachoma, which disease had developed to an alarming extent in our public schools. The physician found cases of persons not of school age, some of whom he treated. In one case it was found advisable to take a little girl to the hospital for treatment.
>
> The inclosed bill has been filed with our county commissioners, and they have asked my opinion as to whether or not they can pay same. I am not clear that they have the authority and am therefore asking your opinion. The commissioners wish to pay the bill if they can do so legally, as they regard the doctor's work a benefit to the public, not only in curing this particular case, but in preventing further spread of the disease.
>
> The parents of the child own no property. The father is a painter and paper-hanger, dependent on his wages for the support of his family, and when the case was being considered it was thought that the child would go without treatment unless somebody besides the father acted.
>
> You understand, of course, that the contract of the school board was for the treatment of children attending the schools, and this case is one entirely outside of said contract."

Unless there is some statute authorizing the county commissioners to contract or pay for services of the kind referred to in your letter, the claim cannot be allowed and paid from the county funds. As was held in Jones vs. Commissioners, 57 O. S. 189:

> "The board of county commissioners represents the county, in respect to its financial affairs, only so far as authority is given to it by statute. It may pass upon and adjudicate claims against the county for services in a matter, which, under the statutes, may be the subject of a legal claim against the county. But it is without jurisdiction to entertain or adjudicate claims which in themselves are wholly illegal and of such a nature as not to form the subject of a valid claim for any amount. And an attempt by the board to allow a claim of such character will not bind the county."

In opinion No. 1192 of the Attorney-General addressed to you under date of May 6, 1918, this department had under consideration the authority of the county commissioners to assist in paying the expenses of a temporary hospital for the treatment of trachoma, etc., and had occasion to review the statutes applicable to municipalities, townships and counties on the subject of needy poor relief, and it was, among other things, said:

> "As a fundamental principle it can be stated that the furnishing of support or relief to the needy poor rests upon the townships and municipal corporations of which the needy poor are residents. Section 3476 G. C. makes such provision and reads as follows:
>
> 'Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each municipal corporation therein, respectively, shall afford at the expense of such township or municipal corportation public support or relief to all persons therein who are in condition requiring it.'

When we note section 3480 G. C. we find that this principle applies not only to the needy poor in general, but to those who are in need of the services of a physician or a surgeon. The first sentence of this section reads:

'When a person in a township or municipal corporation requires public relief, or the services of a physician or surgeon, complaint thereof shall be forwith made by a person having knowledge of the fact to the township trustees, or proper municipal officer * * *'

The provision of this chapter in the first instance controls in the furnishing of relief to the needy poor."

The statutes relating to county infirmaries, those authorizing aid to corporations or associations organized for charitable purposes, and those applicable to municipal and township boards of health, were also referred to and discussed, none of which seem to impose any liability upon counties in cases of the kind referred to in your letter.

I am unable to find any statute which would warrant the county commissioners in paying the bill referred to, and therefore concur in your opinion that the board is without authority to allow and pay the same.

Respectfully,
JOHN G. PRICE,
Attorney-General.

199.

Y. M. C. A. AT LIMA—SECTION 12962 G. C., NOT VIOLATED WHERE MINOR UNDER EIGHTEEN YEARS, WHO IS MEMBER, IS PERMITTED TO PLAY POOL AND BILLIARDS.

In permitting a minor under the age of eighteen years, who is a member of the Lima Y. M. C. A., to play pool and billiards therein, the officials of said Y. M. C. A. do not violate the provisions of section 12962 *G. C. Opinion limited, however, to the precise facts of the query.*

COLUMBUS, OHIO, April 15, 1919.

HON. JOHN L. CABLE, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—In your letter of recent date you say:

"The local Young Men's Christian Association has installed billiard and pool tables. Only members of the Y. M. C. A. are permitted to play and a nominal charge will be made for each game.

Please give me your opinion as to whether, when a minor under the age of eighteen years, who is a member of the Y. M. C. A., is permitted to play pool and billiards, the officials of the Y. M. C. A. are violating the criminal laws of Ohio. I call your attention to section 12962 of the General Code."

Section 12962 G. C., to which you refer, reads thus:

"Whoever, being the owner or keeper of a billiard saloon, or the owner or keeper of a billiard table at any other public place, permits a minor under the age of eighteen years to play billiards or pool, or be and remain in such

saloon or other public place, shall be fined twenty dollars, and for each subsequent offense shall be fined fifty dollars."

The real question for consideration is whether or not the Y. M. C. A. officials mentioned in your letter come within the meaning of the words "the owner or keeper of a billiard table at any other *public place,*" contained in the section just quoted.

The words "public place" are frequently found in statutes like the one in question, and have been frequently and variously defined by the courts.

Citing a large number of decisions as authority, Cyc (Vol. 32, p. 1249), defines a "public place" as follows:

> "A place openly and notoriously public; a place of common resort; a place where all persons have a right to go and be; a place which is in point of fact public, as distinguished from private; a place that is visited by many persons, and usually accessible to the neighboring public; every place which is for the time made public by the assemblage of people."

In general, says Bishop on statutory crimes (section 298), the place, in order to be a public place, must be "one to which people are at the time privileged to resort without an invitation."

As pointed out in Shihagan vs. State, 9 Tex. 430, the term "public" may be applied to a house or place either on account of the *proprietorship,* as a court house, which belongs to the county, or *the purposes for which it is used,* as a tavern, storehouse, houses for retailing spirituous liquors, etc.

It is also to be noted that under a statute like the one under consideration, a place may be public at some times and private at others, and a private place becomes public by being put to public use. White vs. State, 39 Tex. Cr. R. 269; 45 S. W. 702.

Some of the places which the courts have held to be "public places" in the contemplation of statutes of this kind are as follows: Barber shop, court house, dram shop, hotel, restaurant, opera house, physician's office. See Century Digest, Vo. 24, p. 1704.

It appears from your letter, above quoted, and from your supplemental letter of April 7, that persons generally are not permitted to resort to the room or place in the Lima Y. M. C. A., where the pool and billiard tables are located; that only members of the Y. M. C. A. are permitted to play pool or billiards therein; and further, that said Y. M. C. A. has, and attempts in good faith strictly to enforce, a rule prohibiting non-members of any age from being or remaining in the room or place where said pool and billiard tables are located.

In the case of Koenig vs. State (Tex.), 26 S. W. 839, at p. 839, it is asid:

> "Again, reference to the statutes shows that the places and houses named, and those intended to be embraced, are all 'public.' The statute contemplates public houses and public places. Was the club room of the association either? None but members and their guests could enter there, or share its privileges. *So long as this rule was enforced, it was not public, and the evidence shows that the rule was strictly observed.*"
>
> (Italics ours.)

Assuming the existence of the facts above stated, it is the opinion of this department that the room or place kept and maintained by the Lima Y. M. C. A. is not a "public place" within the meaning of section 12962 G. C., and in reply to your question you are advised that, under the assumption just made, the officials of said Lima Y. M. C. A. are not violating said section in permitting a minor under the age of eighteen

years, who is a member of said Y. M. C. A., to play pool and billiards at the room or place therein, above referred to.

Since the question, what is a *public place*, is so largely a question of fact, the opinion herein given is expressly limited to, and based upon, the circumstances disclosed by your letter, and no attempt has been made herein to pass upon the situation obtaining in Y. M. C. A. buildings generally.

Respectfully,
JOHN G. PRICE,
Attorney-General.

200.

BANKS AND BANKING—CONSTITUTIONALITY OF SENATE BILL No. 52—STOCK EXCHANGE.

COLUMBUS, OHIO, April 15, 1919.

HON. LEONARD J. GRAHAM, *Chairman, Committee on Banks & Banking, House of Representatives, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for an opinion as to the constitutionality of senate bill No. 52 entitled: "A bill to amend section 13080 of the General Code, and to define the terms 'delivery' and 'receipt' as the same are applied to commodities and securities."

The purpose of this bill as I understand it is to clarify the situation with reference to the construction of the courts in connection with transactions of stock exchanges. As claimed by those particularly interested in the bill, the real purpose is to define the words "delivery" and "receipt" as the same are applied to commodities and securities, and I am assuming that to be the true situation.

I would suggest that the purpose referred to above will have been accomplished fully by inserting a period after the word "buyer" in place of the semicolon at the end of line 8 and striking out all of lines 9, 10 and 11. Lines 9, 10 and 11 are at least surplusage, if not really objectionable, as they do not add anything to the real purpose of the measure.

It is my opinion that if senate bill No. 52 becomes a law it will not be unconstitutional.

Respectfully,
JOHN G. PRICE,
Attorney-General.

201.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN ROSS AND LAKE COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Culumbus, Ohio.*

COLUMBUS, OHIO, April 15, 1919.

202.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN DELAWARE, HOLMES, KNOX, LUCAS, MARION AND TUCARAWAS COUNTIES.

HON CLINTON COWEN, *State Highway Commissioner, Culumbus, Ohio.*

COLUMBUS, OHIO, April 15, 1919.

203.

APPROVAL OF BOND ISSUE OF STARK COUNTY IN SUM OF

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 15, 1919.

204.

APPROVAL OF SYNOPSIS FOR REFERENDUM PETITION ON AMENDED SENATE BILL N. 74.

Messrs. Geo. B. Okey and T. S. Hogan, Columbus, Ohio.

COLUMBUS, OHIO, April 16, 1919.

205.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN STARK AND WYANDOT COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, April 17, 1919.

206.

ROADS AND HIGHWAYS—TOWNSHIP TRUSTEES APPOINT TOWNSHIP HIGHWAY SUPERINTENDENT AND FIX COMPENSATION FOR TIME *ACTUALLY* EMPLOYED.

Township trustees, in appointing a township highway superintendent in accordance with sections 3370 *and* 3371, *General Code* (107 *O. L.* 93), *are not authorized to fix the compensation on the basis of a month or longer period, but must apportion the compensation to the time for which the superintendent is actually employed in the discharge of his duties; nor are such trustees authorized to employ such superintendent for any fixed period.*

COLUMBUS, OHIO, April 17, 1919.

HON. WALTER W. BECK, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—Attention has been given your communication of date March 15, 1919, wherein you submit for opinion the following:

> "Can the township trustees under section 3373 G. C. fix the compensation of the highway superintendent by the month? Can they employ the highway superintendent for any fixed period of time?"

Your reference is to section 3373. However, the sections of the so-called Cass highway act (106 O. L. 574), relating to appointment of township highway superintendent, have been repealed, among them said original section 3373; and the law relative to township highway superintendents is now to be found in sections 3370 and 3371 (107 O. L. 93). These sections read:

> "Section 3370. The township trustees shall have control of the township roads of their township and shall keep the same in good repair. The township trustees may, with the approval of the county commissioners or state highway commissioner, as the case may be, maintain or repair a county road or intercounty highway or main market road within the limits of their township. In the maintenance and repair of roads the township trustees may proceed in any one of the following methods as they may deem for the best interest of the public, to-wit:
>
> 1. They may designate one of their number to have charge of the maintenance and repair of roads within the township, or
>
> 2. They may divide the township into three road districts, in which event each trustee shall have charge of the maintenance and repair of roads within one of such districts, or
>
> 3. They may appoint some competent person, not a member of the board of trustees, to have charge of the maintenance and repair of roads within the township which person shall be known as township highway superintendent, and shall serve at the pleasure of the township trustees. The method to be followed in each township shall be determined by the township trustees by resolution duly entered on their records."
>
> Section 3371. When the trustees of any township determine to proceed in the third method hereinbefore provided and appoint a township highway superintendent, such superintendent shall before entering upon the discharge of his duty give bond to the state of Ohio for the use of the township in the sum of two hundred dollars, conditioned upon the faithful performance of his duty. Such bond shall be approved by the trustees of the

township and filed with the clerk thereof. The township trustees shall fix the compensation of the township highway superintendent for time actually employed in the discharge of his duties, which compensation shall be paid from the township road fund. The compensation and all proper and necessary expenses, when approved by the trustees, shall be paid by the township treasurer upon warrant of the township clerk."

The provisions of present section 3371 in so far as relating to compensation of the superintendent are a verbatim re-enactment of section 3373 as it appeared in 106 O. L. 574 (594) Cass act; and as they stood in the Cass act these provisions were the subject of an opinion of this department under date of March 4, 1916 (Opinions of Attorney-General 1916, p. 382), the purport of which opinion is indicated by the last paragraph thereof, reading as follows:

"I therefore advise you, in answer to your specific question, that township trustees are not authorized to fix the compensation of township highway superintendents at a stated sum per month or per year, but that such compensation must be fixed on a per diem or per hour basis in order to insure the carrying out of the legislative intent, to the effect that the township highway superintendent should receive compensation from the public treasury for the time actually employed in the discharge of his duties, and should not receive any compensation from the public treasury when not engaged in the performance of the duties of his position."

The conclusion just quoted is adhered to and furnishes the answer to your first inquiry.

As to your second inquiry, whether the trustees may employ a highway superintendent for a fixed period of time.

The only reference to period of employment is the expression in section 3370, "shall serve at the pleasure of the township trustees." This language would seem to preclude entirely the idea of a fixed term of employment, especially when considered in the light of the opinion above expressed in answer to your first question. No doubt, the trustees may encounter difficulty in their effort to employ a superintendent when they can give no assurance that the employment will be for a given length of time; but objections on that score would seem to be no more serious than those arising from the fact that the trustees are without power to fix the salary on a monthly or annual basis.

Under the Cass act, the appointment of road superintendents was provided for in the following language of then section 3370:

"* * * The trustees of the township shall appoint for each road district a superintendent * * * who shall serve until his successor is appointed and qualified. * * * He may be removed by the township trustees or the county highway superintendent for incompetence or gross neglect of duty."

This language was considered in an opinion of this department of date April 4, 1916 (Opinions Attorney-General 1916, p. 606), and the conclusion reached was that while in the terms of the statute the trustees might remove the superintendent only for the causes specified in the statute, yet such trustees might at any time accomplish the removal by merely appointing a successor. The opinion last noted is of course not precisely in point here, owing to change in the language of the statute; but on the other hand the legislature in making the change has certainly not indicated

an intention of broadening the authority of the trustees in the way of appointing for a definite term.

Your second question is therefore answered in the negative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

207.

TAXES AND TAXATION—LEVIES UNDER SECTION 3298-15d (107 O. L. 79) ARE UPON ALL TAXABLE PROPERTY OF TOWNSHIP INCLUDING MUNICIPAL CORPORATIONS.

Tax levies made under authority of section 3298-15d (107 *O. L.* 79) *are to be made upon all the taxable property of a township, including that of municipal corporations therein.*

COLUMBUS, OHIO, April 17, 1919.

HON. G. B. FINDLEY, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Under date April 2, 1919, you submit for the opinion of this department the following:

> "I am interested to know whether township trustees have the right under section 3298-1 G. C. (106 O. L. 589), in raising money for the improvement of roads within the township, to levy a tax both upon the property of the township and upon that of a municipal corporation situated therein."

Said section 3298-1, to wh ch you refer, is found in its present form in 107 O. L. 73. It is the opening section of a series of statutes (section 3298-1 to 3298-15n) which vests in township trustees authority to construct roads. The cost of improvements undertaken by virtue of said series of statutes, may, according to the terms of section 3298-13 (107 O. L. 77) be paid partly by assessment and partly "out of the proceeds of any levy or levies for road purposes *upon the grand duplicate of all the taxable property in the township.*" Specific authority for the making of the tax levy is given in section 3298-15d (107 O. L. 79), which section is here quoted in full:

> "The proportion of the compensation, damages, costs and expenses of such improvement to be paid by the township shall be paid out of any road improvement fund available therefor. For the purpose of providing by taxation a fund for the payment of the township's proportion of the compensasation, damages, costs and expenses of constructing, reconstructing, resurfacing, or improving roads under the provisions of section 3298-1to 3298-15n inclusive of the General Code and for the purpose of maintaining, repairing or dragging any public road, or roads, or part thereof, under their jurisdiction in the manner provided in sections 3370 to 3376, inclusive, of the General Code, the board of trustees of any township is hereby authorized to levy annually a tax not exceeding three mills upon each dollar of the taxable property of said township. Said levy shall be in addition to all other levies authorized by law for township purposes and subject only to the limitation on the combined maximum rate for all taxes now in force. The taxes so authorized to be levied shall be placed by the county auditor upon the tax

duplicate against the taxable property of the township and collected by the county treasurer as other taxes. When collected such taxes shall be paid to the treasurer of the township from which they are collected and the money so received shall be under the control of the township trustees of such township for the purposes for which such taxes were levied."

Language very similar to that of the section just quoted is found in sections 1222 (107 O. L. 132), and 6927 (107 O. L. 101), relating respectively to levies of taxes for township's share of cost of improvements under the supervision of the state highway department, and under the supervision of the county commissioners.

A reading of sections 3298-13 and 3298-15d would seem to leave little room for doubt that the legislature intended the levy to include property within a municipal corporation situate in the township; but if there can be any doubt on that score, it is certainly dispelled by reference to sections 3298-25 to 3298-53 (107 O. L. 83), which provide for the creation of "road districts" embracing the territory of a township outside of municipal corporations therein, and the levying of a tax on the taxable property of said district, the very object of this series of statutes being to guard against situations wherein an already high rate in a municipality might make inadvisable the levying of a tax on all the taxable property of the township, and to leave a way open for the raising of funds for improvements under the direction of township trustees through the levying of a tax on all the property of the township outside of municipal corporations therein. Furthermore, section 3298-18 (107 O. L. 82), which has reference, among other things, to creating a township fund for the dragging, maintenance and repair of roads, provides for a levy "upon all the taxable property of the township outside of any incorporated village or city, or part thereof therein situated."

You are, therefore, advised that a levy made by virtue of section 3298-15d is applicable to all the taxable property of the township, including that of municipal corporations therein.

Respectfully,
JOHN G. PRICE,
Attorney-General.

208

PARTITION FENCES—SECTIONS 5913, 5914 AND 5915 G. C. CONSTITUTIONAL.

Sections 5913, 5914 *and* 5915 *of the General Code (formerly known as R. S. Sec.* 4243), *are not unconstitutional. See Zarbaugh, Treas. vs. Ellinger,* 99 *O. S.* 133.

COLUMBUS, OHIO, April 17, 1919.

HON. HAVETH E. MAU, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Acknowledgment is made of the letter of March 5th, addressed to this department by Hon. William K. Marshall, assistant prosecuting attorney of Montgomery county.

Said letter calls attention to the case of Beach vs. Roth, et al., 18 O. C. C. (N. S.) 579, affirmed without opinion in 80 O. S. 746, and raises the question as to the constitutionality of section 4243 R. S., now code section 5913, 5914 and 5915. Said sections read as follows:

"Section 5913. If either person fails to build the portion of fence assigned to him, the township trustees, upon the application of the aggrieved person,

shall sell the contract to the lowest responsible bidder agreeing to furnish the labor and material and build such fence according to the specifications proposed by the trustees, after advertising them for ten days by posting notices thereof in three public places in the township.

Section 5914. When the work is completed in conformity with such contract and to the satisfaction of the trustees, they shall forthwith certify the costs to the township clerk, and, if not paid within thirty days, such clerk shall certify them to the auditor of the county with a statement of the amount the fence sold for, adding thereto a proportionate amount of costs and expenses of such sale, with a correct description of each piece of land upon which the costs are assessed.

Section 5915. The county auditor shall place such amounts upon the tax duplicate to be collected as other taxes, and the township trustees shall at the time certify the amount due each person for building such fence and the amount due each trustee and clerk for services rendered therein. The auditor may anticipate the collection thereof and draw orders for the payment of such amounts out of the county treasury."

The syllabus of the case just mentioned (18 O. C. C. N. S. 579), says:

"Section 4243, Revised Statutes, providing for the building of line fences and the assessment of the cost thereof upon adjoining proprietors, is unconstitutional."

Speaking of this case, the Attorney-General, in an opinion rendered on January 5, 1917 (Opin. of Atty. Gen., 1916, Vol. II, p. 1976), said (at p. 1977):

"The syllabus in the case of Beach vs. Roth, et al., trustees, 18 O. C. C., N. S., 579, is misleading, the broad statement of the syllabus being that section 4243 R. S. is unconstitutional. If sufficiently appears, however, from the opinion of the court, that the court had in mind a situation where the lands on which it was sought to lay the imposition were unenclosed and were intended by the owner so to remain and that the owner had no occasion for a line fence for the purpose of controlling his own domestic animals or for any other purpose except it might be to protect his lands from the domestic animals of his neighbor, who was seeking to compel him to share in the expense of constructing a line fence. This case was affirmed without report in 80 O. S., 746, on the authority of the Alma Coal Company vs. Cozad, treasurer, supra (79 O. S. 348)."

In McDorman vs. Ballard, et al., 94 O. S. 183, our supreme court was asked to reverse the judgment of the court below upon the ground that sections 5908 et seq., G. C. are unconstitutional. Citing the Alma Coal Co. case, above mentioned, the court said (p. 184):

"It was held that the act could not be so construed and administered as to charge an owner of lands which are, and are to remain, unenclosed, with any part of the expense of constructing and maintaining a line fence for the sole benefit of the adjoining proprietor. It does not appear in the present case that the lands of plaintiff in error are unenclosed, and therefore they do not come within the exceptions of the provisions of the statute mentioned in the case to which we have referred, and upon the authority and the holding in that case the judgment of the court of appeals is therefore affirmed."

The constitutionality of the statutes in question was again upheld in the recent case of Charles H. Zarbaugh, Treasurer, vs. John P. Ellinger, decided by the supreme court of Ohio on December 31, 1918. This case is not yet officially reported, but will appear in 99 O. S. at page 133. The facts in that case were as follows:

The trustees of the township in which the lands were situate, proceeding under section 5908 G. C. and sections following, ordered Ellinger, the defendant below, to build one-half of the fence on each side of a private right of way which passed through farm lands owned by others. This, Ellinger refused to do. The trustees then caused the fence to be built pursuant to the statute and the cost of it was certified to the county auditor. Suit was brought by the county treasurer to collect the amount so certified. The jury returned a verdict for the defendant. It was conceded that the verdict of the jury necessarily followed the charge of the trial court, which entertained the view that the statutory provisions under which the assessment was made are unconstitutional.

The constitutionality of the statutes in question was again upheld by the supreme court. The syllabus of the case reads:

> "1. Where the owner of a private right of way which passes through farm lands owned by others, uses it as a farm outlet to a public highway, he is required by the provisions of sections 5908 and 5919, General Code, to build and keep up one-half of the fence on each side of his private right of way.
>
> 2. The enforcement of that obligation in the manner provided by the statute is not a taking of the property of the owner of such private right of way, in violation of the constitution"

Speaking of the Alma Coal Company case, cited above, the court said:

> "It will be observed that the court did not in that case hold the amended section 4239 R. S. to be unconstitutional. But the right to invoke its application to a situation such as found in that case was denied. In the facts as they there existed, there was no possible basis for the assessment on account of benefit, for there was none."

In neither the McDorman case nor the Zarbaugh case was any reference made by the court to the Beach case, affirmed without report in 80 O. S. 746. If, however, such affirmation must be taken as a decision to the effect that the statutes in question are unconstitutional, it is evident that such decision has in effect been overruled by the later cases just cited.

I therefore advise you that sections 5913, 5914 and 5915 G. C. (formerly known as section 4243 R. S.) are not unconstitutional.

Respectfully,
JOHN G. PRICE,
Attorney-General.

209.

TAXES AND TAXATION—CONSTRUCTION OF SECTIONS 5501 AND 183 G. C. AS TO "GOOD WILL" FOR PURPOSES OF TAXATION.

Neither "good will" nor patent rights, separately considered, constitute "property" within the meaning of sections 5501 *and* 183 *of the General Code, providing for the annual franchise tax and the initial fee, respectively, exacted from foreign corporations; nor is "good will' to be considered as an enhancement of the value of the tangible property of such corporations for the purpose of such statutes with a view to arriving at the value of the whole property as a unit.*

COLUMBUS, OHIO, April 17, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have submitted to this department for opinion the following question:

> "A foreign corporation which owns and uses a part of its capital in this state and does business here reports in its annual statement that a part of its capital stock represents "good will," and that another part thereof represents patent rights.
>
> Should good will and patent rights, or either of them, be considered as 'property' for the purpose of determining the proportion of the authorized capital stock of such corporation represented by property and business in Ohio; and, if so, what if any part or portion of such good will or patent rights should be regarded as "in this state" for the purpose of making such computation? "

The statutes involved in the consideration of these questions, in so far as their provisions are necessary to be noted here, are as follows:

> "Section 5499. Annually, during the month of July, each foreign corporation for profit, doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe.
>
> Section 5501. Such report shall contain:
>
> 1. The name of the corporation and under the laws of what state or country organized.
>
> 2. The location of its principal office.
>
> * * * * * * * * * *
>
> 5. The amount of authorized capital stock, and the par value of each share.
>
> * * * * * * * * * *
>
> 7. The natu e and kind of business in which the company is engaged and its place or places of business, both within and without the state.
>
> * * * * * * * * * *
>
> 9. The value of the property owned and used by the company in this state, where situated, and the value o the property owned and used outside of this state, and where situated.
>
> * * * * * * * * * *
>
> Section 5502. Upon the filing of the report, provided for in the last three preceding sections, the commission, from the facts thus reported and any

other facts coming to its knowledge bearing upon the question, shall, on the first Monday in September, determine the proportion of the authorized capital stock of the company represented by its property and business in this state. On the first Monday of October, the commission shall certify the amount of the proportion of the authorized capital stock of each such company represented by its property and business in this state, as determined by it, to the auditor of state.

Section 5503. On or before October fifteenth, the auditor of state shall charge for collection, as herein provided, annually, from such company in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchises in this state, a fee of three-twentieths of one per cent upon the proportion of the authorized capital stock of the corporation represented by the property owned and used and business transacted in this state, which fee shall not be less than ten dollars in any case. * * *"

As has been held in previous opinions of this department with which commission is familiar, the reference in section 5499 to "all other provisions of law" carries us back to section 183 G. C., which with the related sections provides as follows:

"Section 183. Before doing business in this state, a foreign corporation organized for profit and owning or using a part or all of its capital or plant in this state shall make and file with the secretary of state in such form as he may prescribe, a statement under oath of its president, secretary, treasurer, superintendent or managing agent in this state, containing the following facts:

1. The number of shares of authorized capital stock of the corporation and the par value of each share.

* * * * * * * * * * * * *

3. The value of the property owned and used by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.

4. The proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio.

Section 184. From the facts thus reported and any other facts coming to his knowledge, the secretary of state shall determine the proportion of the capital stock of the corporation represented by its property and business in this state, and shall charge and collect from such corporation for the privilege of exercising its franchise in this state, one-tenth of one per cent upon the proportion of its authorized capital stock represented by property owned and used and business transacted in this state, but not less than ten dollars in any case. Upon the payment of such fee the secretary of state shall make and deliver to such foreign corporation a certificate that it has complied with the laws of Ohio and is authorized to do business therein, stating the amount of its authorized capital stock and the proportion of such authorized capital stock represented in this state."

As the commission has previously been advised, the two groups of statutes from which quotation has been made together constitute a single comprehensive scheme of taxation of the privilege exercised by foreign corporations in the ownership and use of property and the transaction of business in Ohio under corporate forms. Sections 183 et seq. impose a fee or tax upon the "privilege originally conferred" by the state upon such foreign corporations in permitting them to exercise their corporate franchises here (Ashley vs. Ryan, 49 O. S. 504; 153 U. S. 436); while the former im-

pose a tax upon the continuing annual value of that privilege as enjoyed from year to year (Southern Gum Co. vs. Laylin, 66 O. S. 578). Therefore, it is fair to construe the two laws together and to resolve doubts as to the interpretation of the annual franchise tax law, which was the later in point of enactment, in the light of the provisions of the law providing for the annual fee, which was the basis of the franchise tax law.

I call attention to the following features common to both laws:

1 "Property" is not the sole factor upon which the calculation required by each of the laws is to be made; business transacted is a factor of equal weight in the computation which is required

State vs. Cabin Creek Consolidated Coal Co., 17 N. P. n. s. 60.

(2) The property which is to enter into the calculation must be that which is capable of "use" and is used in this state.

(3) The property which must be reported and considered for the purpose of determining the tax must be that which has situation in the state of Ohio and outside of the state of Ohio, respectively.

(4) That which renders a foreign corporation liable to compliance with the Ohio laws and payment of annual franchise taxes, in addition to the doing of business in this state, is the act described as "owning or using a part or all of its *capital or plant* in this state."

From this it might be asserted that anything in the nature of property which might be regarded as of the "capital" of the company is to be regarded as "property" for the further purposes of the section.

If that feature of the statutes which has been mentioned last be taken as the keynote of the law, then we should at once reach an answer to one part of your question, and would have to hold that all subjects of ownership which might constitute parts of the capital of a corporation would have to be considered as "property" within the meaning of that law. This would lead to the further conclusion that good will, patent rights, investments in stocks and bonds, etc., in a word all intangible interests, must be regarded as property and a location in or out of the state assigned thereto for the purpose of the law.

But it is by no means certain that the phrase "capital or plant" conclusively indicates the scope of the word "property" used in the sections under examination. On the contrary the phrase "where situated" used with respect to the property in this state in section 183 G. C. and with respect both to property in this state and that outside of this state in section 5501, at least suggests a meaning of the word "property" limited in scope to that which is capable of a situation of its own; indeed the idea which may be present in this phrase might be even limited to tangible property. Again, the employment of the word "used" not only in the sub-paragraphs of sections 183 and 5501 G. C., but also in the introductory paragraphs of these two sections in connection with the words "capital or plant," apparently negatives the thought of the application of any of these substantives to property or choses in action held as mere investments. Such indeed has been the holding of this department, which I believe has repeatedly advised the commission that tangible property, such as real estate which is not *used* in the business of the company, but is merely held as an investment is not to be counted in determining the basic proportion upon which the computation of the tax is founded. Of course, it is true, as said by Mr. Chief Justice Fuller, in Adams Express Co. vs. Ohio State Auditor, 165 U. S., 194-227, that

> "Presumptively all the property of the corporation or company is held and used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used."

But as the opinion in that case points out, this is but a presumption which may be rebutted by a proper showing.

P. C. C. & St. L. R. R. Co. vs. Bachus, 154 U. S 421;
Fargo vs. Hart, 193 U. S. 490.

What may be termed a cursory view of the statutes involved does not, therefore, clearly indicate the precise scope of the word "property" as therein used. It may mean any of the fol owing:

(1) All things and interests, the subjects of ownership, which go to make up the "capital" of a corporation.

This is the broadest of the possible meanings of the term.

(2) Such real estate and tangible personal property as is actually used in the business of the company, as distinguished from such as may be owned and held passively as investments.

This is the narrowest possible meaning of the term.

(3) Some other meaning lying as it were between the extremes just suggested might be worked out, such as the things and interests, whether tangible or intangible, that are actually used by the company in the transaction of its business.

It may be pointed out that if stress be laid upon the word "capital" as indicating the scope of the term "property" still further ambiguity is encountered; for this word may mean at the one extreme all the property and interests of the company, and at the other so much thereof only as represents the original investment, or the par value of the subscribed shares.

See—Thompson on Corporations, sections 3404 et seq., and sections 2926 et seq., where the meaning of this word and similar phrases is discussed.

See also—Iron Railroad Co. vs. Lawrence Furnace Co., 49 O. S. 102; Bradley vs. Bauder, 36 O. S. 28.

If this point were conclusive it is believed that the broader of these meanings would have to be given to the word in the sections under consideration.

None of these points is conclusive, however, and the solution of the problem cannot be worked out without a careful examination of the fundamental character of the things known as "good will" and "patent rights" with a view to determining the probable legislative intent embodied in the sections under consideration as regards their inclusion within the scope of the meaning of the term "property."

The term "good will" grew up, so to speak, in the law of partnership.

As defined by Lord Eldon, in Cruttwell vs. Lye, 17 Ves. Jr., 335, 346, it was said to be

"nothing more than the probability that the old customers will resort to the old place."

This definition, it will be observed, makes good will dependent upon place or location, and it is no doubt true that *one kind of good will* is of that character. This o.d definition, however, is now recognized as inadequate.

Vice Chancellor Sir W. Page Wood, in Churton vs. Douglas, 5 Jur. N. S. 887, 28 L. J. Ch. 841, said:

" 'good will,' I apprehend, must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage

of the late partner in carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the *benefit of the business.*"
(Italics mine.)

Story in his work on Partnership, section 99, describes "good will" as

"the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity or reputation for skill, affluence, punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices."

It will be observed that Story distinguishes "good will" from "the capital stock, funds or property employed" in an establishment. This distinction is of some interest to us, for though good will has the attributes of property and as such may become the subject of mortgage, sale or lease in connection with the business; yet where the question is, as it is with us, whether or not the word "property" in a statute includes good will the fact that good will is not "property" for all purposes is of some significance.

Definitions might be multiplied, as many courts and writers have attempted them. What have been quoted, however, will suffice for the purposes of the present discussion. Enough has been said, it is believed, to bring out the following points concerning the nature of good will.

(1.) From the very nature of the term itself and from the definitions of it which have been given, it is at least certain that good will, however it arises, consists fundamentally of a disposition on the part of people other than the so-called "owner" of it. In its original sense the term denotes an attitude of mind, and indeed in the sense in which we are dealing with the term it must be reduced in analysis to just an attitude of mind. This attitude of mind is that which is entertained by the customers of the firm or company, and may be described as their probable disposition to continue to be customers.

(2.) Whether the favor of the people whose attitude of mind really constitutes a "good will" be bestowed upon a place, a name, a product, or anything else, it is very clear that it cannot originate save in the transaction of business. In other words, where no business has ever been conducted there is no good will of the kind now under discussion.

By carefully considering these two points we see how it is that one man may be said to own and to be able to sell an attitude of mind on the part of other men. In truth he cannot own nor can he sell their favor or patronage; what he can do is to have and dispose of the privilege of doing a particular business with them; for the business done which has created their attitude of mind is something which is subject to his control and the control of which he may yield up to another. Thus it is seen that "good will," though it be called "property" and though it be said to be vendible, cannot be separated from the business which originated it. Hence it appears to be an attribute of business.

On the whole, it is submitted that an adequate description of what is known as "good will" would be the privilege of carrying on a particular business. I use the term "privilege," not in the narrow and technical sense in which it is sometimes used to denote something which is the supposed creature of the state or of some natural monopolistic conditions, but in the sense in which it has been defined by recent writers. (See—"Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (Hohfeld), 23 Yale Law Journal, 16.) Nevertheless, in some instances the public

does step in and confer the privilege upon whom it chooses. For example, let us suppose that a corporation has been granted the right to operate a street railroad system over the streets of a municipality. Of course, it will by the conduct of that enterprise in time acquire a "good will," but it cannot dispose of that good will except to one who by assignment or otherwise likewise acquires the right to use the streets for such purpose.

These considerations raise the question as to whether or not it could have been the intention of the Ohio legislature in passing the statutes which have been quoted to class "good will" as "property;" for, as previously pointed out in this opinion, the amount of the fee, both original and annual, is calculated upon two bases—property and business. If but one criterion were set up, and that were property, it would be quite proper to hold that "good will" which has many of the attributes of property should be considered in determining the amount of the tax. For after all, as has been pointed out, the real object of the law is to determine the extent to which the corporate franchise is being enjoyed in Ohio as compared with its total enjoyment. This could not be adequately done on the basis of tangible property alone.

But where business as well as property is to furnish a test for determining the extent to which a franchise is being enjoyed or exercised in this state, it would seem at least incongruous to measure business by some such criterion as volume of sales and then to introduce it again into the calculation by appraising the value of the privilege of doing the business as "property." In other words, such an interpretation of the statute would seem to give double weight to business as a factor, whereas the decision which has been cited holds that equal weight is due to business and property, respectively.

But it may be asserted that good will, though capable of being separated from other property, as such, is, so long as its ownership is joined with that of the property which is used in the conduct of the business, simply as element entering into the organic value of the whole property as an artificial unit or "going concern." Upon this basis it might be argued that inasmuch as the tax commission is afforded no machinery for making a separate appraisement of the tangible or other separate items of a company's property, and inasmuch too as the statute neither authorizes nor requires such property to be reported to the commission at its value as assessed for property taxation in this state and elsewhere, the legislature must have intended that the value of the property of the company as a whole should be taken into consideration.

The conception of the organic value of property devoted to a single business use under single ownership is thoroughly established and well understood in this state.

What was known as the "Nichols law," the essential principles of which are now embodied in sections 5415 to 5431 and 5445 to 5460, inclusive, of the General Code, provided a method of valueing the properties of public utilities, many of which extended into more than one state or more than one county, by which the whole property was to be considered as a single unit for the purpose of appraisement. Under this scheme of assessment it was held that elements that might enter into and enhance the value of the property when offered for sale as a single unit or going concern, such as good will and the like, were not to be eliminated in such an appraisement of the entire property. The following may be quoted from the decisions of the Ohio supreme court and that of the supreme court of the United States in these cases:

> "If by reason of the good will of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market

value than it otherwise would have had, it cannot properly be said not to be its true value in money within the meaning of the constitution, because good will and other elements indirectly entered into its value. The market value of property is what it will bring when sold as such property is ordinarily sold in the community where it is situated; and the fact that it is its market value cannot be questioned because attributed somewhat to good will, franchise, skillful management of the property, or any other legitimate agency * * *.

(Dickman, J., in State ex rel vs. Jones, 51 O. S. 492.)

The unit is a unit of use and management, and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, the capital necessary to carry on the business—whether represented in tangible or intangible property—in Ohio, possesses a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies (express companies) as the other (railroad companies, sleeping car companies, telegraph companies, as to which similar methods had been previously sustained by the supreme court of the United States.)

We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business. * * *

There is here no attempt to tax property having a situs outside of the state, but only to place a just value on that within. * * *

(Mr. Chief Justice Fuller, in Adams Express Co. vs. Ohio State Auditor, 165 U. S. 194-220, 227.)

The burden of the contention of the express companies is that they have within the limits of the state certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property within the state; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them.

But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. * * * It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. * * * Now whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. * * *

Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation. * * * Suppose an express company is incorporated to transact business within the limits of a state and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes in the market of the state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does

substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses?

(Mr. Justice Brewer, in Adams Express Co. vs. Ohio State Auditor, (Rehearing), 166 U. S., 185, 218-220.)"

If the view last above suggested be adopted, and if we treat the word "property" as used in the franchise tax laws as substantially synonymous with the phrase "the entire property of such public utility within this state, in the prportion which the value of such property bears to the value of the entire property of such public utility" (section 5424 G. C.), then, it is submitted, that it would follow from such an interpretation that the good will must attach to and inhere in the tangible property considered as a unit and be considered, in short, as an augmentation of the value of that property used as a unit. In other words, on this theory it could not be successfully argued, as it has been by counsel for one of the companies whose assessment for franchise tax purposes gives rise to the question which you have submitted, that all the good will is to be allocated to the state of origin of the corporation on the principle *mobilia sequntur personam.* In fact the cases cited decide exactly to the contrary by repeated declarations to that effect, one of which I quote at length:

"It is suggested that the company may have bonds, stocks, or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show that the fact. * * *

But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc. is of the value of $12,000,000 and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. Every state within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs, not merely from the original grant of corporate power by the state which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges into a single unit of property, and this state contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property. That this is true is obvious from the result that would follow if all the states other than the one which created the corporation could and should withhold from it the right to transact express business within their limits. It might continued to own all its tangible property within each of those states, but, unable to transact the express business within their limits, that $12,000,000 of value attributable to its intangible property would shrivel to a mere trifle.

(From opinion of Mr. Justice Brewer, supra, at pp. 222-224.)"

Indeed it is believed to be clear that if the word "property" is to be read in the sense now under consideration, good will as an element contributing to the unit value of the whole is not to be segregated and allocated to the state of origin or the place from which the actual control of the corporate concern is exercised, but, consistent with the Ohio policy and the decisions of the courts, must be distributed pro rata where the tangible property is found.

Thus, New York had a law taxing foreign corporations upon their "capital employed * * * within this state." (Laws of 1896, section 181, Chap. 908). Under this law a number of interesting decisions have been made involving the taxation of good will, patent rights, etc. These decisions are not strictly in point because the New York law is primarily a property tax law; but upon the point of the situs of good will and other similar interests one of them, *People ex rel.* vs. *Roberts,* 159 N. Y. 70, is instructive. I quote from the minority opinion of Gray, J., and the prevailing opinion of Vann, J., in that case:

(Gray, J.):

> "The important question, which arises upon this appeal, is whether a tax could legally be assessed upon the relator which included, in the items going to make up the amount of capital employed within this state, the copyrights and the good will of the corporation. The statute provides, that the tax upon a foreign corporation 'is to be computed upon the basis of the capital employed by it within this state,' * * * and we have held that that means only such of the capital as was represented by the value of property, whether of money, goods or other tangible things. * * * It is the policy of the state, with respect to corporations which are created under the laws of another state or country and do business in this state, that a tax should be assessed upon that business. The jurisdiction to impose the tax is gained by reason of the business which they are privileged to do here under the protection of our laws. * * * So far as the franchises themselves of the foreign corporation are concerned, they are beyond the reach of our tax laws. * * * When it is sought to exercise them within this state, the condition of the right to do so is the liability to taxation and control by the legislature, so far as the capital can be seen to be employed in business here. The domicile of this relator, in legal contemplation, is in the state of West Virginia, and it is difficult to conceive of any taxation of its properties within this state, unless it be confined to such as are corporeal and tangible. The only properties of that nature, which represented the capital of the relator in this state, consisted in cyclopaedias which were printed and put upon the market and in its pecuniary assets, in bank account, or in accounts receivable. Its copyrights are Federal grants of privileges and no more power exists to include them in the valuation for assessment purposes, than would exist with respect to patent rights. It has been but recently held by us, in People ex rel. * * * vs. Assessors (156 N. Y., 417), that patent rights cannot be made the subject of taxation, and if they are not taxable, clearly, the same principle, which exempts them from the taxing power of the state, should exempt copyrights. * * *
>
> Nor does the power exist to assess a foreign corporation upon its good will. That is an intangible asset of the corporation, *whose only conceivable situs is at its domicile.* It is the reputation of the business. It may be defined as the right acquired to continue the publication and sale of the cyclopaedia under the protection of the copyrights, and that could not be regarded as capital employed within this state. * * * It appertains to the corporation as such and can exist only where the corporation exists, viz: within the territory of the government which created it.

* * * In the case of a domestic corporation, however, the field of assessment is wider and comprehends both the corporate franchise and the business. Nothing is beyond the reach of the taxing power of the state in such a case, which is not rendered exempt by Federal law. Therefore, it was that in People ex rel. * * * vs. Roberts (154 N. Y. 101), we held that in appraising the capital stock of a domestic corporation at its actual value, the element of the good will of the business * * * might be included in the appraisal: * * *."

(Vann, J.):

"Copyrights clearly stand on the same basis as patent rights, with reference to the subject of taxation by the state, and as we have held that the former are exempt the latter should be held exempt also. * * *

No other item is open to discussion except the 'good will of the corporation and the good will acquired by it,' * * *.

Good will is a modern but important growth of the law, not mentioned by some of the early writers, but given great prominence at the present time. * * *

(Judge Vann here quotes the definitions of Lord Eldon and Vice Chancellor Wood, both of which are given in this opinion, and refers to numerous other definitions of English and American courts. He also gives the definitions of text writers, among them that of Judge Story, which has been given in this opinion. One or two of these definitions will bear quotation here, in the language of Judge Vann):

In Parsons on Partnership it is defined as 'that benefit or advantage which rests only on the good will, or kind and friendly feeling of others,' and in a note it is added 'that, so far as it has a transferable value, it consists in the additional value which a business possesses *when it can be sold as a going concern.*'

(Italics mine.)

Mr. Lindley, in his treatise on Partnership (Vol. 2, page 439), says, '* * * it is plain that good will has no meaning except in connection with a continuing business; * * *.

Mr. Pollock says, 'That which the purchaser of the good will actually acquired as between himself and his vendor is the right to carry on the same business under the old name * * *.

(It is interesting to note that the conclusions of the learned authors quoted by Judge Vann are substantially the same as those hereinbefore reached with respect to the essential character of good will and its necessary dependence upon business.)"

Coming to the facts of the precise question in the case before him, Judge Vann says: (p. 83)

"The relator was incorporated in 1892, under the laws of the state of West Virginia, * * *. The firm of D. Appleton & Co. of the city of New York, owns substantially all the shares of stock that have been issued, and its president, secretary and treasurer are members of that firm. It never did any business, owned any property or had an office in West Virginia, and its only connection with that state is its charter, * * *. While nominally a corporation of West Virginia, for all practical purposes it is a New York corporation. * * * In its report to the comptroller, * * * it stated that its business * * * was carried on at '72 Fifth avenue, in the city of New York.' * * * All the business of the relator is done, and all its stock owned, in the state of New York The cyclopaedia is sold throughout

the country through D. Appleton & Co. as selling agents, and the sales of the relator are made almost exclusively to that firm, and wholly in this state. * * *

The good will of the relator, aside from that purchased of Mr. Johnson (the author of the cyclopaedia), is the result of exercising its corporate franchises and carrying on its business in this state, *and is inseparable from that business.* (Italics mine.) It is the product of an investment of capital in this state, and the exercise here of the privilege for which the tax was laid. To hold that it was not capital employed in this state upon the ground that the domicile of the corporation is in West Virginia, where it never transacted any business nor earned any good will by fair dealing and efficient methods, would exalt form above substance. As the good will is the result of the employment of capital and an incident to an established business, it can exist for no practical purpose in the state where the relator * * * never invested any capital nor did any business. The good will of the relator be ongs to its old and well established business, which is conducted wholly in this state. * * * *The value of the books, and the other tangible property used in their production, is augmented by the good will.* (Italics mine.) The mere fact that good will is intangible does not take it out of the state, so far as the tights of taxation is concerned, *because it is inseparably attached to property which is tangible, located in this state.* * * * (Italics mine) It exists at the place where it has a market value, which is where the relator carried on its business and earned a reputation for super or work and honorable conduct. This reputations was not built up in West Virginia, where it did no business, but in New York, where it did all its business."

It would seem to follow logically upon the reasoning of Vann, J., that if a corporation did business with tangible property located in several states the good will of the entire business located in several states the good will of the entire business should be fairly apportioned among the several states in which it did business, in proportion ot the extent of its tangible interests therein, as in the Express Company cases heretofore quoted. It is clear from the authorities which have been abstracted that one contention made by counsel for the companies who are interested in the question submitted to this department can be answered with assurance by saying that good will cannot be allocated on the principle *mobilia sequuntur personam.*

But the cases which have been quoted bring us back again to the fundamental question which must be answered on the inquiry. For it will not do to dispose of the whole question, so far as it relates to good will, by saying that at the most good will must be distributed between Ohio and the rest of the world in proportion to the value of the property situated here and everywhere, respectively. If property only were the basis of the tax it would make no difference in arriving at the proportion whether we should leave out good will entirely or allocate it proportionally to the tangible and other intangible property. But, as has been pointed out, the tax is computed according to a double calculation, and if good will is to enter into that calculation on the side of property, though it is distributed in the same proportion between Ohio and the rest of the world that the property is distributed, the effect will be greatly to enhance the weight of property as a factor in the calculation, in comparison with that of business as a co-ordinate factor therein. There is, therefore, a real and practical difference between eliminating good will as "property" and including it as "property" but distributing it in proportion to the other property.

Returning, then, to the main question, a study of the decisions which have been cited tends to confirm the view previously expressed, that it would violate the underlying purpose of the law to count good will as "property" in the calculation which has to be made thereunder; or, putting it in another way, to take the value of the

property as a unit or a going concern for such purpose. An additional argument in the same direction is afforded by the fact that the Ohio legislature has not seen fit to use in the franchise tax law the formula of words which it has always used when it intended to provide for an appraisement of property as a unit or a going concern. The outstanding word in sections like sections 5424 and 5452 G. C. is "entire." This word in the context in which it is found in those sections clearly expresses the idea of unity which is so forcibly brought out in the opinions of the courts which have been quoted. Nothing is clearer upon careful review of all the opinions, including that of the New York court as well as the others, than that good will can appear as an element of value only when property is appraised as a going concern. When it is separated into its component parts the good will disappears as an enhancement of value of anything.

Two reasons thus appear for rejecting "good will" as an element of the "property" which is required to be reported for the purpose of assessing the franchise tax under the sections under examination. Summarizing them, they are as follows:

> (1) Good will is the product of business; its value, if it is capable of appraisement at all, depends upon business. Therefore in a statute in which property and business are set over against each other in contradistinction 'good will' cannot be regarded as 'property'.
>
> (2) 'Good will' considered as an element in the value of property does not exist save when property is considered in its organic relations as a single business unit or going concern. The statutes of Ohio which are aimed at assessments of property on that basis use language which is not found in the statutes under examination. Therefore, it follows that it must not have been the intention that the word 'property' as used in the sections under examination should denote property considered as a unit or going concern.

It should have been stated in connection with the last mentioned point that not only do sections 183 and 5501 G. C. omit any such word as "entire" in connection with the word "property" therein, but they also omit any requirement to the effect that the facts shall be reported to the secretary of state or the tax commission, as the case may be, upon the basis of which alone an adequate appraisement of going value could be made. Let section 5422 G. C. be examined in this connection. It provides not only for a report of the par value of authorized capital stock, as do the sections under consideration, but also the market value of the shares of stock as of a day certain, the bonded indebtedness and indebtedenss not bonded, the gross receipts, the gross expenditures, statement of the value of real property used in operation and that not used in operation, etc. As the commission well knows, facts like these must be taken into consideration in making a real appraisement of the value of property as a unit or going concern. That sections 5501 and 183 do not require such facts to be reported is an additional argument in support of the conclusion which has been reached in this opinion, which is to the effect that no such appraisement or valuation was intended by these sections.

For all these reasons, then, it is the opinion of this department that "good will" is not "property" for the purpose of section 5501 G. C. and the related sections.

This conclusion is, moreover, most consistent with the context of those sections, in that, for reasons already stated, good will itself has no independent situs; whereas property the value of which must be reported for the purpose of assessing the franchise tax is that, the situation of which can be likewise reported.

It may be added that conversation with some of the counsel representing the companies whose reports have been given rise to the question submitted by you disclose that the "good will' reported by such companies is not such as would be arrived at by any method of appraisement of the property of the companies as a whole or as a going concern, unless the market value of the stock and the par value of the bonds

of the company could be taken as an absolute index of such unit value. In other words, the amounts shown on the books of these companies as representing "good will" are placed there to balance issues of stock made in payment for property and business of competitors or predecessors on reorganization. Thus, a person, firm or company will "sell out" to a corporation, receiving in payment shares of stock in the corporation. In some instances (though perhaps this is not so with respect to the companies directly in question) the vendee corporation or the reorganized corporation will close out the business so purchased and dismantle its plant. In such cases it may be that the "good will" of the vendee corporation is thereby created or enhanced in value; but it is submitted that the "good will" of the vendor which has gone out of business is destroyed. This fact is mentioned because it has been argued, for example, that where a corporation so acquires the assets and business of an individual or corporation formerly doing business at a particular place, so much of the "good will" of the acquiring corporation as is represented by such acquisition should be allocated to the place where the old business was carried on. This cannot be so.

Of course, in such instances the item "good will" gets on the books of the purchasing company when an appraisement is made of the tangible assets purchased, and it represents the difference between such appraisement and the selling price of the stock so issued in payment therefor.

These considerations all tend to show how complicated and untrustworthy an element in a computation like that required to be made under the statutes under consideration "good will" is, if considered as property. They confirm the view previously expressed that it was never the intention of the general assembly in enacting sections 183 and 5501 G. C. to consider such elements as distinct property. As previously stated, it is also the view of this department that "good will" cannot be consisdered as an enhancement of the value of other property, for the reason that machinery is lacking for the ascertainment of such value on the unit basis.

Your inquiry also covers patent rights. As brought out by the New York case, such patent rights are not taxable as separate property by the state. Without going elaborately into the discussion of this question, it is the opinion of this department that the principles above established afford such an interpretation of section 5501 and related statutes as to exclude patent rights from the category of property for the purposes of such sections. It seems fairly clear that the general assembly in using this term could not have intended to indicate subjects of ownership that were not taxable by any state. Patent rights considered as property are not only not taxable to a foreign corporation in Ohio, but also would not be taxable to it as "property" in the state of its origin. Therefore, they should for this additional reason be eliminated from consideration entirely.

In direct answer to your question, therefore, you are advised that neither good will nor patent rights should be considered as "property" for the purpose of determining the proportion of the authorized capital stock of a foreign corporation represented by property and business in Ohio. No objection is seen to considering book or otherwise estimated value of good will or patent rights as employed in Ohio for the purpose of reflecting upon the volume of "business" done by the corporation in Ohio. As previous opinions of this department have pointed out, business may be measured by any fair criterion of volume. Both good will and patent rights are things which are employed in carrying on business; the one results from business and begets more business; the other creates business and protects it. Neither, however, can be said, fairly considered, to be "property" as used in the Ohio law.

Respectfully,
JOHN G. PRICE,
Attorney-Geueral.

210.

APPROVAL OF BOND ISSUE OF WARREN CITY SCHOOL DISTRICT IN SUM OF $85,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 17, 1919.

211.

APPROVAL OF BOND ISSUE OF GREENE COUNTY IN SUM OF $33,500.00

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 17, 1919.

212.

APPROVAL OF BOND ISSUE OF CITY OF MIDDLETOWN IN SUM OF $12,000.00.

Industridl Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 17, 1919.

213.

APPROVAL OF BOND ISSUE OF ASHLAND COUNTY IN SUM OF $50,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 17, 1919.

214.

APPROVAL OF BOND ISSUE OF WOODVILLE VILLAGE SCHOOL DISTRICT IN SUM OF $80,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 17, 1919.

215

MAYORS OF CITIES ENTITLED TO FEES FOR VIOLATIONS OF STATUTES —MUNICIPAL COURTS—HOW CREATED.

1. *Mayors of cities are entitled to fees collected in cases tried before them for violations of state statutes.*

2. *The power to establish a municipal court having the judicial powers and jurisdiction of mayors, is vested in the general assembly by article IV of the constitution and not in municipalities under article XVIII.*

COLUMBUS, OHIO, April 18, 1919.

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

GENTLEMEN:—Your letter of February 4, 1919, requesting my opinion on the right of the municipal judge of East Cleveland to fees in state cases, was duly received.

Your letter reads as follows:

"STATEMENT OF FACTS.

The charter of the city of East Cleveland, Ohio, provides as follows:

'Section 25. There shall be a court styled "The Municipal Court of East Cleveland, Ohio," held by a municipal judge chosen by the electors having such judicial powers and jurisdiction as is now or may hereafter be conferred by the general assembly of the state of Ohio upon mayors of municipalities. He shall have been admitted for three years to the practice of law in Ohio, and practiced law in courts therein for three years and shall hold office for a term of four years. He shall receive a salary of $300 per annum until otherwise provided by ordinance of the commission, and his salary shall not be increased or decreased during his term of office.'

No ordinance of the commission having any bearing upon the matter has been passed The customary mayor's fees have been assessed in state cases and are on deposit in the depository of the city. Question: Is the judge of the municipal court entitled to such fees in state cases?"

In addition to section 25 quoted in your letter, the following sections of the city charter are also pertinent to your inquiry, viz:

"Section 26. The city manager shall detail one or more members of the police force to perform the duties of clerk and bailiff of said court, and

the process of said cou rt shall be directed to the chief police officer and served by him or by any member of the police force.

Said municipal court shall have a seal with the name of the state in the center, and the style of the court in the margin.

Section 27. Error and appeal may be prosecuted as may now or hereafter be provided by the general assembly of the state of Ohio for error and appeal from courts having like jurisdiction."

1. *Right of city mayors to fees in state cases.*

Section 4213 G. C. provides that

"Except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

In Piqua vs. Cron, 2 N. P. (n. s.) 165, the Miami county common pleas court held that

"The mayor of a city in Ohio is entitled to retain his fees and costs, collected in cases tried before him for violation of the criminal statutes of the state, * * * and a provision of a city ordinance which purports to require him to pay such fees and costs into the city treasury is invalid as being in conflict with the statutes of the state."

In the opinion, at page 168, the court said:

"The new Municipal Code provides in section 1536-633 (now 4213 G. C.) that 'except as otherwise provided in this act, all fees pertaining to any office shall be paid into the city treasury.' It therefore appears that there are exceptions to the rule. But for this exception it would seem, that, whether justly or not, under the statute, the city would be entitled to appropriate any money received by the mayor officially, whether earned in conection with municipal business or not. When we come to look for the exception, it would seem to appear plainly in Revised Statutes, section 1536-774 (now 4550 G. C.), and nowhere else. That section provides that the mayor 'shall be entitled to receive the same fees that are, or may be allowed justices of the peace for similar services.' * * *

"Construing together with this section 1536-633 (now 4213 G. C.), which requires him to turn over all fees, 'except as otherwise provided,' and section 1536-774 (now 4550 G. C.) which declares him 'entitled to receive the same fees allowed a justice of the peace,' and there is no difficulty in harmonizing the three, which were passed at the same time, and are of equal authority. They evidently mean, as seems just and right, that for services judicial or otherwise, performed by the mayor, for the municipality, he must be satisfied with his salary without additonal costs, and that the city gets the benefit of the fees and costs accruing in the transaction of municipal business. But as to fees and costs earned by the mayor, while transacting, not the business of the city of Piqua, but of the state of Ohio, or of its private citizens, the law, at present at least, does not give them to the city."

And in Portsmouth vs. Milstead, 8 C. C. (n. s.) 114, affirmed by the supreme court without report (76 O. S. 597), the court, in construing section 1536-633 R. S. (now 4213 G. C.), said (page 116):

"When the legislature provided that all fees 'pertaining to any office' shall be paid into the city treasury, did it intend more than the fees pertain-

ing to the office of the mayor, and such as arose from duties purely municipal? * * *

The state fixes and controls the amount and character of fees in state cases, and has delegated to municipal councils authority to fix the fees for violation of its municipal laws. The scheme of legislation recognizes the distinction between the jurisdiction, powers and duties of the mayor, and such as he exercises as an ex-officio justice of the peace. * * *

It would seem, therfore, that * * * 'all fees pertaining to any office,' under the rule established in Ravenna vs. Penn. Co. (45 O. S. 118) refers to municipal fees or such that may be fixed and controlled by municipal authority."

To the same effect is opinion No. 285, in 1913 Annual Report of the Attorney-General, Vol. I, page 257.

See, also, on this subject Cambridge vs. Smallwood, 6 C. C. (n. s. 230, affirmed 75 O. S. 339; and Bellefontaine vs. Haviland, 3 N. P. (n. s.) 99, holding that section 4270 G. C. applies only to mayors of villages.

Under authority of the Cron and Portsmouth cases, supra, I am of the opinion that mayors of cities are entitled to fees collected in cases tried before them for violations of state statutes.

2. *Power of Home Rule charter cities to establish courts.*

But what has been said does not necessarily mean that the judge of the municipal court of East Cleveland is entitled to the fees collected in state cases. It is a vital question in this case whether East Cleveland had the power to establish a municipal court, in view of section 1, article IV, of the state constitution, which provides that the judicial power of the state shall be vested in the supreme court, courts of appeal, court of common pleas, court of probate, and such "other courts" inferior to the courts of appeal as may from time to time be "established by law," and the provision of section 15, article IV, that laws may be passed to "establish other courts, whenever two-thirds of the members elected to each house shall concur therein."

The general assembly in numerous instances after the adoption of the home rule amendment, and apparently in the exercise of the authority conferred by sections 1 and 15 of article IV, has established municipal courts in charter cities, but the question whether article XVIII has conferred such power either exclusively or concurrently or at all upon home rule charter cities has not, so far as I have been able to ascertain, been authoratively decided by any court. There are, however, judicial expressions in some of the supreme court decisions, apparently concurred or acquiesced in by all the judges, to the effect that article XVIII has no application whatever to the judicial organization of the state. Thus, in State vs. Yeatman, 89 O. S., 44. in which the constitutionality of the acts enlarging the jurisdiction of the municipal courts of Cincinnati and Dayton were involved, Judge Shauck, at page 47 and 48, said: "The provisions of article XVIII as amended have no relation to the judicial organization of the state, but only to the government of municipalities." And in Hesse case, 93 O. S., 230, also involving the validity of a certain section of the act establishing the municipal court of Cincinnati, the court was characterized as a statutory court only."

Perhaps the nearest direct approach to the question under consideration was made in Ide vs. State, 95 O. S., 224, where the court eliminated its discussion with the remark that,

"It is sufficient to say * * * that this charter does not purport to establish a court."

The East Cleveland case, however, cannot be so easily disposed of, because the charter in express terms *does purport* to establish a court. Section 25 clearly states

that there shall be a court styled "The Municipal Court of East Cleveland, Ohio." The powers and jurisdiction of the court are also provided for. It is also provided that a judge shall be chosen by the municipal electors, and that such judge must possess certain qualifications. His term of office and annual salary are also fixed. Under section 26 provision is made for a court clerk and bailiff, for the service of process, and for a seal, and in section 27 provision is made for the prosecution of appeal and error proceedings.

If the provisions of sections 25, 26 and 27 of the East Cleveland charter do not establish a court, it would be difficult to find language which would have that effect.

The courts have heretofore had occasion to determine what is meant by the expression, "to establish courts," as used in article IV.

In Mendelson vs. Miller, 11 N. P. (n s.) 586, the Cuyahoga common pleas court, in an opinion by Judge Phillips, held:

> "The general assembly establishes a court when it enacts that there shall be a court, fixes the number of judges, defines the jurisdiction and prescribes the procedure to be followed therein."

In the opinion, at page 588, the court say:

> "For the legislature to enact that there shall be a court, for it to fix the number of judges, to define the jurisdiction, and to prescribe the procedure, etc., is to *establish* a court."

The court also in that case clearly pointed out that courts, other than those specifically named in and created by the constitution, are established by the general assembly, and that such courts can only be established "whenever two-thirds of the members elected to each house shall concur therein."

Certain decisions of the supreme court, some of which were decided after the adoption of the home rule amendment, tend very strongly to the conclusion that the power to establish courts (other than the constitutional courts), inferior to the courts of appeals, is vested only in the general assembly.

In State vs. Bloch, 65 O. S., 370, the court, at page 391, speaking with reference to section 1, article IV, of the state constitution, said:

> "The general power is here undoubtedly granted to the general assembly to create courts other than those enumerated in the section; and the material inquiry is, what other courts may be so created? The answer is found in the language of the section, which is, 'such' other courts 'as the general assembly may from time to time establish.' That language vests in that body full power to determine what other courts it will establish, local, if deemed proper, either for separate counties or districts, and to define their jurisdiction and powers. The only limitation placed upon the exercise of that power is that the courts so established shall be inferior to the supreme court, subject, of course, to the further qualification that no legislation can alter the judicial system established by the constitution, nor interfere with the courts designated by that instrument as the recipients of the judicial power. Apparently there could have been but one purpose in making this special grant of legislative power, and that was to enable the general assembly to meet the public needs for additional courts; as they might arise in different parts of the state."

And in State vs. Ritchie, 97 O. S., 41, the court held:

> "Section 1 of article IV of the constitution confers upon the general assembly of Ohio authority to establish by law courts inferior to the courts of

appeals, throughout the entire state, or in any one or more localities within the state."

In the opinion at pages 46 and 47, the court said:

"Section 1 of article IV vests in the general assembly of Ohio authority to establish by law courts inferior to courts of appeals. This provision of the constitution was adopted after the decision of this court in the case of State ex rel., vs. Bloch, 65 O. S., 370, holding that similar language in the constitution of 1851 vested in the general assembly 'full power to determine what other courts it will establish, local, if deemed proper, either for separate counties or districts, and to define their jurisdiction and powers.' When this provision was written into the amendment of 1912, and adopted by the electors of the state, it was done with the knowledge of the construction given it by this court. It must have been the intention not only of the constitutional convention, but of the electors adopting it, that the same construction would obtain; otherwise the language would have been changed to indicate a different intent and purpose."

In view of the somewhat unsettled state of the law as to the exact scope of the powers conferred upon home rule cities under article XVIII of the constitution, especially with respect to subjects which seem to be specially provided for in other sections of the constitution (for example, taxation and courts), questions such as the one under consideration are not free from doubt.

The language of Judge Jones in State vs. Cooper, 97 O. S. 86, 92, seems pertinent at this point, viz:

"The power of taxation in every form, the power of eminent domain, the power to establish courts of record or conciliation and to define their jurisdiction, these may be so employed by chartered cities as to affect only their own people, and, thus considered, seem local in character. *But it does not follow that the home rule sections above named, endow municipalities with such powers, nor with the powers now claimed here. Especially is this true if consideration be given to other express provisions of the constitution.*"

In view of the policy that has, without apparent objection, been pursued by the general assembly in establishing municipal courts in home rule cities, such as Cleveland, Cincinnati, Dayton, and Sandusky, and the decision above referred to, it would seem reasonable to conclude that the power to establish municipal courts is found in article IV, and not in article XVIII of the constitution, and that, therefore, it is the general assembly only that has the power.

It might be contended with some plausibility that municipalities possess the power under article XVIII to establish local tribunals with jurisdiction limited to municipal offenses only, thereby excluding state cases. But, however, that may be (and I express no opinion on the matter), I am of the opinion that the power to establish courts having the judicial powers and jurisdiction of mayors, is vested in the general assembly by article IV of the constitution, and not in charter cities under article XVIII. It follows, therefore, that the municipal judge provided for in section 25 of the East Cleveland charter is not entitled to the fees referred to in your letter.

Respectfully,
JOHN G. PRICE,
Attorney-General.

216.

TOWNSHIP TRUSTEES—DISBURSEMENT OF POOR RELIEF FUND—MANIPULATED SO AS TO INCREASE TRUSTEES COMPENSATION—WHEN PAYMENTS OF SAME ILLEGAL.

Where township trustees so manipulate their official transactions in disbursing the poor relief, as to unnecessarily increase their compensation under section 3294 G. C., their service to the extent augmented with such object of personal gain is not "service in the business of the township" as provided in said section and such trustees are not entitled to compensation therefor.

COLUMBUS, OHIO, April 18, 1919

HON. W. R. WHITE, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter dated March 26, 1919, containing supplemental facts relating to your inquiry of February 28, 1919, in which you request the opinion of this department as to the legality of certain practices of the township trustees in disbursing township funds for the relief of the poor.

To state the situation and exhibit the question contained in your letters, it is deemed sufficient to quote from that part of your second letter which contains the comments of the report of the examiner, Mr. M. H. Jenkinson, as follows:

> "The compensation illegally drawn as set forth above and which is ordered paid back into the treasury of the township was not drawn for 'service in the business of the township' as required by the section quoted, but upon flimsy excuses, made in most cases without reference to the service rendered but merely for the purpose of getting the money. Four out of five days' services claimed was for giving a single order for groceries, for coal or for a note to the poor doctor. In a majority of the cases the amount of the relief given was less than the amount of the charge made by the trustee for the service. In fact in 1916, when nine-tenths of the days charged for were in connection with the disbursement of aid to the poor, the total amount disbursed by all three trustees, as shown by their statements, was $289.25, while their pay for disbursing same was $450.00.
>
> As evidence that the service accounts of the trustees were made with a view of getting the maximum salary allowed by law, it is only necessary to observe the accounts of the two old members—Messrs. McCormick and Snead. Each succeeded in having the poor of his district get sick or needy on different days, so that a day's service might be charged for each order given. Mr. Jones, the new member who entered upon his duties in 1916, gave many orders in one day during the first month or two of his term, but he soon fell into the ways of his elders, and arranged his orders so as to cover the maximum number of days. He retired from office September 1, 1917, to become county recorder.
>
> In addition to showing that most of the charges are for a single order for relief, or for the doctor, they show in several instances that two days were charged for on a single date In many instances an order was given for groceries one day and an order for coal to the same person the following day. Both needs could have been attended to in one day had the trustee made an investigation. If he made no investigation then he rendered no service that should entitle him to a day's compensation. The section quoted says that compensation was to be received for each day's service. One minute or even five minutes, required to write an order for a dollar's worth

of groceries, or a note to the doctor, cannot be construed as a day's service."

From the matter above quoted, it is apparent that the legality of the action of the trustees, in so manipulating the township business as to increase the number of days for which they may charge the per diem compensation allowed by law, is involved.

Sections 3294 (as amended in 107 O. L., 698) and 13105 G. C. are pertinent and in part are:

> "Section 3294. Each trustee shall be entitled to * * * two dollars and fifty cents for each day *of service in the business of the township,* to be paid from the township treasury. The compensation of any trustee to be paid from the treasury shall not exceed two hundred and fifty dollars in any year, including services in connection with the poor."
>
> Section 13105. Whoever, knowing it to be false or fraudulent, in whole or in part, makes, presents for payment or certifies as correct to * * * the township trustees or other township officer, a claim * * * or other evidence of indebtedness for procuring its allowance * * * out of the treasury * * * of the township * * * shall be imprisoned."

Subject to the limitations of two hundred and fifty dollars, we have here authority for the payment to township trustees of two dollars and fifty cents for each day's service in transacting the business of the township.

It has been held by the courts of this state that the law does not recognize parts of days in construing provisions of this kind which make a per diem allowance, and without citing authority it may be correctly said that if, in the discharge of the duties referred to in your letter, the trustess, acting in good faith in issuing the orders for poor relief on a certain day, did not have a sufficient number of applications for poor relief to occupy a whole day, and there was no fraud or procurement on their part to induce applicant to make their application on other days, with a view of increasing the number of days which such trustess could charge for their services, then and in that event neither section 3294 nor 13105, supra, would be violated. But, where the trustees connive and conspire to time the application for poor relief and their official action thereon, in such a manner as to unnecessarily require the action of the trustees upon different days, and when in the ordinary prosecution of such township business such applications could be acted upon and such official services rendered in one day, then such acts and conditions present a totally different situation, and in such a case, in his acts whereby he makes it necessary for his own private gain, that he perform official duties upon another day and thereby increase the amount of compensation which he may collect from the township, such trustee is not engaged in the "service in the business of the township" but is acting in his own corrupt personal interest and dictates of common decency and honesty would prohibit such an officer from profiting by his own betrayal of his trust.

All of the above acts and facts being proven, there is no reason for concluding that such an official is not presenting a fraudulent claim to the township treasury when he presents a claim for such services for payment, as prohibited by section 13105 G. C.

As said in *State ex rel.* vs. *Maharry,* 97 O. S., at p. 276:

> "Finally we have come to regard all public property and all public moneys as a public trust. *The public officers in temporary custody of such public trusts are trustees for the public,* and all persons undertaking to deal with and participate in such public trust do so at their peril; that is, the rights of the public, as beneficiaries, are paramount to those of any private person or corporation."

It is common knowledge that a public office is a public trust and that the officers having charge of the disbursement of public funds stand in a fiduciary relation to the public and are charged with the utmost good faith in the discharge of their official duties in connection with the disbursement of public funds. The penal statutes of Ohio prohibit an officer charged in law with the making of contracts and expenditure of public money from being interested financially in any contract which he is so authorized to make. This is done on the theory that he must not be interested in any contract because his only interest therein must be in behalf of the public authority he exercises and whose funds he disburses. It has long been held that public policy prohibits such an interest on the part of an officer.

As stated by Judge Bigger in *State* vs. *Pinney*, 13 O. D., p. 211:

> "It is a doctrine of our law, as old as the principle of equity, that an agent in the execution of his agency, shall not be permitted to put himself in a position antagonistic to his principle. An agent by accepting the undertaking committed to his care, impliedly agrees that he will use his best endeavors to further the interest of his principal. This principle of law precludes him absolutely from dealing with himself either directly or indirectly."

What was said in that case about public policy precluding an officer (in that case a county commissioner) from being interested in a contract of his principal would apply with no less reason and force to an agent or officer so arranging and manipulating the business of his principal as to increase his compensation to the detriment of the interest of his principal.

As against the considerations above indicated, it might be claimed that section 3294 confers sufficient discretion and authority upon the trustees that they may arrange their business in such manner as they choose, without violating the spirit or letter of section 13015.

In answer to such a claim, it may be observed that the doctrine of law, which as stated by Judge Bigger in the Pinney case, supra, is as old as the principles of equity that an agent in entering the service of his principal agrees that he will use his best endeavors to further the interest of that principal, is underlying and read into every law creating an office or trust, or defining the duties thereof.

Section 2856 G. C., relative to the duties of the county coroner, provides that when information is given to any coroner that the body of a person, whose death is supposed to have been caused by violence, has been found within his county, he shall proceed to inquire how the deceased came to his death, and that his fees, the cost of subpoenaing witnesses, etc., shall be paid by the county.

In *State ex rel. Jones* vs. *Bellows et al.*, 15 C. C., 504, the court quotes with approval the decision of the supreme court of Pennsylvania (Lancaster Co. vs. Mishler, 100 Pa. St., 627), in which it is held that the power to hold an inquest

> "is not a power to be exercised capriciously and arbitrarily and against all reason * * *. If there be no reasonable ground to suspect that the death was not a natural one, it is a perversion of the whole spirit of the law to compel the county to pay him for such services."

and in the Ohio case, page 510 of the opinion, the court concludes:

> "the coroner must act in good faith—not capriciously or arbitrarily."

Because of these principles of public policy, long sanctioned by the courts of this

state, it is concluded that in so far as charges are made for services so fraudulently made necessary, it is the opinion of this department that the same are illegal.

Respectfully,
JOHN G. PRICE,
Attorney-General.

217.

EMBALMING DEAD HUMAN BODIES—SECTION 1344 G. C. VIOLATED —JUSTICE OF PEACE SHOULD HOLD ACCUSED TO PROPER COURT WHEN COMPLAINT FILED—EXCEPTION.

Where a complaint is filed with a justice of the peace, charging a person with a violation of the statute governing the embalming of dead human bodies, such officer should hold the accused to the proper court having jurisdiction, unless the accused, in a writing subscribed by him, waive a jury and submit to be tried by such magistrate.

COLUMBUS, OHIO, April 18, 1919.

HON. B. G. JONES, *Secretary-Treasurer, State Board of Embalming Examiners, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following statement of facts:

> "On January 4, 1919, I filed an affidavit against one R. T., for embalming a dead human body, in violation of section 1344 of the General Code. This case was brought before C. A. C., a justice of the peace.
>
> According to a conversation I had with Mr. C. A. C., over the telephone yesterday, R. T. appeared before him and pleaded not guilty and was remanded by Mr. C. A. C. to the grand jury.
>
> This is the first time that a case of this sort has been brought before a justice of the peace and the above procedure looks to me as entirely unnecessary, if legal.
>
> Kindly give me your opinion on the above and suggest what course, if any, I can pursue to bring this matter to a head."

Attention is invited to section 1344 G C., as amended in 107 O. L., 659, which reads as follows:

> "No person shall embalm, either by arterial or cavity treatment or prepare for burial, cremation or transportation any dead human body unless he or she is a duly licensed embalmer within the meaning of this chapter. Any person who shall practice in this state the science of embalming, either by arterial or cavity treatment of any dead human body, or prepare for burial, cremation or transportation any dead human body, without having complied with the provisions of this act, *shall be guilty of a misdemeanor*, and upon conviction thereof in any court be fined not less than forty dollars nor more than seventy-five dollars for the first offense and for the second and each repeated offense shall be fined not less than fifty dollars nor more than one hundred dollars, or imprisoned for six months or both, at the discretion of the court. All such fines shall be paid into the common school fund."

From the above section it will be noted that R. T. was accused of a misdemeanor in embalming a dead human body in violation of section 1344 G. C. and attention is therefore directed to sections 13510 and 13511 G. C., covering proceedings of this kind before a justice of the peace, and which read:

> "Section 13510. When a person charged with a misdemeanor is brought before a magistrate on complaint of the party injured and pleads guilty thereto such magistrate shall sentence him to such punishment as he may deem proper, according to law, and order the payment of costs. If the complaint is not made by the party injured, and the accused pleads guilty, the magistrate shall require the accused to enter into a recognizance to appear at the proper court as is provided when there is no plea of guilty.
>
> Section 13511. When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of such accused. If it appear that an offense has been committed and that there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance at the proper time and before the proper court; otherwise he shall discharge him from custody. If the offense charged is a misdemeanor and the accused, in a writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

On the case in question there was no plea of guilty, but there was "probable cause to believe the accused guilty." Hence the justice of the peace was directed by the statute to "order him to enter into a recognizance" for his appearance at the proper time and before the proper court, which seems to have been done. Again, it is requred in section 13510 G. C. that it must be on the complaint of *the party injured,* in order that the justice of the peace may sentence and order payment of costs.

In the case of Hanaghan vs. State, 51 O. S. 24, it was held:

> "By the 'party injured' is meant the person who suffers some particular injury from the commission of the misdemeanor, as distinguished from that which results *to the public,* or local community where it was committed."

Here the complaint was not made by the "party injured," but by one representing the public in an official capacity, and even if the accused had pleaded guilty, still would the magistrate be required to have the person charged enter into a recognizance to appear in the proper court the same as where there is no plea of guilty. It may be said too, that if the person charged with a misdemeanor waives a jury and submits to be tried by the magistrate, in a proper writing before or during examination, the magistrate may render final judgment, but this would be limited to the matters defined in section 13423 G. C., which reads:

> "Section 13423. Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to:
>
> 1. Adulteration or deception in the sale of dairy products and other food, drink, drugs and medicines.
>
> 2. The prevention of cruelty to animals and children.
>
> 3. The abandonment, non-support or ill treatment of a child by its parent.
>
> 4. The abandonment or ill treatment of a child under sixteen years of age by its guardian.

5. The employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life or morals, or which cause or permit it to suffer unnecessary physical or mental pain.

6. The regulation, restriction or prohibition of the employment of minors.

7. The torturing, unlawfully punishing, ill treating, or depriving anyone of necessary food, clothing or shelter.

8. The selling, giving away or furnishing of intoxicating liquors as a beverage, or keeping a place where such liquor is sold, given away or furnished, in violation of any law prohibiting such acts within the limits of a township and without the limits of a municipal corporation.

9. The shipping, selling, using, permitting the use of, branding or having unlawful quantities of illuminating oil for or in a mine.

10. The sale, shipment or adulteration of commercial feed stuffs.

11. The use of dust creating machinery in workshops and factories.

12. The conducting of a pharmacy, or retail drug or chemical store, or the dispensing or selling of drugs, chemicals, poisons or pharmaceutical preparations therein.

13. The failure to place and keep in a sanitary condition a bakery, confectionery, creamery, dairy, dairy barn, milk depot, laboratory, hotel, restaurant, eating house, packing house, slaughter house, ice cream factory or place where a food product is manufactured, packed, stored, deposited, collected, prepared, produced or sold for any purpose.

14. Offenses for violation of laws in relation to inspectionof steam boilers, and of laws licensing steam engineers and boiler operators.

15. The prevention of short weighing and measuring and all violations of the weights and measures laws."

It will be noted that nowhere in the above section is jurisdiction in cases of embalming dead human bodies conferred.

It is, therefore, the opinion of the Attorney-General that the justice of the peace, in holding the accused, charged with a violation of section 1344 G. C., to the grand jury, pursued the proper course, in view of the sections quoted.

Respectfully,
JOHN G. PRICE,
Attorney-General.

218.

MUNICIPAL CORPORATIONS—PUBLICATION OF REVISED AND CODIFIED ORDINANCES IN BOOK FORM—QUESTION WHETHER *NEW MATTER* CONTAINED IN SAID PUBLICATION.

The authorization to publish in book form in case of revision and codification of ordinances as provided in section 4230 G. C. is applicable only to the extent that the revision and codification does not effect a substantial change or departure from the original purport and scope of the ordinances.

*The provision "a new ordinance * * * which contains entirely new matter shall be published as heretofore required by law," as found in said section is construed as importing any subject which is entirely new rather than that the subject matter be new in its entirety.*

COLUMBUS, OHIO, April 18, 1919.

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

GENTLEMEN:—You request my written opinion upon the correctness of your

ruling to the city solicitor of Norwood, Ohio, upon the sufficiency of publication of revised ordinances in book form, your ruling and the statement of facts submitted by the city solicitor being as follows:

"Solicitor's Statement.

The city of Norwood is going to pass a building code next Monday night, fifty per cent. of the sections are entirely new, many corrections are made in the old sections retained, the city intends to publish same in book form.

Under the provisions of section 4230 General Code, does this ordinance have to be published in the newspaper?

The question which perplexes me is whether 'entirely new matter' means any new matter at all, or whether if there is any old matter at all in the ordinance it does not have to be published.

If you know of any ruling on this section please let me know, and if there has been no ruling your early advice in the matter will be appreciated."

You state your ruling as follows:

"We have your favor of February 12, 1919, and in view of section 4230 G. C., as follows:

'(When publication in book form sufficient.) When ordinances are revised, codified, rearranged and published in book form and certified as correct by the clerk of council and the mayor, such publication shall be a sufficient publication, and the ordinance or several ordinances so published in book form, under appropriate titles, chapters and sections, shall be held the same in law as though they had been published in a newspaper or newspapers. A new ordinance so published in book form, which has not been published according to law, and which contains entirely new matter shall be published as heretofore required by law. Such revision and codification may be made under appropriate titles, chapters and sections and in one ordinance containing one or more subjects.'

and in further view of the fact, that there are at the present time two bills before the general assembly of Ohio; one bill to codify the banking laws of Ohio and another bill to codify the fish and game laws of Ohio, which tends to show that codification may legally be made of certain classes of laws without codification being made of the entire laws of the state. While we have no ruling on the matter, it is our opinion that the ordinance codifying the building code of your city, since it does not contain entirely new matter, that if the ordinance be published in book form does not require and there should be no newspaper publication.

Question: Are we correct in our holding?"

The section referred to by the city solicitor and quoted supra in your ruling, section 4230 G. C. appears to be the only section of the statutes throwing any light upon the question presented, and I do not find that there has been any judicial determination of the question.

While both the terms "revised" and "codified" as employed in the statute, import primarily merely a legislative declaration of the state of the law as contradistinguished from an original enactment or even a fundamental alteration in scope or purpose of existing laws, yet, both terms are authoritatively used in the broader sense, to signify amendment, reformation and even addition to the original state of the thing revised or codified.

The Century Dictionary defines "revise" as follows:

1. To look carefully over with a view to correction; go over in order to suggest or make advisable changes and corrections.

2. To amend; bring into conformity with present needs and circumstances; reform, especially by public or official action.

The Standard Dictionary defines "revise" as follows:

1. To go or look over or examine for the correction of errors, or for the purpose of suggesting or making amendments, additions or changes;

2. Hence, to change or correct (anything) as for the better or by authority; alter or reform.

"Revision" is defined as follows:

1. The act or result of revising; examination or re-examination with correction or change;

The same authority defines "codification" as follows:

"The act or process of reducing laws to a code, it is the collection, condensation, systematizing and reconciling of what is scattered or contradictory."

The specific reference in the section requiring construction (section 4230 G. C.), to a new ordinance containing "entirely new matter" as a condition of the requirement for publication in the newspaper must determine in large measure the legislative intent and purpose as to the sense in which the terms "revise," "codify" and "rearrange" have been employed.

I construe section 4230 G. C. to authorize publication in book form, in case the codification does not embody an ordinance governing or applying to subject matter outside the scope and purview of the original enactment, and that such publication is sufficient where the new form of the enactment consists only in an assembling together and rearrangement of existing legislation on a given subject with such corrections, modifications and even amendments as do not amount to a substantial or fundamental departure from the original subject matter, scope and effect of the legislation.

However, I am of the opinion that when an enactment is made to apply to subject matter not contemplated in the previous legislation brought together in the codification, or so far departs from the original tenor and scope of the legislation as to give it new or different application, it must be said to "contain entirely new matter," requiring its publication as an original enactment. It is perceived that the purpose of the requirement for publication is to advise the members of the public of their liability to the mandate or restraint of the ordinance, and the publication of ordinances at the time of the original enactment remains sufficient in the case of the later codification into book form, so long as the revision and re-arrangement does not introduce new matter amounting to a departure from the general purport and the effect of the original.

In case an essential departure or enlargement in scope or applications is to be accomplished, the usual publication is deemed essential.

When any matter entirely outside or foreign to the scope or application of the existing legislation is embodied in the codification or it is made to have a different tenor or effect, it is considered to "contain entirely new matter" within the meaning of the statute.

In short, it is my opinion that the phrase "contain entirely new matter" contemplates any subject matter which is entirely new, rather than that the subject matter be new in its entirety.

From the statement of facts sunmitted by the city solicitor it appears that the codification of the building ordinances of the city of Norwood will embody numerous departures from the existing provisions of the old sections, and in fact it is said that fifty per cent of the sections are entirely new, which suggests that the building code will probably be made to apply to places and structures to which the old sections were not applicable, and that new and different restrictions and penalties will be provided, in which event it is held that the usual newspaper publication would be required as to such new provisions.

The facts submitted by the solicitor are not adequate to clearly disclose the character and extent of the change to be made, and without further information thereon, I will merely submit the construction of the statute foregoing.

Respectfully,
JOHN G. PRICE,
Attorney-General.

219.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY IN SUM OF $13,600.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 18, 1919.

220.

PUBLIC UTILITY AS DEFINED IN SECTION 4000-1 G. C. NOT APPLICABLE TO WATER WORKS PLANTS—SECTIONS 4, 5 AND 12 OF ARTICLE XVIII OF OHIO CONSTITUTION ARE SELF-EXECUTING.

1. *Sections* 4000-1 *to* 4000-15 *G. C.* (103 *O. L.* 726) *apply to the public utilities included within the term "public utility" as defined in section* 4000-1 *G. C., and not to water works plants or systems.*

2. *The provisions of sections* 4 *and* 5 *of article XVIII of the Ohio constitution authorizing any municipality to proceed by ordinance to acquire a public utility, and of section* 12 *of the same article authorizing such municipality to issue mortgage bonds therefor which impose no liability upon the municipality, and secured only upon the property and revenues of the public utility, etc., are self-executing; and the ordinance therefore is not required to be submitted to the municipal electors unless, before its effective date, a referendum be demanded as provided in section* 5.

COLUMBUS, OHIO, April 18, 1919.

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

GENTLEMEN:—Your letter of April 7, 1919, requesting my opinion on certain

questions submitted by the city solicitor of Xenia, was duly received, and reads as follows:

"We are in receipt of the following communication from the city solicitor of Xenia, Ohio:

'April 4, 1919.

Hon. Moses Blau,
Columbus, Ohio.

DEAR SIR:—Referring to your letter of March 25th, we are submitting the following question upon which we desire information:

Statement: The city contemplates the purchase of a privately owned water works and proposes to enlarge or extend the said plant. The purchase price is agreed upon by the city and the water company. The city proposes to issue mortgage bonds on the plant, imposing no liability on the municipality, but secured only upon the property and revenues of such water works.

Question 1. Does G. C. sections 4000-1-15 inclusive govern the proper procedure in the purchase of the water works, as above outlined?

Question 2. If General Code sections 4000-1-15 are not applicable, then, are sections 5 and 12 of article 18 of the constitution of Ohio self executing? That is to say, can the city proceed to acquire said water works by ordinance without the submission of the same to a vote of the electors unless a referendum be demanded on such ordinance?

Respectfully submitted,
J. A. Finney, City Solicitor.'

We are respectfully asking your written opinion upon questions Nos. 1 and 2."

1. Sections 4000-1 to 4000-15 G. C. (103 O. L. 726), inclusive, referred to in the above letter do not, in my opinion, include within their terms water works plants or systems. The public utilities included in those sections are those that come within the definition of the term "public utility" as defined in the first section (4000-1), as follows:

> "Wherever in this act and for the purpose of this act, the term 'public utility' shall be taken to mean and include any street railroad operated in whole or in part under the act passed April 22, 1896, commonly known as 'The Rogers Law' and entitled 'An act to amend and supplement sections 2505a and 2505b of the Revised Statutes of Ohio, enacted May 1, 1891, and amended April 18, 1892,' or any street railroad operated in connection with or upon the tracks of any such street railroad and any corporation which owns, operates or leases any such street railroads."

2. Sections 4, 5 and 12 of article XVIII of the Ohio constitution are, in my opinion, self-executing. Such also was the opinion of the former Attorney-General (see opinion No. 1607, dated December 13, 1918), in which the following language was used:

> "The above quoted provisions (sections 4, 5, 6 and 12) of the home rule amendment, are in my opinion, self-executing and apply to all municipalities."

See also opinion of the Attorney-General No. 90, dated March 3, 1919, involving sections 4 and 6, wherein it was said:

> "It should be noted that these constitutional amendments are self-executing and need no intermediary acts of the legislature to enforce them."

I am of the opinion, therefore, that Xenia may proceed by ordinance to acquire a water works plant or system, and issue mortgage bonds therefor which impose no liability upon the municipality, and secured only upon the property and revenues of the public utility, etc., as authorized by section 12, without submitting the ordinance to the municipal electors, unless before the effective date of the ordinance a petition signed by ten per centum of the municipal electors is filed with the executive authority of the municipality demanding a referendum on the ordinance.

Respectfully,
JOHN G. PRICE,
Attorney-General.

221.

PROBATE COURT—LUNACY AFFIDAVIT FILED—PERSON WANDERS INTO ANOTHER COUNTY—SHERIFF OF ADJOINING COUNTY INCURS EXPENSES IN SAID ARREST WITHOUT HAVING WARRANT—HELD—NO LEGAL AUTHORITY TO PAY EXPENSES.

A lunacy affidavit was filed with the probate judge of O_____county against one M. P., a resident of that county. Warrant for the arrest of M. P. issued to sheriff of O_____county. M. P. having wandered away from O_____county into P_____county, the sheriff of P_____county, upon request of the sheriff of O_____county, but without warrant or other authority therefor, took the said M. P. into custody, incurring expense of transporting M. P. to the county jail and of boarding her therein.

Held: There is no legal authority for the payment to the sheriff of P_____county of the expenses mentioned.

COLUMBUS, OHIO, April 19, 1919.

HON. MERVIN DAY, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—I have your letters of recent date, setting forth certain facts which may be stated thus:

> A lunacy affidavit was filed with the probate judge of Ottawa county against one M. P., a resident of that county. Thereupon said probate judge issued his warrant to the sheriff of Ottawa county, commanding him to bring said M. P. before him.
>
> After the issuance of said warrant, the sheriff of Ottawa county, having ascertained that the said M. P. had wandered away from her home in Ottawa county and had gone over into Paulding county, requested the sheriff of Paulding county to take the said M. P. into custody. This the latter proceeded to do, holding M. P. in the county jail of Paulding county for several days. At the end of that time he turned her over to the sheriff of Ottawa county, who took her before the probate judge of Ottawa county. The latter than adjudged M. P. insane.
>
> The sheriff of Paulding county had no warrant or other evidence of authority for the arrest or detention of said M. P. He incurred, however, an expense of three dollars for livery hire in transporting said M. P. to the jail of Paulding county, and a further expense of two dollars and twenty-five cents for boarding her until the sheriff of Ottawa county came after her. The sheriff of Paulding county called upon the sheriff of Ottawa county to pay these expenses, or cause the same to be paid, but the latter refused to do so, on the ground that Ottawa county is not legally liable therefor.

There is nothing in your letters to indicate that the said M. P. was guilty of any breach of the public peace in Paulding county, so as to require or justify action by the sheriff under section 2833 G. C.

You state your question thus:

> "We wish to know where the sheriff of Paulding county is to get his pay for his services rendered, whether from Paulding county or from Ottawa county."

No liability could attach to Ottawa county for the payment of the expenses in question, unless the authority therefor could in some way be predicated upon section 1981 G. C., which in part says:

> "The probate judge shall make a complete record of all proceedings in lunacy. The costs and expenses, other than the fees of the probate judge and sheriff, to be paid under the provisions of this chapter, shall be as follows: * * *; to the person other than the sheriff or deputy sheriff making the arrests, the actual and necessary expense thereof and such fees as are allowed by law to sheriffs for making arrests in criminal cases: * * *."

The words "sheriff" and "deputy sheriff," in the excerpt just quoted, undoubtedly mean the sheriff and deputy sheriff of the county in which the lunacy affidavit is filed. Under such an interpretation it would be possible to regard the sheriff of another county as included in the words "the person other than the sheriff" contained in said section. This, however, is of no benefit to the sheriff of Paulding county in the case under consideration. "The person other than the sheriff or deputy sherift," who is authorized by section 1981 G. C. to receive actual and necessary expenses and fees, is the person described therein as *"making the arrest"*—that is, he is the person to whom the probate judge, under section 1954 G. C., issues a warrant, of arrest, commanding the bringing into court of the person alleged to be insane. Your letters show, however, that the sheriff of Paulding county acted under no warrant writ or other order. It is, therefore, not perceived how Ottawa county can be held liable for the claim in question.

Whether any authority exists for the payment of this claim by Paulding county depends upon the construction to be given to sections 2850 and 2997 G. C. Said sections read as follows:

> "Section 2850. The sheriff shall be allowed by the county commissioners not less than forty-five nor more than seventy-five cents per day for keeping and feeding prisoners in jail, but in any county in which there is no infirmary, the county commissioners, if they think it just and necessary, may allow any sum not to exceed seventy-five cents each day for keeping and feeding any idiot or lunatic. The sheriff shall furnish at the expense of the county, to all prisoners confined in jail, except those confined for debt, only fuel, soap, disinfectants, bed, clothing, washing and nursing when required, and other necessaries as the court in its rules shall designate.
>
> Section 2997. In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge,

children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

The sections just quoted furnish no authority for an allowance by the county commissioners to the sheriff of that county for the board of any inmate of the jail except (a) persons who are "prisoners" therein, and (b) idiots or lunatics in counties having no infirmaries. The term "prisoner" as used in said sections, while not qualified, clearly means a prisoner *lawfully confined* in the county jail; that is, a person detained therein by virtue of some lawful proceeding, judicial, legislative or otherwise. It would be ridiculous to suppose that the legislature intended to make the county liable for the board of any person whom the sheriff might see fit to receive into the jail, regardless of the status of that person. So to hold, would be to sanction the conversion of a public institution erected and maintained by public taxation into a hostelry to which any person agreeable to the sheriff could resort with financial impunity.

Again, the authority given by section 2997 G. C. to the county commissioners to "make allowances quarterly to each sheriff for * * * his actual and necessary expenses incurred * * * in conveying and transferring persons to and from any state hospital for the insane * * * and all institutions for the care * * * of unfortunates * * *" is not broad enough to warrant the payment of livery hire incurred by the sheriff of Paulding county in the case put by your letter. The transportation in question was not to a state hospital, or institution "for the care, cure, correction, reformation and protection of unfortunates," within the meaning of section 2997 G. C., above quoted. Nor can it be said that the authority of the county commissioners, under said section, to "allow his necessary livery hire for the proper administration of the duties of his office" is broad enough to authorize payment by the Paulding county commissioners of the transportation expenses in question. The "duties of his office are such, and such only, as are enjoined upon him by statute. And there seems to be no statute which makes it the duty of a county sheriff to arrest and detain, without a warrant, an alleged insane person, resident of another county, upon the mere request of the sheriff of the foreign county.

In saying that the duties of the sheriff are such only as are enjoined upon him by statute, we have not lost sight of section 2834 G. C., which in part says that he shall "exercise the powers conferred and perform the duties enjoined upon him by statute *and by the common law.*"

I am unable to find any authority for the proposition that under the common law it was the duty of the sheriff of one county to arrest and detain, without a warrant and upon the mere request of the sheriff of another county, an alleged insane person, resident of the foreign county.

Considerations of official courtesy and reciprocity suggest the propriety of the acts of service performed by the sheriff of Paulding county in the case now before us, but such considerations can not be taken as a substitute for statutory authority to pay compensation for those acts.

See Clark vs. Commissioners, 58 O. S. 107 at p. 109.

You are, therefore, advised that there is no authority in law for the payment to the sheriff of Paulding county of the expenses mentioned in your letter.

Respectfully,
JOHN G. PRICE,
Attorney-General.

222.

MUNICIPAL COURT OF GALLIPOLIS—SAME PERSON CANNOT PERFORM DUTIES OF JUDGE OF SAID COURT AND CITY SOLICITOR.

The powers and duties granted to and imposed upon the judge of the municipal court and city solicitor by the Gallipolis charter, cannot be exercised and performed by the same person.

COLUMBUS, OHIO, April 19, 1919.

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

GENTLEMEN:—Your letter requesting my opinion upon the following questions arisig under the Gallipolis charter, was duly received:

1. Can a charter city establish a municipal court and confer upon the judge of such court the judicial powers granted to mayors by law?
2. Is not the establishing of said court contrary to the constitution of the state, Art. IV, section 1?
3. Can the solicitor, when provided by the charter, be the judicial officer of such court? and
4. What effect does section 4306 G. C. have upon the judge of the court when, as solicitor, he is made by law the prosecutor in said court?

Section 78 of the charter provides as follows:

"All general laws of the state applicable to municipal corporations, which are in effect January 1, 1918, and which are not in conflict with the provisions of this charter, or with ordinances or resolutions hereafter enacted by the city commission, shall be applicable to this city; but nothing contained in this charter shall be construed as limiting the power of the city commission to enact any ordinance or any resolution not in conflict with the constitution of the state or with the express provisions of this charter."

The charter also provides (section 20) that there shall be a city solicitor who shall be nominated and elected on a non-partisan ticket for a term of four years. The duties of the city solicitor are set forth in section 21, as follows:

"The city solicitor shall be the judge of the municipal court in said city of Gallipolis, Ohio, and shall have all judicial powers now granted mayors of cities under the general laws and constitution of the state of Ohio, and all powers that may hereafter be granted, either by statute of the state or by ordinance of the city commission. The city solicitor shall act as the legal adviser to, and attorney and counsel for the municipality and all of its officers in matters relating to their official duties. He shall prepare all resolutions, ordinances, con-

tracts, bonds and any and all instruments in writing in which the municipality is concerned, and shall endorse on each his approval of the form and correctness thereof; and no contract with the municipality shall take effect until his approval is thus endorsed thereon. In addition to such duties, he shall perform such other duties as may be required of him by the city commission, as well as such as may be required of city solicitors by the general laws of the state applicable to municipalities in accordance with the provisions of section 78 of this charter, and not inconsistent with any other provision of this charter, or with any ordinance or resolution that may be passed by the city commission.

Upon the written request of not less than two members of the city commission, the city solicitor shall cause an investigation to be made of the affairs of any department, or the conduct of any officer or employee of the city, or of the commission itself. In making such investigations he shall have the power to compel the attendance of witnesses and the production of books, papers and other evidence, and for that purpose may issue subpoenas or attachments which shall be signed by him and shall be served by an officer authorized by law to serve such process. He shall also have power to cause testimony to be given under oath to be administered by some officer authorized by law to administer oaths. And he shall also have power to punish as for contempt any person refusing to testify to any fact within his knowledge or to produce any books or papers under his control, relating to the matter under investigation.

He may appoint such assistants or special counsel as the city commission may authorize."

Section 69 of the charter provides that before any ordinance shall be submitted to the city commission, it shall first be approved as to its form by the city solicitor, whose duty it shall be to draft such proposed ordinance in the proper legal language, etc.

1. The abstract question, Can a charter city establish a municipal court having the judicial powers of city mayors under the laws and constitution of the state? would have to be answered in the negative, because of sections 1 and 15 of article IV of the constitution. See my opinion No. *215*, in the East Cleveland case.

Under section 1 of article IV the judicial power of the state is vested in a supreme court, courts of appeal, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeal as may from time to time "be established by law," and under the provisions of section 15 it is provided that laws may be passed to establish other courts "whenever two-thirds of the members elected to each house shall concur therein."

In State vs. Bloch, 65 O. S. 370, the court, at page 391, very clearly stated that the constitution vests in the general assembly the power to determine what courts it will establish, local, if deemed proper, and that the only limitation placed upon the exercise of that power is that the courts so established shall be inferior to the supreme court (now courts of appeal under the 1912 amendment).

In State vs. Ritchie, 97 O. S. 41, decided after the adoption of the home rule amendment, the court held that:

> "Section 1 of article IV of the constitution confers upon the general assembly of Ohio authority to establish by law courts inferior to the courts of appeals, throughout the entire state, or in any one or more localities within the state."

But does the charter of Gallipolis establish a municipal court? The only place

in the charter where the expression "Municipal Court" is used, is in section 21 of the charter as follows:

"The city solicitor shall be the judge of the municipal court."

In Ide vs. State, 95 O. S. 224, the supreme court held that a provision in the municipal charter of Sandusky that the president of the city commission "shall have the judicial functions of a mayor under the laws of Ohio," is not in conflict with any provision of the Ohio constitution. At page 227 the following language, which is also pertinent to the Gallipolis charter, was used:

> "It is sufficient to say in reference to the first contention that this charter does not purport to establish a court, but, on the contrary, provides that the president of the city commission shall have the judicial functions of a mayor under the general laws of Ohio, and may use the title of mayor in any case in which the execution of legal instruments of writing, or other necessity arising from the general law of the state so requires. If, therefore, this officer has any judicial powers whatever, they are conferred upon him by the general laws of the state, and not by any provision of the charter further than that it designates him as the municipal officer who shall to this extent be mayor of the city of Sandusky."

Under authority of the case of Ide vs. State, supra, I am forced to the conclusion that the Gallipolis charter does not establish a court, but merely undertakes to impose upon the city solicitor the judicial powers of city mayors under the general laws and constitution of Ohio.

2. "Can the solicitor, when provided by the charter, be the judicial officer of such court?"

The Gallipolis charter, it will be observed, provides that the city solicitor shall have all the judicial powers now granted to mayors of cities under the general laws and constitution of Ohio, and in addition thereto, that he shall perform such other duties as may be required of city solicitors by the general laws of the state, etc.

Before referring to the duties of city solicitors and mayors of cities under the laws of Ohio, it may not be improper to refer to the law on the subject of incompatibility of offices. The subject is discussed and the decisions of the English and American courts, including both state and federal, are referred to at length in L. R. A. 1917A, p. 216, and in 22 Ruling Case Law, p. 412. The authorities therein referred to are, in substance, summed up as follows:

At common law a public officer is prohibited from holding two incompatible offices at one time. The doctrine, it is said, is imbedded in the common law, and is of great antiquity. The rule has never been questioned, and its correctness and propriety are so well established, that it has been assumed without discussion in practically every case in which the matter of incompatibility has arisen. The debatable question in all cases is, however, what is incompatibility? The question has been answered by the courts with varying language, but generally in the same sense. While the courts are agreed upon general underlying principles, none have attempted to formulate a definition of the term applicable to all cases. When it comes to stating what constitutes incompatibility, the courts invaribly evade the formulation of a general definition, but content themselves with a discussion of specific cases. This, together with the fact that two cases seldom arise involving the same offices, has made the subject one of specific cases, rather than of general rules. The closest courts have come to defining incompatibility, is to substitute the word "inconsistency" therefor. In a number of cases it has been said that incompatibility consists in an inconsistency in the functions of the two offices. In some cases the courts seem inclined to the view

that the question of incompatibility is largely one of public policy. When it is considered, however, how much difficulty is involved in defining public policy, this attempted definition will be seen to have little value. In a less general way it has been said that offices are incompatible when one is subordinate to the other, or when one has supervision over the other, and from these rules it has been held that incompatibility exists between offices where one has over the other the power of visitation, punishment, etc.

If the question under consideration should turn upon an answer to the further question whether or not the offices of mayor and city solicitor are incompatible, it would be necessary to ascertain the powers of city mayors and city solicitors under the general laws of the state, for only in that way could it be determined whether or not the duties of the two offices are incompatible. Having this question in view, a brief reference to some of the general laws referred to may not be out of order.

First: *Statutes conferring judicial powers on city mayors:*

Sec. 4527. Mayor has final jurisdiction to hear and determine prosecutions for violations of municipal ordinances.

Sec. 4528. Mayor has jurisdiction to hear and determine prosecutions for misdemeanors.

Sec. 4531. Mayor may impanel a jury and try municipal offenses on affidavit, in the same manner and with like effect as misdemeanors are tried in the court of common pleas on indictment.

Sec. 4532. Mayor has jurisdiction to try cases prosecuted by the state.

Sec. 4533. Mayor may discharge, or recognize prisoners to common pleas court, etc.

"Sec. 4534. In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justices of the peace. * * *"

Second: Statutes relating to the duties of city solicitors.

"Sec. 4306. The solicitor shall also be prosecuting attorney of the * * * mayor's court.

"Sec. 4307. The prosecuting attorney of the * * * mayor's court shall prosecute all cases brought before such court and perform the same duties, as far as they are applicable thereto, as required of the prosecuting attorney of the county.

"Sec. 4308. When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action.

"Sec. 4311. The solicitor shall apply in the name of the corporation, to a court of competent jurisdiction for an order of injunction 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 ordinances governing it, or which was procured by fraud or corruption.

Sec. 4313. In case an officer or board fails to perform any duty expressly enjoined by law or ordinance, the solicitor shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty."

Under the law creating the bureau of inspection and supervision of public offices

(Secs. 274 et seq. G. C.) the bureau is authorized and empowered to inspect and supervise both the offices of mayor and city solicitor, as well as other public offices. By one of these statutes (Sec. 286 G. C.) it is expressly provided that if the inspector's report sets forth that any public money has been illegally expended, or has not been accounted for, or that any public property has been converted or misappropriated the city solicitor, as well as the Attorney-General and prosecuting attorney, shall institute civil actions in the proper court for the recovery thereof, and prosecute the same to final determination. One of the "proper courts" referred to in that section is the mayor's court (See Sec. 286-1 G. C.).

It will thus be seen that if the same person is to exercise the judicial powers of city mayors and at the same time perform the duties of city solicitor, as provided for in the Gallipolis charter, he will be his own legal adviser, attorney and counselor in matters relating to the official duties of both offices, and cases might arise where, as city solicitor, he would be required to investigate and prosecute himself, and where, as mayor, he would be called upon to hear and decide his own case. The utter inconsistency of this is apparent, and, unless clearly authorized by law, should not be tolerated. To permit a man thus to be a judge in his own cause, or to be his own investigator or prosecutor, would place it within his power (if he were so disposed) to convert checks and safeguards which the law has provided against fraud and peculation into potent instruments of corruption and iniquity. It would be as though a visitor were visiting himself and inquiring into and deciding upon the propriety of his own conduct. Or, stated differently, a case might arise wherein as city solicitor he would be required to prosecute himself before himself as mayor, or to hear and determine complaints involving his own infraction of law. As aptly stated in Howard vs. Harrington, 114 Me. 442, "The duties are repugnant. He can only perform the duties of one office by neglecting to perform the duties of the other." Such a situation would also present the spectacle of a judge practicing in his own court, and it is everywhere viewed as improper for a judge to engage in the practice of his profession while holding judicial office.

In State vs. Ry. Co. 12 C. C. (n. s.) 49, Judge Allread at page 63, used the following language which is pertinent to the present inquiry:

> "It is a sound principle everywhere acknowledged that no man, even if his motive be as correct as those attributed to Sir Matthew Hale, can be a judge in his own case, or in a case in which he has a private interest; and this principle applies to all cases of public trust."

While it might be within the range of possibility for the same person to impartially perform the duties of city solicitor and mayor, yet, as was said in the case just referred to, the law looks upon the tendency and has regard to the frailties of human nature and the temptation of being controlled by self-interest.

Since Gallipolis has adopted a charter whereby the same person is expressly authorized to exercise the judicial powers of city mayors, and at the same time to perform the duties of city solicitor, it has in effect expressed its desire not to be bound by the rule of incompatibility of office with respect to those two offices. While it might be conceded that article XVIII would warrant charter cities in dispensing with the rule referred to in so far as its purely municipal affairs are concerned , on the theory that a charter provision to that effect affects only its local self-government, I cannot reach the conclusion that article XVIII was ever intended to or in fact does authorize charter cities to set aside well established rules of public policy applicable to matters affecting the general public or state government, as distinguished from matters of a strictly local nature. As Judge Jones said in State vs. Cooper, 97 O. S., 86, at page 92, powers affecting subjects of a general nature, such as the power of taxation, and the power to establish courts and to define their jurisdiction, may be so employed by

charter cities as to affect only their own people, and thus considered, seem local in character. "But," added the learned judge, "it does not follow that the home rule sections above named endow municipalities with such powers."

And in Miami County vs. Dayton, 92 O. S., 215, the court held that, "The doctrine of home rule does not now, and never did, have any application to the governmental affairs of the state."

That Gallipolis has by section 21 of its charter undertaken to set aside a rule of public policy applicable to state governmental affairs, will readily appear when it is considered that the judicial powers of mayors are not confined or limited to their respective municipalities or to violations of municipal ordinances, but are also coextensive with the county in which each municipality is located, and also embrace offenses committed in violation of state laws. That this is true, is clearly shown by section 4528 G. C. which provides that "He (mayor) shall have final jurisdiction to hear and determine any prosecution for a misdemeanor * * * and his jurisdiction in such cases shall be co-extensive with the county;" by section 4534 G. C., which provides that "in felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power throughout the county, concurrent with justices of the peace;" by section 13,423 G. C., which provides that mayors of cities and villages shall have jurisdiction within their "respective counties" of a long list of offenses in violation of state statutes, including those relating to the adulteration of food, cruelty to children, child labor, intoxicating liquors, etc. See, also, sections 4536 and 4542 G. C., relating to village mayors.

And, with repsect to city solicitor, it has already been shown that the duties of their office under the general laws of the state, are not of a strictly local or municipal nature, but are also of general public interest or concern. See sections 4306 and 4307 G. C. which provide that the city solicitor shall prosecute "all cases," brought before the mayor's court, and shall perform the same duties, as far as they are applicable, "as required of the prosecuting attorney of the county." See, also, sections 4670 and 4671 G.C. requiring the city solicitor to prosecute certain offenders in the probate court.

At this point the language of Chief Justice Savage in Howard vs. Harrington, supra, seems pertinent:

> "It has been pointed out that a distinction may exist between a municipal officer whose functions relate exclusively to local concerns of the particular community, and one whom the law vests with powers and charges with duties which concern the general public. In this state the duties of a mayor are not limited to the performance of mere municipal functions and attending to the municipal business. As will be seen * * *, he is charged by the public statutes with certain duties which concern the public interest. He is required specially to enforce certain criminal statutes enacted for the general public good, and which are a part of the general machinery adopted to suppress crime and promote the public well being."

My conclusion is that the powers and duties granted to and imposed upon the judge of the municipal court and city solicitor by the Gallipolis charter, cannot be exercised and performed by the same person.

Respectfully,
JOHN G. PRICE,
Attorney-General.

223.

COUNTY BOARD OF EDUCATION—TRANSFER OF TERRITORY FROM ONE RURAL SCHOOL DISTRICT TO ANOTHER DISTRICT OF SAME COUNTY—SECTION 4692 G. C. DOES NOT AUTHORIZE TRANSFER BACK BY FILING PETITION, ETC.

The filing of a petition with the county board of education signed by seventy-five per cent. of the electors in territory desired to be transferred from one rural school district to another in the same county, is not authorized in section 4692 G. C. under which section transfers in same district are to be made.

COLUMBUS, OHIO, April 19, 1919.

HON. LEWIS G. CHRISTMAN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion of the Attorney-General on the following questions, growing out of the statement of facts given:

> "In 1917 territory was properly transferred from rural school district 'A' to rural school district 'B.' Later, 1918, school district 'B' voted to issue bonds to build a school house. Those bonds have not been sold. Part of the territory so transferred from district 'A' to district 'B' now petition, by the electors therein, to be transferred back to district 'A.' More than seventy-five per cent. of the electors of the territory asking to be retransferred, petition for such transfer.
>
> 1. Does this case fall within section 4696 General Code?
> 2. Must the county board of education act upon such petition, or is such petition unauthorized by law?
> 3. Provided such transfer can be had, would district 'A' be entitled to and responsible for their equitable share of the funds arising from the sale of bonds, if the bonds are subsequently sold?"

Attention is invited to section 4696 G. C., which reads:

> "A county board of education may transfer a part or all of a school district of the county school district to an adjoining exempted village school district or city school district, or to another county school district, provided at least fifty per centum of the electors of the territory to be transferred petition for such transfer. Provided, however, that if at least seventy-five per cent. of the electors of the territory petition for such transfer, the county board of education shall make such transfer. No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer; also a map shall be filed with the auditor or auditors of the county or counties affected by such transfer."

It will be noted that this section governs the matter of transfer of territory from a school district of the county school district "to an *adjoining exempted village school district* or *city school district*, or to *another county school district*," and does not apply in the transfer of territory from one rural school district to another rural school dis-

trict in the same county, as in the case you mention. Hence the answer to your first question:

> 1. Does the case fall within section 4696 General Code?"

is in the negative.

You indicate that a petition "asking to be retransferred" has been signed by more than seventy-five per cent. of the electors of the territory in question, such petition seemingly having been prepared under the provisions of section 4696 G. C., which, as pointed out, is not the section covering your question, and the petition is, therefore, unauthorized, in answer to your second question,

> "2. Must the county board of education act upon petition or is it unauthorized?"

The matter of transfer of territory from one rural school district to another rural school district in the same county falls within section 4692 G. C., which reads:

> "The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. If an entire district be transferred, the board of education of such district is thereby abolished or if a member of the board of education lives in a part of a school district transferred the member becomes a non-resident of the school district from which he was transferred and ceases to be a member of such board of eduaction. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

From the language of this section it will be seen that there is no provision for a petition of the electors desiring to be transferred, the sole provision being for a written *remonstrance* against such transfer, to be signed by a majority of the electors in the territory and to be filed with the county board of education within thirty days after the filing of the map showing the transfer. Where such written remonstrance is properly filed by a majority of the electors in the territory, and within the thirty days mentioned "such transfer shall not take effect;" and this is the only prohibition in the section which prevents the county board of education making such transfers as it may decide upon, between rural districts in the same county. So the matter of the transfer of territory in the county from one rural school district to another rural school district lies entirely with the county board of education, under section 4692 G. C., the opening sentence of which says that such board "may transfer a part or

all of a school district of the county school district to an adjoining district or districts of the *county school districts.*" The county board of education need not act on such petition as it is unauthorized by law.

Following the answers made to your questions one and two, that such transfer cannot be made under section 4696 G. C., and such petition is unauthorized, there is no occasion to answer your question three, based upon a provision that section 4696 G. C. applies, which it does not.

Respectfully,
JOHN G. PRICE,
Attorney-General.

224.

JUDGES AND CLERKS OF ELECTIONS—COMPENSATION—TWO ELECTION DAYS FOR BOND ISSUE—PAID FOR *EACH ELECTION DAY.*

Judges and clerks of elections in precincts shall each receive five dollars for services rendered on any election day, regardless of the questions submitted to the voters on that day. In similar manner the compensation and mileage due judges calling for supplies and delivering the returns is based on the election day.

COLUMBUS, OHIO, April 19, 1919.

HON. FOSTER E. KING, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following statement of facts:

> "There was held in Ridgeway, Ohio, at the last general election a special school election. The Logan county board of elections did not furnish ballots for that part of Ridgeway situated in Logan county, and the presiding judge was paid at the same rate as if the election was a valid one. Later a special school election was called, at which time it was conducted properly and in accordance with the laws governing such special elections.
>
> The question the Hardin county board of elections wants you to determine is on what basis will the board pay the presiding judge, also associate judges and clerks, and whether or not the full precinct board, comprised of one presiding judge, three associate judges and two clerks, are to receive the regular pay of $5.00 per day and the presiding judge to receive his additional service pay of coming after ballots and delivering his returns."

Under date of March 11, 1919, you furnished additional information upon request, in which you say there were two precincts voting in the elections upon the same question, one in Logan county and one in Hardin county; that the questions are:

> "1. Whether the election officials are to receive the regular pay of $5.00 per day?
>
> 2. Is the presiding judge entitled to his extra compensation for mileage and making a return of the vote cast for both the school election in November, along with the general election, and also the special election held at a subsequent date, as well as his compensation for both elections?
>
> 3. Must the Hardin county board of elections pay this additional

cost of the special election for the failure of Logan county to furnish ballots? "

Attention is invited to section 4860 G. C., which says:

> "Such judges and clerks shall *each receive* as compensation for their services the sum of five dollars, which services shall be the receiving, recording, canvassing and making returns of *all the votes* that may be delivered to them in the voting precinct in which they preside *on each election day.* * * *"

It is clear from this section that *each* of the judges and clerks on duty is to receive five dollars for each *election day* and this amount for taking care in legal manner of all the votes that may be delivered to them, that is, the whole vote cast on such election day. So the fact that on the day of the last regular election there were also votes cast in a special school election does not affect the per diem pay of such judges and clerks, for they are paid five dollars each for the *election day,* regardless of what was voted upon, for such compensation is for receiving, recording, canvassing and making returns of *all the votes* delivered to them.

Relative to your second question, we quote section 5043 G. C. as follows:

> "The judge of elections called by the deputy state supervisors to receive and deliver ballots, poll books, tally sheets and other required papers, shall receive two dollars for such service, and, in addition thereto, mileage at the rate of five cents per mile to and from the county seat, if he lives one mile or more therefrom.
>
> The judge of elections carrying the returns to the deputy state supervisors, and the judge carrying the returns to the county or township clerk, or clerk or auditor of the municipality, shall receive like compensation. * *"

In the November general election the presiding judge called for the ballots, poll books and supplies (which ballots included the special school election ballots) for the use of the voters in Ridgeway precinct on election day. He is entitled under section 5043 G. C. to two dollars for such service as well as his mileage at five cents per mile to and from the county seat, and such two dollars and mileage is all he is entitled to for going after the ballots and supplies; the fact that there were two elections, a general and a special one, does not entitle him to any second payment of two dollars, for such ballots and supplies are the supplies for one election day. As to payments for carrying the returns to the boards of elections at the close of such election day in November, the presiding judge is entitled to two dollars for such service, along with his mileage, as the law contemplates that the returns of "all votes" (section 4860 G. C.) shall be made in one trip at the end of such election day, and there is no additional allowance for the presiding judge for the November election day, because a school question was also submitted on that day.

Due to the fact that the voters in the second precinct of the Ridgeway school district (situated in Logan county) were not supplied with ballots for the school election held on the day of the general election in November, it was necessary that a subsequent special election be held in such school district and this was done. This was an election day and pay of election officials is the same for special election days as for days of regular elections, that is to say, the judges and clerks in such subsequent special election would be entitled to five dollars each for that election day. It was no fault of such election officials in the precincts that the second election was necessary, and service was rendered on both days by direction of the board of deputy super-

visors of elections. Further, the judge designated to call for the ballots and supplies for such special election would be entitled to two dollars and his mileage, and a "like compensation" for delivering such returns to the deputy state supervisors at the close of the special election.

Answering your third question, the Hardin county deputy state supervisors of elections must pay their share of the expense of the special election, for they participated in its call, prepared ballots, ordered the precinct election officials to function, and received the returns in regular manner. The special election, once called, becomes an entity by itself, and must be treated as such in the matter of expense and payment of those officials who performed service on such election day.

It is the opinion of the Attorney-General, therefore, that each judge and clerk on duty in the precincts is entitled to five dollars per day for the November election and the same amount for the subsequent special election; that the presiding judge who called for ballots and delivered them is entitled to two dollars and his mileage for the November general election and a similar amount for such services in the special election; that the judge of elections delivering the returns to the deputy supervisors is entitled to two dollars and his mileage for the November election and a similar amount for the same service performed at the close of the special election held on a later date; that the Hardin county deputy state supervisors must pay their proper share of the expense of such later special election in which they participated.

Respectfully,
JOHN G. PRICE,
Attorney-General.

225.

APPROVAL OF BOND ISSUE OF DEFIANCE COUNTY IN SUM OF $71,750.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 21, 1919.

226.

APPROVAL OF LEASE TO EBERSBACH COAL COMPANY FOR STATE LAND IN MEIGS COUNTY.

COLUMBUS, OHIO, April 22, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter dated April 7, 1919, with which was transmitted for the approval of this department a coal lease to the Ebersbach Coal Company for fractional section No. 29, township 2, range 12, Ohio company purchase, Meigs county.

After careful examination of this lease and consideration of the facts stated in your letter, in connection with section 3209-1 G. C., as amended in 105 O. L., p. 6, the opin-

ion of this department is that the lease is authorized by said section and is in conformity therewith. It further appears that the terms of the lease are for the best interest of the beneficiary of said section 29.

The lease is therefore approved.

Respectfully,
JOHN G. PRIC ,
Attorney-General.

227.

REISSUANCE OF LOST OR DESTROYED BOND OR DETACHED COUPON—SECTION 2295-5 G. C. INTERPRETED—PROCEDURE TO BE FOLLOWED.

Section 2295-5 General Code authorizes the reissuance of a bond or of a coupon detached from a bond and lost or destroyed, upon compliance with the conditions therein stipulated.

Proof of loss by affidavit would be sufficient for the purposes of said section.

So far as said section is concerned, an indemnity bond executed in compliance with its provisions must be deemed a sufficient safeguard to protect the taxing district against double payment in the course of many years' time.

COLUMBUS, OHIO, April 23, 1919.

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

GENTLEMEN:—You request the opinion of this department on certain questions raised by a communication of the office counsel of a certain bank, as follows:

> "1. In case of loss of a coupon bond or coupons of a coupon bond has the taxing district which issued such bonds authority to pay the person who claimed to be the holder of such bond or coupons the payments thereon as they mature?
>
> 2. If there be such authority what proof of the loss may be considered competent proof?
>
> 3. Would a bond furnished by such person, claiming the loss, to protect such taxing district against the future appearance of such bond or coupons be a sufficient safeguard to protect such taxing district against double payment in the course of many years' time? "

These questions invoke consideration of section 2295-5 of the General Code, which provides as follows:

> "Whenever bonds, notes or certificates of indebtedness, issued by a municipal corporation, school district, county, township, or other political subdivision or taxing district of this state, are lost or destroyed, said corporation, school district, county, township, subdivision or district may reissue to the holder or holders duplicates thereof in the same form and signed as the original obligations were signed, which obligation so issued shall plainly show upon its face as being a duplicate of such lost bond, note or certificate, upon proof of such loss or destruction and upon being furnished with a bond

of indemnity against all loss or liability for or on account of the obligations so lost or destroyed."

The authority conferred in this section is to issue a duplicate security. By necessary implication this authority extends to the payment of the interest on and principal of the duplicate security when issued. So far as your first question relates to the coupon bond itself, therefore, it may be answered by the statement that if the provisions of section 2295-5 G. C. are complied with the taxing district which issued the lost bond has authority to issue a duplicate thereof, with the coupons thereon, to the person who was the holder of the original, and to pay the same according to the tenor of the duplicate bond and its coupons.

The question with respect to coupons separated from the bond is not so clear. The letter quoted in your communication makes it apparent that this question is one in which you are especially interested. Section 2295-5 G. C. speaks of the issuance of duplicate "bonds, notes or certificates of indebtedness." It does not expressly authorize the issuance of duplicate coupons when such coupons have been lost after having been detached from the original bonds. Yet the coupon itself is a note calling for the payment of a specified sum by way of interest to the bearer. It is therefore within the letter of section 2295-5, if that section be liberally interpreted. The case of a lost or destroyed coupon separated from the original bond is certainly within the spirit of the entire section. It is the opinion of this department, therefore, that section 2295-5 G. C. does authorize the issuance of duplicate coupons in place of those detached from the original bonds and then lost or destroyed, in the same manner as the bonds themselves may be duplicated under the provisions thereof; and that payment may be made to the holder of such duplicate coupon.

Your second question may be answered by saying that any proof which is deemed sufficient by the authorities of the taxing district whose duty it is to execute bonds, notes or certificates of indebtedness will be competent for the purposes of section 2295-5 which contains no specifications on this point.

The word "proof" means that the person or tribunal which must determine the facts involved is able to find the fact to be as alleged by a preponderance of competent evidence. The proceeding under section 2295-5 not being judicial, it is most natural to suppose that an affidavit is intended, and you are advised that an affidavit of a credible person setting forth the circumstances of the loss or destruction will in most cases be sufficient.

In answer to your third question you are advised that so far as the statute is concerned a bond of indemnity such as you refer to is deemed a sufficient safeguard to protect the taxing district against double payment in the course of many years' time. If it is your purpose to question the policy of the statute, permit me to observe that the peril of double payment does not last indefinitely, because the taxing district would be able to interpose the defense of the statute of limitations at the expiration of fifteen years from and after the due date of the bond or coupon. Of course, in the case of long-time bonds such a date might be quite remote, yet it would not lie indefinitely in the future. However this may be, the legislature has seen fit to authorize the reissuance of duplicate bonds under the circumstances set forth in section 2295-5 G. C It is to be pointed out, however, that the statute does not require such action on the part of the authorities of the taxing district.

Very respectfully,
JOHN G. PRICE,
Attorney-General.

228.

TAXES AND TAXATION—WHEN ACCOUNTS AND BILLS RECEIVABLE OF FOREIGN CORPORATION ARE CONSIDERED "PROPERTY" BY SECTION 5501 ET SEQ. G. C.—SALE OF RAW MATERIALS CONSIDERED—WHEN TAXED AND WHEN SAME ARE INTERSTATE COMMERCE.

Considered as "property" for the purposes of sections 5501 et seq. General Code, the accounts and bills receivable of a foreign corporation which had its actual managerial office in Ohio, at which office all orders are received and all contracts made and all such accounts and bills receivable collected and controlled, are located in Ohio.

A sale by a foreign corporation in Ohio to an Ohio customer of products or raw materials shipped in delivery from points outside of the state constitutes interstate commerce and cannot be considered as business done in Ohio, unless it appears that the contracts of sale do not call for delivery from any place outside of the state.

Sales in Ohio by a foreign corporation of raw materials stored in Ohio to Ohio customers constitute business done in Ohio.

COLUMBUS, OHIO, April 23, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Receipt of your letter of March 20th submitting certain questions for the opinion of this department is acknowledged. You state the questions as follows:

> "The Cleveland Cliffs Iron Company is a foreign corporation organized under the laws of West Virginia. The report filed with this commission states that the principal office is in Michigan. The company also maintains a business office at Cleveland, Ohio, through which practically all of its business is conducted and where all orders are received and contracts made and where accounts and bills receivable are collected and controlled.
>
> Our special examiner has found that in the report for 1918 the company allocated to property outside of Ohio an item of $4,803,259.00, which represents accounts and bills receivable. Inasmuch as these accounts are collected and controlled at Cleveland, should not this property be allocated to Ohio?
>
> The examiner also found that the company reported as business outside of Ohio the following items: Sales of chemical products through Cleveland, Ohio, shipped from Michigan and Wisconsin plants to customers in Ohio $98,858.00. Sales of ores through the Cleveland office, shipped from Ohio docks to customers in Ohio, $3,755,208.00. Sales of ores through the Cleveland office, shipped direct from upper lake ports to customers in Ohio, $2,107,870.00.
>
> We request your opinion as to whether the above items should not have been reported as business in Ohio."

Assuming, without discussion, that accounts and bills receivable constitute "property" within the meaning of section 5501 of the General Code and related sections, it is the opinion of this department that the items inquired about in your first question should be allocated to Ohio. No opinion is expressed as to whether or not such accounts are "property" because your letter does not request an opinion thereon.

It may be said generally of each of the three items mentioned in your second question that they represent business done in Ohio. Whether or not, however, they are to be taken into account as such business done in Ohio for the purpose of the franchise tax

law depends upon a further consideration. By several previous opinions of this department, with which I concur, the commission has been advised that business which consists of sales is not to enter into the computation by which the franchise tax of a foreign corporation is fixed, if the sales are in interstate commerce. In other words, if the complete transaction or agreement between the parties involves a promise on the part of one to make a delivery necessitating the carrying on of interstate commerce, the transaction does not constitute "business done in Ohio" within the meaning of the Ohio statute. This is upon the theory that if the entire business of a company consisted of such transactions, the state would not have power to tax it, though such business were carried on through the agency of persons who might maintain a permanent business office in the state. This being true, such taxation cannot be effected when the company also transacts some intrastate business in the state, at least under a law like that of Ohio, whatever may be the case under a law which plainly attempts to and does avoid the imposition of direct burdens upon interstate commerce.

These general observations afford a key to the solution of the three specific questions embodied in your second general question. If the chemical products sold through the Cleveland office under such circumstances as to require shipment from points in Michigan and Wisconsin to customers in Ohio are specifically products to come from the points mentioned, such sales constitute interstate commerce and should not have been reported as business done in Ohio. So also with the third item, which consists of sales of ores shipped direct from upper lake ports to customers in Ohio. It would probably be true that if the company merely made contracts for the sale of so much ore, without any specification as to the place from which it should come, such contracts and the sales thereunder would not constitute interstate commerce. If the facts show that this is the case, then the opposite answer would have to be given to these two parts of the question, but if, as I imagine may be the case, the understanding, if not the express contract of the parties in such cases, is that the products or ores shall come from outside of the state, the transactions would be interstate.

The second subdivision of your second question seems clearer. As you put it, the business described thereby would be strictly Ohio business intrastate in character. The agreement, in effect, would be to sell and ship ore which is understood to be on Ohio docks at the time of the sale to customers in Ohio. The delivery required to complete the contract would be an intrastate movement.

In this connection it will be observed that the actual shipment that takes place in the discharge of the contract is not a conclusive criterion of its interstate or intrastate character. The contract may be to sell and deliver ore without respect to where the vender gets the ore. This would not be interstate commerce; but where the contract calls for delivery of something from outside of the state the reverse is true.

Your second question may, therefore, be answered as follows:

The sales of chemical products through the Cleveland office to Ohio customers, completed by shipments from Michigan and Wisconsin points, do not constitute business done in Ohio for the purpose of the franchise tax law, unless the contracts, fairly interpreted, show that the place from which the products were to come was a matter of indifference to the vendees.

The same general observation is true of sales of ores through the Cleveland office to Ohio customers, completed by delivery from upper lake ports.

Sales of ores through the Cleveland office, completed by delivery from Ohio docks to customers in Ohio, constitute business done in Ohio.

Respectfully,
JOHN G. PRICE,
Attorney-General.

229.

COUNTY COMMISSIONERS—COMPENSATION OF DEPUTY SHERIFFS FOR DOG REGISTRATION LAW—COMMISSIONERS PROVIDE FUNDS —SECTION 2980-1 G. C. NO LIMITATION.

Section 5652-8 G. C. provides adequate authorization to the county commissioners for appropriation of the necessary funds for compensation of deputy sheriffs required in the administration of the dog registration law. Secs. 5652 et seq. G. C.

The provisions of section 2980-1 G. C. are not a limitation upon said authorization.

COLUMBUS, OHIO, April 23, 1919.

HON. H. W. KUNTZ, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I have your communication of March 13, 1919, asking for a construction of the duty of the county commissioners under section 5652-8 G. C. (107 O. L. 535.)

With your communication you submit a communication from Sheriff Harvey Garrett of your county setting forth statement of facts relating to necessity for an allowance from the public funds to provide deputies for the enforcement of the statutes relating to the registration of dogs.

You call attention to three opinions of my predecessor relating to the construction of the statute involved in your inquiry, and which opinions are Nos. 861 for the year 1917, and 973 and 1612 for the year 1918.

After a general survey of the statutes bearing upon the question, you request my opinion as follows:

> "I am asking for your opinion upon this statement of facts, because of the state-wide importance which the proper consideration of this statute demands."

The section which you desire construed, section 5652-8 G. C. is a part of an enactment found at page 534 of 107 O. L. and the act relates primarily to the matter of registration of all dogs, and the collection of an annual fee for such registration, thereby providing for raising a fund to compensate for losses sustained by owners of live stock on account of injuries inflicted by dogs.

The provision for assessment and collection of the fee for registration is made in section 5652 G. C. This section is followed by a number of supplemental sections providing machinery for the enforcement and carrying out of the objects of the initial section, supra.

From among the supplemental sections I call attention to section 5652-7 G. C. which provides:

> "County sheriffs shall seize and impound all dogs more than three months of age, except dogs kept constantly confined in a registered dog kennel found not wearing valid registration tags. Upon affidavit made before a justice of the peace, that a dog more than three months of age and not kept constantly confined in a registered dog kennel is not wearing a valid registration tag and is at large, or is kept harboured in his township, such justice of the peace shall forthwith order the sheriff of the county to seize and impound such dog so complained of. Such sheriff shall forthwith give notice to the owner of such dog, if such owner be known to the sheriff, that such dog has been impounded, and that the same will be sold or destroyed if not redeemed within four days. If the owner of such dog be not known to the sheriff, he shall post a notice in the county court house describing the dog and place

where seized, and advising the unknown owner that such dog will be sold or destroyed if not redeemed within four days."

This section is then followed by 5652-8, which is the one you desire construed with reference to the duty of the county commissioners in relation to providing funds for the employment of deputy sheriffs, and that section is as follows:

"County commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provisions of this act, shall provide nets and other suitable devices for taking dogs in a humane manner, and, except as hereinafter provided, shall also provide a suitable place for impounding dogs, and make proper provision for feeding and caring for the same, and shall also provide humane devices and methods for destroying dogs. Provided, however, that in any county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, and having one or more agents appointed in pursuance of law, and maintaining an animal shelter suitable for a dog pound and devices for humanely destroying dogs, county commissioners shall not be required to furnish a dog pound, but the sheriff shall deliver all dogs seized by him to such society for the prevention of cruelty to animals and children at its animal shelter, there to be dealt with in accordancewith law, and the county commissioners shall provide for the payment of reasonable compensation to such society for its services so performed out of the county general fund."

While neither this particular section last quoted, nor in fact any of the sections of the act purport to provide the method of appointment of deputy sheriffs, yet I am of the opinion that they do purport to provide the compensation for such deputy sheriffs as shall be made necessary by the duties imposed upon the sheriff's office in the performance of their functions under the act, as well as other expense incident to the performance of such functions by way of providing nets and devices for catching the dogs, suitable impounding places, etc.

A consideration of section 5652-7 readily discloses that the executive functions under the law are vested in the sheriff, which as readily suggests the probability of the requirement of additional assistance or deputies over that which would be found necessary for the regular duties of the offices exclusive of those added by the provisions of the act under consideration.

Except for the existence of other provisions of law for providing compensation for deputy sheriffs, it is probable that no question would arise as to the sufficiency of the authority found in the act under consideration providing the necessary compensation for deputies required in the administration of the laws relating to the registration of all dogs. But inasmuch as a question has now been raised, it is necessary to determine whether the fact of general provision having been made, the same is now to be considered exclusive, or as governing entirely the subject of providing compensation for deputies required for the administration of this particular law.

At the outset, the fact of special provision being here made for the expense incident to the administration of this particular matter, is considered significant: in other words, if adequate and complete provision covering the subject already had been provided, there would have been no occasion for the additional reference to the matter in this law, and the fact that special provision is here embodied, we think indicates a purpose to add something to that which had previously been provided.

The language "the county commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provision of this act," is considered as furnishing a cumulative authorization for deputy sheriffs' compensation to the extent that

the service is made necessary by the additional duties added to the office of sheriff under the law in question.

Of further significance is considered the fact that such fees as are to be collected on account of the sheriff's services under the act in question are to go into the county treasury to the credit of the general county fund, while for the ordinary services of the sheriff's office the fees are to be paid into the county treasury and to be kept in separate fund, which is commonly known as the fee fund. (Sec. 2983 G. C.)

The compensation for deputies under the general provision which may be allowed by the county commissioners is based on certain graduated percentages of the fees and perquisites so accumulated in the fund thereby created. Thus it becomes apparent that the old provision for compensation of deputies is not especially adapted to or commensurate with the general plan and purpose of the legislation under consideration.

Of course, it is provided by section 2980-1 that upon application the common pleas judge may make additional allowance for deputy hire, but the provision of section 5652-8 clearly indicates that the authority to provide sufficient and suitable compensation necessary to administer the provisions of the law relating to registration of dogs is vested in the county commissioners, and it should not be necessary to go beyond that and look to the common pleas court for the necessary provision for such fees. Section 5652-8 was intended to be sufficient for the purpose, and it is the duty of the county commissioners to make a sufficient and proper allowance measured only by the necessities created by the duties imposed by the law rather than the condition of the sheriff's fee fund.

It is probable that in some counties the sheriff's fee fund would not be found sufficient even for providing the deputies and assistants necessary for the regular duties of the sheriff's office, and in that event, under the contrary construction of the special provision under consideration the county commissioners would not be able to provide for making this law effective at all, as such a construction would in fact be substituting the extraordinary provision for an application to the common pleas judge for additional allowance in the place of the apparently ample and apt authorization to the county commissioners to provide the necessary funds incident to the raising of the larger revenues which constitute the major purpose of the act.

The opinions of my predecessor which were referred to in your communication have been duly considered, and I find that the first of the opinions, No. 861, found at page 2347 of the Opinions of the Attorney-General for the year 1917, does not determine the question as to whether the limitations on allowances to be made by the county commissioners provided in the original section 2980-1 are applicable to the case of providing for deputy sheriffs necessary in carrying out the provisions of the dog registration law, but it was simply said "it will be time enough to meet that question when it is presented." Other observations of the opinion to which I might call attention are as follows:

> "The question arising in your mind is probably the meaning of the word 'provide,' and it is sufficient in this connection to say that 'provide' does not mean 'appoint.' * * * Therefore, the requirement that the commissioners shall provide him with deputies would necessarily mean that they should provide him with the means of employing such additional deputies as might be rendered necessary by the provisions of these new duties. The sheriff himself selects his deputies. * * * The duty imposed by this act upon the county commissioners to provide the means to carry it into effect is undoubtedly mandatory."

The second opinion, being No. 973 for the year 1918, deals more specifically with the subject, and the more pertinent observations are as follows:

"No express statement is contained in the law that the provision for deputies is to be in any other manner than that already specifically provided."

Again, after quoting the first part of section 2980-1 G. C. it is said:

"If this language were effective it might in some instances leave an insufficient amount if the maximum was fixed by law without regard to these new duties. However, if the amount turns out insufficient the statute proceeds:

'Said officer shall make application to a judge of the court of common pleas of the county wherein such officer was elected; and thereupon such judge shall hear said application and * * * he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, * * * and thereupon the board of county commissioners shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries.'

Here is the regular place in the provisions already made for the board of county commissioners to do the thing required in the new act, viz.: provide for the employment of deputy sheriffs necessary to enforce the provisions of this act. The fact that the maximum which the commissioners may allow is not based upon any of the fees for duties under the new act would be a sufficient reason for the judge allowing an additional amount if such maximum amount was insufficient."

In the later opinion, being No. 1612 of the Opinions for 1918, the conclusion in the last considered opinion was reaffirmed, and it was said:

"In an opinion (No. 973) rendered to Hon. John V. Campbell, prosecuting attorney, on January 29, 1918, I held that the deputy sheriffs who performed the duties under the law designated above are to be paid in the same manner as are the ordinary deputies in the sheriff's office. In other words, the sheriff must make his report to the county commissioners, and said commissioners make an allowance, in accordance with the provisions of law, which will take care of the full deputy force needed by the sheriff."

I find myself unable to agree with the holding of my predecessor that the general structure of the law for converting the various county offices from a fee basis to a salary basis and providing for the compensation of deputies and assistants required in the offices from a fund accumulated from the fees and perquisites of the office and set apart as a special fund for that purpose, was intended to limit and govern the general authorization in the law now under consideration for providing for the administration of said latter law, which has for its main purpose the raising of a revenue in the exercise of police power to compensate for injuries and losses which are regularly sustained as a consequence of inadequate regulation of dogs, and under which enactment the inconsequential provision for sheriffs' fees conveys them into the general fund of the county.

I, therefore, hold that by the provision of section 5652-8 G. C. the duty is imposed upon the county commissioners and the power vested in that body to provide the funds necessary for the administration of the law for the regulation and registration of dogs, including such an amount as shall be required for compensation of deputy sheriffs made necessary in the administration of the law, and that in the exercise of said function the limitations of section 2980-1 G. C. relating to appropriation from the sheriff's fee fund are not applicable.

Respectfully,
JOHN G. PRICE,
Attorney-General.

230.

APPROVAL OF BOND ISSUE OF LAKEWOOD CITY SCHOOL DISTRICT IN SUM OF $93,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 23, 1919.

231.

APPROVAL OF BOND ISSUE OF MEDINA COUNTY IN THE SUM OF $72,786.07.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 23, 1919.

232.

APPROVAL OF BOND ISSUE OF VILLAGE OF WORTHINGTON IN THE SUM OF $25,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 23, 1919.

233.

GOVERNOR—CONSTRUCTION OF WORD "ADJOURNMENT" IN SECTION 16 OF ARTICLE II OF OHIO CONSTITUTION—HOW BILLS FROM GENERAL ASSEMBLY ARE TO BE DISPOSED OF.

1. *The word "adjournment," as used in section* 16 *of article II of the state constitution, means the final adjournment of the general assembly.*

2. *During a temporary adjournment of both houses of the general assembly to a day beyond the time within which the governor is required to return a bill which he does not approve, the governor, in case he desires to exercise his veto power, should return the bill, with his objections in writing, to the clerk of the house in which the bill originated within ten days, Sundays excepted, after it has been presented to him for approval. A return to the clerk, during such adjournment, is a return to the house, within the meaning of section* 16 *of article II of the state constitution.*

COLUMBUS, OHIO, April 24, 1919.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Your letter of April 21, 1919, requesting my opinion on certain questions concerning the construction of section 16 of article II of the state constitution was duly received and omitting the formal parts, reads as follows:

"With regard to certain bills, filed with me for consideration on the 16th day of April, I may desire to exercise the power of disapproval conferred on me by section 16, of article II of the constitution. If at all consistent with my proper course of procedure under the section referred to, I want to make certain that the right of the general assembly to review my action shall be preserved.

As you know the legislature adjourned on April 17th, and will not be in session again until the 5th day of May next.

In the meantime, I desire to have you advise me:

1. What disposition must I make of any bills filed with me as aforesaid, in the event I want to disapprove the same within the ten day limit imposed by the constitution? In other words, shall I file such bill with my objections thereto in the office of the secretary of state, or in the office of the clerk of the house in which such bill originated, although such house is not in session?

2. Does 'adjournment' as used in the last sentence but one of the section of the constitution referred to above, mean 'final adjournment,' or does it include an adjournment to a fixed day as in the present case?

If at all possible, I should like to hear from you this week, as the time for action on my part will expire on the 28th of April."

Section 16 of article II of the constitution, so far as pertinent to the present inquiry, provides that:

"Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor for his approval. If he approves, he shall sign it and thereupon it shall become a law and be filed with the secretary of state. If he does not approve it, he shall return it with his objections in writing, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. * * *

If a bill shall not be returned by the governor within ten days, Sundays excepted, after being presented to him, it shall become a law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it shall become a law unless, within ten days after such adjournment, it shall be filed by him, with his objections in writing, in the office of the secretary of state."

The weight of judicial authority is to the effect that the word "adjournment" as used in constitutional provisions identical with or substantially the same as section 16 of article II of the Ohio constitution, means final adjournment, and that during temporary adjournments or recesses of either or both houses of the general assembly the governor may return a bill with his objections in writing to the clerk of the house in which it originated.

In Johnson City vs. Electric Co., 182 S. W. 587, decided by the supreme court of Tennessee, one of the vital questions in the case involved the meaning of the word 'adjournment" as used in the following provision of the state constitution, viz.:

"If the governor shall fail to return any bill, with his objections within five days (Sundays excepted) after it shall have been presented to him, the same shall become a law without his signature, unless the general assembly, by its adjournment, prevents its return, in which case it shall not become a law."

In that case the bill in question, which originated in the house, was duly and regularly passed by both branches of the general assembly, and was signed by their respective presiding officers. The bill was presented to the governor on April 1st. On April 3rd, both houses of the general assembly by joint resolution adjourned, not sine die, but to meet again on May 3rd, on which latter date that body again assembled pursuant to adjournment. In the opinion the court said:

"Under the facts which are not in dispute the controversy between the parties is narrowed to a single question. What is meant by 'adjournment' in section 18, Art. 3, of our constitution?

At this point two rival contentions arise: First, appellant insists that, under section 18, article 3, of our constitution of 1870, the return of a bill with his objections thereto in writing, which is required to be made by the governor, if he refuse to sign it, must be made to the house in which the bill originated, at a time when there is present in that house a quorum of its members competent to a reconsideration of the bill or other transaction of legislative business. Second, appellee insists that such return may be made to some officer, agent, or employe of the house chargeable, within the meaning of the constitution, with the duty of placing before the house, for its reconsideration, the returned bill, and the objections of the governor thereto, whether a quorum of the membership of the house be present or not at the time the bill with the objections of the governor be placed in the hands of the officer, agent, or employe of the house. * * *

It is manifest from a reading of the foregoing section that if the insistence of the appellant be the true postulate from which we should proceed, that is to say, if the return must be made to the house when a quorum of its membership is present, then the meaning of the phrase in the above section, 'unless the general assembly by its adjournment prevents its return' is that any adjournment which would result in the absence of a quorum would be such an adjournment as would prevent the return of the bill, and therefore it would result that the governor could not return a bill during adjournment if the house in which it originated had adjourned for midday luncheon, or had adjourned at night until the following morning, or had adjourned for any longer period of time, or had finally adjourned.

If we should adopt the above conclusion it would necessarily result in a holding that the time during which the house in which the bill originated was temporarily adjourned could not be counted against the time limiting the governor's right or power to return the bill with his objections to 5 days from the time it was presented to him, and therefore in order that the governor might at times be advised of the amount of time within which the power was still in him to so act in respect of any particular bill, it would be necessary that he be informed of the length of each adjournment, and that he add the space of each to the 5 days' time referred to above. We think such a construction would result in many evils and abuses, and that it is not the one intended by the framers of section 18 of article 3.

The sound insistence is the one made by appellee. 'Adjournment,' as used in the phrase above quoted from the constitution, means final adjournment. * * *

Beyond question a return made by the governor of a bill with his objections thereto in writing to the committee on enrolled bills of the house of origin, or to any member thereof, would be a good return of the bill and objections within the meaning of the constitution. The committee, or any member of it *virtute officii*, would be under the duty of placing before the house where the bill originated, when a quorum was present therein, the

bill with the objections of the governor thereto, to the end that the bill might be reconsidered by that house, and if passed by it, and passed by the other house, notwithstanding the objections of the executive, it might be dealt with by the committee as provided by section 230 of Shannon's Code. Furthermore, we think such a return might properly be made within the meaning of the constitution to the clerk of the house in which the bill originated. He would be chargeable by reason of his office or employment with the duty of informing the house, when a quorum was present, of the fact that the governor had returned the bill with his objections thereto. * * *

The house in which a bill originates is a parlimentary body, and must, so far as the manual possession of its journals, bills and enrolled bills, resolutions and the like, is concerned be represented by agents. It has custody of such things through its agents, and although a house in which a bill originated might be in open session with a quorum present, it could only gain knowledge of the fact that the bill was returned by the governor, with his objections, through the manual act of some agent for the house, or member acting in that capacity. In other words, if a bill should be returned by the governor, with his objections, to the house in which it originated, while the house was in open session, with a quorum present, and ready to reconsider the bill, the messenger from the governor, or the governor himself, if he should return the bill in person, would doubtless deliver manual possession of the bill to the clerk of the house, to the speaker of the house, or to some member of the committee on enrolled bills, and by means of the individual agency so selected, the house would gain intelligence of the fact that the bill had been returned, and of the substance and meaning of the objections of the governor returned with the bill. These considerations demonstrate that it could not have been the intent of the framers of section 18 of article 3 that the return of the bill, with the objections of the governor, could only be made while the house in which the bill originated was in open meeting with a quorum present. Nothing could be accomplished by a return of this character which would not be equally well accomplished in any one of the other modes above indicated. * * *

Only one contingency can save a bill from becoming a law, where the governor fails to return it, with his objections, to the house where it originated, within the time limited; 'the same shall become a law without his signature, unless the general assembly, by its adjournment, prevents its return, in which case it shall not become a law.' Such is the unmistakable mandate of the constitution. House Bill No. 19 was not returned during the time limited within which power was vested in the governor to return it with his objections; its return was not prevented by final adjournment of the assembly; therefore the bill became a law at the expiration of the time limited, and its subsequent return by the governor to the house, and any action on it taken by the house must be regarded as nullities. * * *

There is no warrant in the constitution for the idea that a session of the general assembly ends with each temporary adjournment by the joint action of both houses composing it, nor for the idea that a new session begins with each subsequent resumption of activity. The session is continuous, although parliamentary and legislative activity, which must be accomplished by human agencies, necessarily cannot be continuous. If the intent of the framers of the constitution had been that a mere temporary adjournment of the house in which a bill originated could prevent its return by the governor within the time limited, no reason can be imagined for their failure to express the idea in plain terms."

The foregoing decision of the supreme court of Tennessee is supported by the following authorities which are cited in the opinion, and which on examination are found to be in point:

Miller vs. Hurford, 11 Nebr., 377;
State vs. Michel, 52 La. Ann. 936;
In Re: Soldiers Voting Bill, 45 N. H. 607;
Harpending vs. Haight, 39 Calif., 189;
Corwin vs. Comptroller, 6 S. C. 390;
Hequenbourg vs. Dunkirk, 48 Hun., 550;
Opinions of the Justices, 3 Mass., 567;
Lewis' Southerland Statute Construction (2nd Edition) Vol. Sec. 62.

The constitutional provision involved in the foregoing cases was substantially the same as the provision of the Ohio constitution now under consideration.

In Miller vs. Hurford, supra, the court held that:

"The constitutional restriction applies to an adjournment sine die and not to one from time to time."

In State vs. Michel, supra, the court at page 941 said:

"'Adjournment' as here used means final adjournment at the close of the session; not adjournment for the day, or for several days during the session. * * *

If the house in which the bill, proposed to be vetoed, originated, should happen not to be in session when the governor's message arrived, delivery of the bill, with the governor's objection, to the presiding officer of the body, or to its clerk, would seem, according to the adjudicated cases, to suffice; and in case neither the presiding officer, nor the clerk, can be found, its deposit on the presiding officer's table or desk, or in the office of the clerk would, doubtless, likewise suffice."

In Re: Soldiers Voting Bill, supra, the court at page 610 said:

"The adjournment referred to in this provision of the constitution is not, we think, the ordinary recess or adjournment from time to time during the continuance of the session, but the final adjournment at the close of the session. In fact, this is the only adjournment we think which could prevent a return of the bill within the time limit."

It was also held in the foregoing case that the governor during temporary adjournments, could return bills within the constitutional time "to the speaker or to the clerk or some other proper officer."

In Harpending vs. Haight, supra, the court approved and followed the New Hampshire decision (45 N. H. 610), and distinguished between temporary and final adjournments. With respect to temporary adjournments of the general assembly the court said:

"It still has an organized existence as a legislative body, with its president, secretary and other officers, to whom, under such circumstances, a substitutional delivery of the bill and message might be made, and whose official duty it would be to place the bill and message before the senate at as early a time as might be thereafter. Such a return, as we have said, would be the

only one permitted by the circumstances, and when the bill should afterwards actually reach the senate, it could then proceed to reconsider it, as required by the constitution in that respect.

But when a final adjournment of the legislature has occurred, there is an end to the organized existence of the senate. It has no longer officers to represent it for any purpose; nor could the bill, in the nature of things, ever be brought to its attention, for it would not be in session thereafter, nor be reconsidered by it, which is the purpose to be attained, for it would be itself no longer existing."

In Corwin vs. Comptroller, supra, the court, after holding that the word "adjournment," as used in a constitutional provision similar to section 16 of article II of the Ohio constitution, meant final adjournment, also held that bills might be returned to the speaker or clerk within the proper time during temporary adjournment. At page 398 the court said:

"In our judgment, too, the bill might have been returned to the speaker or clerk on any day of the three days after it was presented to the governor (Sunday excepted); and the house not being in session on Friday or Saturday, and, assuming, for the argument, that it was not in session on Monday, did not prevent his compliance with the constitutional requisition. From the commencement to the close of a session, the speaker and the clerk may, by fair inference, be supposed to be present at the seat of government, although the house may have adjourned for three days. Certainly the clerk has a known office where the papers committed to his keeping, both during the sitting and vacation of the house, are kept, and where persons having official business may confer with him."

In State vs. Joseph, 57 So., 942, while the court held that the word "adjournment" as used in a constitutional provision of the class now under consideration, contemplated a final adjournment, and not a mere recess, also held that the governor could not return a bill to any officer or aggregation of members of either house when it is not in session. This latter holding is probably based upon the further constitutional provision which does not appear in our constitution, that "when return is prevented by recess, such bill must be returned to the house in which it originated within two days after the reassembling, otherwise it shall become a law."

It may be suggested or contended that there is a conflict of authority on the questions now under investigation, but as was aptly said in Johnson City vs. Electric Co., supra, "the conflict is very slight, if it may be said to exist." The court then proceeds to examine and distinguish the so-called opposing cases of People vs. Hatch, 33 Ill., 135 and State vs. South Norwalk, 77 Conn., 257.

With respect to People vs. Hatch, supra, it was said:

"Some of the reasoning of the Illinois court is in conflict with the views we entertain and with those entertained by the other courts above cited. But it is manifest that the conclusion reached by the Illinois court must be rested upon the peculiar provision of its constitution."

With respect to State vs. South Norwalk, supra, it was pointed out that the court rested its decision on the practical construction of the Connecticut constitution made by the legislature and chief executives of the state, which had been acted upon by those two departments of the state government for a period of eighty-five years. The decision also was made without reference to any of the cases holding the opposing view.

A decision of the supreme court of New Jersey in re: An Act, etc., concerning Public Utilities, 84 Atl., 706, should also be added to the small group of opposing cases.

In accordance with the weight of judicial authority, it is my duty to advise you as follows:

(1) The word "adjournment," as used in section 16 of article II of the state constitution, means the final adjournment of the general assembly.

(2) During a temporary adjournment of both houses of the general assembly to a day beyond the time within which the governor is required to return a bill which he does not approve, the governor, in case he desires to exercise his veto power, should return the bill, with his objections in writing, to the clerk of the house in which the bill originated within ten days, Sundays excepted, after it has been presented to him for approval. A return to the clerk, during such adjournment, is a return to the house, within the meaning of section 16 of article II of the state constitution.

Respectfully,
JOHN G. PRICE,
Attorney-General.

234.

COSTS IN FISH AND GAME CASES—COUNTY AUDITOR'S DUTY UNDER PROVISIONS OF SECTION 1404 G. C.

The direction to the auditor under the provisions of section 1404 *to issue a warrant for costs property certified to him in prosecutions under the fish and game laws, in cases where the defendant has been acquitted or discharged from custody, or convicted and committed in default of payment of fine and costs, is mandatory.*

COLUMBUS, OHIO, April 25, 1919.

The Department of Agriculture, Bureau of Fish and Game, Columbus, Ohio.

GENTLEMEN:—I have your communication of March 13, 1919, requesting my opinion as follows:

> "In several instances the attention of this department has been called to the fact that justices of the peace in certifying, under oath, to the county auditor the costs in fish and game cases, as provided under section 1404, wherein the defendant has been acquitted or discharged from custody and committed in default of payments of costs, that the auditor refuses to make the proper certification and issue his warrant on the county treasurer.
>
> Will you, therefore, advise me if the county auditor shall issue his warrant on the county treasurer after all errors are corrected therein?"

Seetion 1404 to which you refer, is as follows:

> "A person authorized by law to prosecute a case under the provisions of this chapter shall not be required to advance or secure costs therein. If the defendant be acquitted or discharged from custody, or if he be convicted and committed in default of payment of fine and costs, such costs shall be certified, under oath by the justice to the county auditor who shall correct all errors therein and issue his warrant on the county treasurer payable to the person or persons entitled thereto."

The language of the statute is unambiguous and mandatory, and imposes the duty upon the auditor to issue his warrant for payment of costs as therein provided.

The section is applicable to all prosecutions properly instituted for violation of the provisions of the chapter of the Code relating to fish and game in which the defendant has been acquitted or discharged by dismissal or abandonment of the prosecution, or has been convicted and committed in default of payment of fine and costs.

The same holding was made by this department in an opinion to Hon. P. A. Saylor, prosecuting attorney, Eaton, Ohio, and being opinion No. 2016, page 1750 Opinions of the Attorney-General for 1916.

Being of the opinion that the auditor has no discretion in the matter, I advise that after the correction of errors, if any may appear in the cost bill, it is the mandatory duty of the auditor to issue a proper warrant for the payment of such costs.

Respectfully,
JOHN G. PRICE,
Attorney-General.

235.

APPROVAL OF BOND ISSUE OF CLEVELAND HEIGHTS IN THE SUM OF $75,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 25, 1919.

236.

COUNTY AND INDEPENDENT AGRICULTURAL SOCIETIES DISTINGUISHED.

When one agricultural society has been formed in a county, and is operating in compliance with law as a county society, and is receiving the official recognition of the state department of agriculture as such, the statutes do not contemplate the existence of additional societies with the status of "county society," but apply to them the status of "independent societies."

COLUMBUS, OHIO, April 26, 1919.

HON. ROBERT M. NOLL, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—I have your letter of February 10, 1919, requesting my opinion upon the following statement of facts and inquiry:

> "We have in Washington county, at Barlow, Ohio, an association under the name of The Barlow Agricultural & Mechanical Association. They

hold land by lease, on which they have placed valuable improvements in the way of buildings, stalls, stands and pavilions. They have successfully and continuously held forty-seven annual fairs. The corporate name of the society as taken from their constituton, article 1, section 1:

'Name: This society shall be known as The Agricultural & Mechanical Association of Barlow and Adjoining Township.'

By-laws, article 1, is as follows:

'Competitors for premiums, except in Art Hall and Floral Pavilion, at the annual fair, must be members of the society or belong to the family of such member, and own the article exhibited.'

This society has complied with all the requirements of section 9880-1 and are under favor of this section, receiving financial aid from Washington county.

The officers of said Barlow Association desire to have interpreted in their favor section 14571 of the General Code, in order that they may receive from the county commissioners assistance to be used in the improvement of their grounds and buildings.

I will be pleased to have your opinion interpreting section 14571 as to whether the commissioners of Washington county, Ohio, may or may not render the assistance to this society under favor of this section."

On March 19, 1919, pursuant to my request, you further advised me, regarding the agricultural society in question, that said society is one organized not for profit and pursuant to the provisions of the act of February 28, 1846, which fact is also shown by certain references in its constitution and by-laws. You also advised that there is in Washington county another society known as the Washington Agricultural and Mechanical Association, which receives assistance both from the county and the state and holds fairs annually, of a general county fair character.

Section 14571 G. C., to which you refer, is as follows:

"When a county society in a county containing a city of second grade of the first class has purchased or leased for a term of not less than twenty years, real estate as a site whereon to hold fairs, or when the title to the grounds is vested in fee in the county, but the society has the control and management of the lands and buildings the county commissioners may if they think it for the interests of the county and society, pay out of the county treasury the same amount of money for the purchase or lease and improvement of such site or either of them as is paid by such agricultural society or individuals for such purpose or either of them, and such commissioners may levy a tax upon all the taxable property of the county sufficient to meet the provisions of this section."

In the case of commissioners of Lawrence County vs. Brown, Auditor, 1 N. P. (N. S.) 357, the above section was considered, and while the special application of the section to counties having a city of the second grade of the first class was held unconstitutional, the remainder of the section was considered valid and operative.

It is, then, to be noted that the operative provisions of said section 14571 G. C., as thus construed, do not differ in any essential respects from the provisions of section 9887 G. C., and in my opinion have no broader or different application.

Section 9887 G. C. reads as follows:

"When a county society has purchased, or leased real estate whereon to hold fairs for a term of not less than twenty years, or the title to the grounds is vested in fee in the county, but the society has the control and manage-

ment of the lands and buildings; if they think it for the interests of the county, and society, the county commissioners may pay out of the county treasury the same amount of money for the purchase or lease and improvement of such site as is paid by such society or individuals for that purpose, and may levy a tax upon all the taxable property of the county sufficient to meet such payment."

From the information which you have furnished me, it is apparent that the agricultural society in question was not originally formed as a township society, pursuant to the provisions of section 9911 G. C., not only from the definite reference in the by-laws to the act of 1846, as the source of authority for the creation of the society, but also from the further fact that section 9911 G. C., relating to township societies, in its earliest form appears not to have been enacted at the time of the organization of the society in question.

The exact scope and effect of section 9880-1 G. C. are not altogether free from difficulty inasmuch as it seems to evidence a legislative notion that agricultural societies are clearly divisible into classes of county and independent societies, whereas an examination of the legislation creating agricultural societies does not clearly disclose such classification with respect to their powers and qualifications for the purpose of the several provisions for public assistance or aid.

It must be said that the various statutes relating to the creation and administration of agricultural societies are encumbered with a great deal of uncertainty and their proper construction and the mode and manner of distinguishing between the so-called county society and the independent society fraught with much doubt.

However, it appears to have long been determined by administrative construction that section 9880 G C., and its predecessors in the development of the legislation, as well as the several other sections providing for public aid in various forms for county societies, contemplate the existence of but one county society, and that when the field has once been occupied by the proper formation and continuation of a society, the authorization in that regard has been exhausted. Such other societies as may be formed within the county are thus relegated to the domain of independent societies.

Thus construed it is at once apparent that the one society first establishing its identity as the county society may avail itself of the several provisions for public aid to county societies, while the remainder of the species must look only to the provision of section 9880-1 G. C., as the source and extent of their authority for acquiring aid from the public treasury.

There has been no judicial determination of the correctness of the interpretation established in the administration of the law, but upon investigation I find it has been quite uniformly pursued and acquiesced in, and has received the approval of this department on a number of occasions as wellas of the state department of agriculture.

In an opinion of this department found at page 2080 of the Opinions of the Attorney-General for 1915, it was said:

"While there seems to be no express provision of law regulating the mode and manner by which the status of an agricultural society may be legally fixed, as the county agricultural society, yet the administration of the law as an entirety is inconsistent with any other procedure than to recognize as the county society the society adopted by the state board under the provisions of said section 9880, supra."

In the absence of the requisite certainty in the provision of the statute to import with some definiteness a contrary intent and purpose in their enactment, I am not

inclined to dissent from the interpretation which has been worked out in the administration of the law.

From what has been said it follows that the right of the Barlow Agricultural and Mechanical Association to receive the aid from the county commissioners which they are seeking, is dependent upon the fact of its having established its identity as the county agricultural society in advance of the field having been occupied by any other existing county society duly qualified as such.

Your statement indicates that there is another society in your county recognized as the county society, and receiving public aid as such, and if it has so qualified in advance of the Barlow society, I advise that the latter would not be entitled to receive the aid it is seeking.

Respectfully,
JOHN G. PRICE,
Attorney-General.

237.

SHERIFF—WITHOUT AUTHORITY TO EMPLOY CHAUFFEUR.

No legal authority exists for the employment by the sheriff, at the expense of the county, of a chauffeur to operate an automobile purchased, under section 2412-1 G. C., by the county commissioners for the use of the sheriff.

COLUMBUS, OHIO, April 26, 1919.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of March 6th, reading as follows:

> "The sheriff has an automobile the property of the county, purchased by authority of sections 2412-1 and 2412-2 G. C., 107 O. L. 585.
>
> The sheriff's deputy does not operate an automobile and there have been occasions when a chauffeur has been employed to operate and run the automobile for the sheriff or deputy. This is done sometimes when the sheriff or deputy has a prisoner or insane patient or at times when serving writs.
>
> May the commissioners allow these expenditures of the sheriff?"

Sections 2412-1 and 2412-2 G. C. (107 O. L. 585) authorize county commissioners to purchase automobiles for the use of the county commissioners and the county sheriff, but furnish no authority for the employment of chauffeurs to operate such automobiles.

Section 2997 G. C. is the only section I know of which in any way seems pertinent to the present inquiry. That section reads:

> "Section 2997. In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary expenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble-minded youth, Ohio hospital for epileptics, boys' industrial

school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

In opinion rendered on March 20, 1915 (No. 154, Opin. of Atty. Gen. for 1915, Vol. I, p. 295), the Attorney General said:

"In the case of State ex rel. Sartain as sheriff of Franklin county, Ohio vs. Sayre, as auditor, etc., et al., (12 O. N. P. N. S. 61), Judge Rathmell of the court of common pleas of said county held that the word 'vehicles' as used in the above statute, includes automobiles.

The county commissioners may, therefore, make an allowance to the sheriff for the expenses of maintaining his automobile when used in the proper administration of the duties of his office. The answer to your question calls for a definition of the word 'maintaining' as above used.

In the case of State ex rel. Denormandie vs. Commissioners of Mahoning county, 10 Ohio Cir. Ct. (n. s.) page 398, the court in construing the above section defined the word 'mairtaining' as follows:

'The meaning of the word "maintaining" as used in this section, in reference to horses and vehicles, means supporting; sustaining; keeping up; supplying with the necessaries of life; and the legislature, therefore, in this provision only meant and intended that sheriffs should be allowed the necessary expense incurred in supporting, sustaining and supplying their horses with the necessaries of life and *in keeping their vehicles in good condition*, and not in the purchase of them.' "

From the definition just quoted, it would seem that the word "maintaining," in section 2997 G. C., refers, in the case of an automobile, to the upkeep of the vehicle itself, and is not broad enough to authorize the employment and compensation of a chauffeur to operate the same for the sheriff.

Such was the conclusion reached by the Attorney-General in an opinion rendered on October 4, 1913 (Annual Rep. of Atty. Gen. for 1913, Vol II, p. 1405), the last two paragraphs of which are:

"There is no authority conferred by the foregoing section upon a sheriff to employ a chauffeur or caretaker for his automobile at the expense of the county, even though the automobile is used in the discharge of official duties.

I am therefore of the opinion that payment out of the county treasury for such purpose would be illegal."

It is true that the automobile spoken of in the opinion just referred to was an automobile owned by the sheriff, whereas we are now considering an automobile bought and owned by the county, under section 2412 G. C., cited supra. It is not perceived,

however, how the difference in the nature of the ownership produces any different result on the question raised by your letter.

You are therefore advised that there is no authority for the allowance and payment by the county commissioners of the expenditures mentioned in your letter.

Respectfully,
JOHN G. PRICE,
Attorney-General.

238.

TAXES AND TAXATION—SLEEPING CAR, FREIGHT LINE AND EQUIPMENT COMPANIES—BASIS OF APPORTIONMENT—TRACK MILEAGE.

Under the decision of the supreme court of the United States in Union Tank Line Co. vs. Wright, rendered March 24, 1919, the thing to be apportioned to Ohio on the basis of track mileage under sections 5463 to 5465, inclusive, of the General Code, is the value of the daily average number of cars operated in this state by a sleeping car, freight line or equipment company, and not the value of the whole number of cars owned and operated by the company.

The basis of apportionment under such sections is the track mileage, and not the car mileage.

COLUMBUS, OHIO, April 26, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—My attention has just been called to a very recent decision of the United States supreme court in the case of Union Tank Line Co. vs. Wright, comptroller-general of Georgia, rendered March 24, 1919. This decision is of some importance to the tax commission in connection with the administration of the statutes providing for the taxation of sleeping car, freight line and equipment companies. I have therefore assumed the privilege of addressing an opinion to the commission as to the effect of the decision without a formal request therefor.

The facts before the supreme court, as stated by Mr. Justice McReynolds, who delivered the opinion in the case, were as follows:

> "Union Tank Line * * * an equipment company * * * which has never carried on business or had an office in Georgia, owns twelve thousand tank cars suitable for transporting oil over railroads and rents them to shippers at agreed rates, based on size and capacity. The roads over which they move also pay therefor stipulated compensation. Under definite contract certain of these cars were furnished to the Standard Oil Company of Kentucky and all of those which came into Georgia were being operated by the oil company under such agreement. They were not permanently within that state but passed 'in and out.'
>
> * * * the tank line made the following tax return to the comptroller general for 1913—
>
> * * * * * * * * *
>
> (The report showed the total value of the cars of the company and stated that 'Union Tank Line Company had an average of 57 tank cars in Georgia during 1913, which at a value of $830 per car equals $47,310.00' * * *.)
>
> Acting upon information contained in return above quoted, the comptroller general assessed the tank line's property for 1913 at $291,196.00, * * *

and demanded payment. In explanation of this action he wrote to it as follows:

"* * * you have furnished the data desired, but have made an error in the application of same. After giving the mileage for the company everywhere and for Georgia, you then go ahead and assign 57 tank cars for this state and value them at $830 each, making the total for Georgia $47,310.00. This is an incorrect method. If you were to be allowed to merely assign so many cars to the state for taxation there would be no need for the mileage figures to be furnished. The valuation to be assigned to Georgia must be in the same proportion to the valuation for the entire company, as the mileage in Georgia bears to the entire mileage everywhere. * * *"

The case was submitted upon an agreed statement of facts which admitted that the comptroller had no evidence before him other than that set forth in the report. An action being brought in the courts of Georgia, it was ultimately held by the supreme court of that state that the physical property of the company had been properly assessed as required by statutes not in conflict with either state or federal constitution. (146 Ga., 489).

The statutes under which the proceedings were had and the decision of the supreme court of Georgia was made are as follows:

"Sec. 989. Each non-resident person or company whose sleeping cars are run in this state shall be taxed as follows: Ascertain the whole number of miles of railroad over which such sleeping cars are run, and ascertain the entire value of all sleeping cars of such person or company, then tax such sleeping cars at the regular tax rate imposed upon the property of this state in the same proportion to the entire value of such sleeping cars that the length of lines in this state over which such cars are run bears to the length of lines of all railroads over which such sleeping cars are run. The returns shall be made to the comptroller-general by the president, general agent, or person in control of such cars in this state. The comptroller-general shall frame such questions as will elicit the information sought, and answers thereto shall be made under oath. If the officers above referred to in the control of such sleeping cars shall fail or refuse to answer, under oath, the questions so propounded, the comptroller-general shall obtain the information from such sources as he may, and he shall assess a double tax on such sleeping cars. If the taxes herein provided for are not paid, the comptroller-general shall issue executions against the owners of such cars, which may be levied by the sheriff of any county of this state upon the sleeping cars or cars of the owner who has failed to pay the taxes.

"Sec. 990. Any person or persons, co-partnership, company or corporation wherever organized or incorporated, whose principal business is furnishing or leasing any kind of railroad cars except dining, buffet, chair, parlor, palace or sleeping cars, or in whom the legal title in any such cars is vested, but which are operated, or leased, or hired to be operated on any railroads in this state, shall be deemd an equipment company. Every such company shall be required to make returns to the comptroller-general under the same laws of force in reference to the rolling stock owned by the railroads making returns in this state, and the assessment of taxes thereon shall be levied and the taxes collected in the same manner as provided in the case of sleeping cars in section 989."

For the purpose of camparison at this point I quote section 5462 et seq. of the General Code of Ohio:

"Sec. 5462. Annually, between the first and thirty-first days of May, every sleeping car, freight line and equipment company, doing business or owning cars which are operated in this state, shall under the oath of the person constituting such company, if a person, or under the oath of the president, secretary, treasurer, superintendent or chief officer in this state of such association or corporation, if an association or corporation, make and file with the commission a statement in such form as the commission may prescribe.

Sec. 5463. Such statement shall contain:

1. The name of the company.

2. The nature of the company, whether a person or persons or association or corporaton, and under the laws of what state or country organized.

3. The location of its principal office.

4. The name and postoffice address of the president, secretary, auditor, treasurer and superintendent or general manager.

5. The name and postoffice address of the chief officer and managing agent of the company in this state.

6. The number of shares of capital stock.

7. The par and market value, or, if there is no market value, the actual value of the shares of stock on the first day of May.

8. A detailed statement of the real estate owned by the company in this state, where situated, and the value thereof as assessed for taxation.

9. The total value of the real estate owned by the company and situated outside of this state.

10. The whole length of the lines of railway over which the company runs its cars, and the length of so much of such lines as is without and is within this state.

11. The whole number and value of the cars owned or leased by the company classifying the cars according to kind, and the daily average number of cars operated in this state.

Sec. 5464. In the case of an equipment company, such statement shall also contain the whole number and value of the cars owned and leased by the company, classifiying the cars according to kind; the whole length of the lines of railway, wherever located, operated by the companies, naming them, to which cars owned by such equipment company are leased, and the length of so much of such lines as is without and within this state, giving the name and location of the lines wholly or partially within this state.

Sec. 5465. On the first Monday in July, the commission shall ascertain and determine the amount and value of the proportion of the capital stock of sleeping car, freight line and equipment companies, representing capital and property of such companies owned and used in this state, and in so determining shall be guided in each case by the proportion of the capital stock of the company representing rolling stock, which the miles of railroad over which such company runs cars, or its cars are run in this state, bear to the entire number of miles in this state and elsewhere over which such company runs cars, or its cars are run, and such other rules and evidence as will enable the commission to determine, fairly and equitably, the amount and value of the capital stock of such company representing capital and property owned and used in this state."

Without at this time making the comparison in detail, let me observe that the Ohio statute is evidently framed on the very theory adopted by the general assembly of Georgia and by the comptroller-general in making the assessment.

The supreme court of the United States held this assessment to be illegal, using the following language:

"A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the Fourteenth Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well 'the intangible value due to what we have called the organic relation of the property in the state to the whole system.' How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisement produ ing results approximately correct—for example, the mileage basis in case of a telegraph company (W. U. Tel. Co. vs. Massachusetts) and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. vs. Hall). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause of the Fourteenth Amendment or both. *W. U. Tel. Co.* vs. *Massachusetts*, 125 U. S. 530; *Marye* vs. *B. & O. R. R.*, 127 U. S. 117; *Pullman's Car Co.* vs. *Pennsylvania*, 141 U. S. 18, 26; *Adams Express Co.* vs. *Ohio*, 165 U. S. 194, s. c. 166 U. S. 185; *American Refrigerator Transit Co.* vs. *Hall*, 174 U. S. 70; *Union Referigerator Transit Co.* vs. *Lynch*, 177 U. S. 149; *Fargo* vs. *Hart*, 193 U. S. 490; *Cudahy Packing Co.* vs. *Minnesota*, 246 U. S. 450, 453.

In the present case the comptroller general made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim— of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted ha no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia during 1913 and each had a 'true' value of $830. Thus the total there subject to taxation amounted to $47,310—the challenged assessment specified $291,196.

We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce.

Pullman's Car Co. vs Pennsylvania, supra, relied on by defendant in error, contains the following passage which seems to uphold the Georgia rule—'The mode which the state of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more.' But the point therein spoken of was unnecessary to deter-

mination of the cause; and so far as the quoted passage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable and productive of conclusive results it must be regarded as *obiter dictum*, and we cannot now approve or follow it."

Both the Ohio statute and the Georgia statute were, I feel bound to say, based upon the very passage in *Pullman's Car Co. vs. Pennsylvania*, which the supreme court by its latest decision has stamped as an inaccurate dictum.

The supreme court in the Georgia case did not hold the statute unconstitutional, but merely held the assessment invalid as relating to property which was outside the taxing jurisdiction of the state. I feel bound to say that the Georgia statute in terms commands the comptroller general to do exactly what he did, and under the Ohio statute the commission is commanded to take the whole "capital stock of the company representing rolling stock" and assess for taxation that proportion thereof which is indicated by the proportion which "its cars are run in this state, bear (s) to the entire number of miles in this state and elsewhere over which such company runs cars, or its cars are run."

Fortunately, however, the Ohio statute is a little more liberal than the Georgia statute, in that the Georgia statute expressly stated what should be done in making the assessment, whereas the Ohio statute (section 5465) merely declares that the commission shall be "guided in each case by" the calculation which I have mentioned and may take into consideration, in addition to the result of such calculation, "such other rules and evidence as will enable the commission to determine, fairly and equitably, the amount and value of the capital stock of such company representing capital and property *owned and used in this state*."

I feel certain, therefore, that the Ohio statute is constitutional. I must, however, advise the commission that it would not be lawful to apply the mileage ratio which the statute commands to the entire rolling stock of sleeping car, freight line or equipment companies in the light of the decision which the supreme court has made. Instead, the commission must have regard to what is reported under the heading designated as

> "The whole number and value of the cars owned or leased by the company classifying the cars according to kind, *and the daily average number of cars operated in this state*;"

and the thing to be apportioned on the track mileage basis is the total value of the daily average number of cars operated in this state.

It may be that the commission has been following the proper rule. If such is not the case, however, I must strongly advise that the rule be changed to conform to that which I have just outlined.

In this connection it may be worth while to observe that the basis of apportionment under the statute is track mileage—not car mileage. In other words, it is the number of miles of railroad over which the cars are run, and not the number of miles which the cars actually run, that is to determine the ratio. This will result, of course, in a very small percentage being assigned to Ohio, and the combined effect of the observance by the commission of the two points touched upon in this opinion will very much reduce the revenues of the state from this source, if the commission has been apportioning the whole value of the rolling stock on the basis of car mileage, instead of apportioning the value of the average number of cars moving through the state on the basis of track mileage. To avoid in part such loss of revenue the statute might be amended to provide for the use of the car mileage factor instead of the track mileage rule. Ohio would probably profit by such an arrangement.

Respectfully,
JOHN G. PRICE,
Attorney-General.

239.

PROCEDURE FOR PROBATE COURT WHEN INQUEST FOR INSANITY IS TO BE ASCERTAINED—PERSON CHARGED RESIDENT OF ANOTHER COUNTY—PROCEDURE IN SUCH CASE.

1. *A probate judge has, generally speaking, no power to make an adjudication of lunacy unless the person who is the subject of the inquest is a resident of the county wherein the probate court is situate.*

2. *Where a probate judge ascertains, after a lunacy affidavit is filed, that the alleged insane person is not a resident of the county wherein the lunacy proceeding is instituted, but of another county of the state, there is no statutory authority for the transfer of such person to the probate court of the county of his residence.*

3. *In such case it would be proper for the probate judge to communicate with the probate judge of the county of such alleged person's residence, to the end that a lunacy affidavit might be filed in the latter county. A warrant then issued thereon, under section 1954 G. C., would authorize the person to whom said warrant was directed to take the alleged insane person into custody in any county of the state.*

COLUMBUS, OHIO, April 26, 1919.

HON. JOHN P. COONROD, *Judge of Probate Court, Fremont, Ohio.*

DEAR SIR:—Acknowledgment has already been made of your letter of recent date, reading thus:

> "What is the procedure for the probate court when in an inquest of insanity he ascertains that the person so adjudged insane is not a resident of this county, but a resident of some other county of the state?
>
> I know of no authority that authorizes the transfer of the person so charged with being insane, to the place of his legal residence.
>
> There is a provision of law that if a person so alleged to be insane is not a resident of Ohio, and his residence is unknown, that the court shall notify the board of state charities who shall direct further procedure.
>
> The above proposition has come up several times during my administration as probate judge. If the person so alleged to be insane is committed to the asylum and he has no friends or relatives who can be charged with his care and support, the county becomes liable for his clothing, etc.
>
> I would be greatly obliged to you for your opinion on the above proposition."

That the probate judge has no jurisdiction to make an adjudication of lunacy unless the person who is the subject of the inquest is a resident of the county wherein the probate court is situate, was pointed out by the attorney-general in opinion No. 764, found in 1917 A. G. O., Vol. III, p. 2037. The reasons for such conclusion were not, however, stated in said opinion, the point being assumed, rather than discussed.

The soundness of the proposition is, however, apparent from various sections of the law relating to admission to hospitals for the insane, among which sections the following are especially noteworthy.

Section 1953 G. C. says:

> "For the admission of patients to a hospital for the insane, the following proceedings shall be had. A resident citizen of the proper county must file with the probate judge of such county an affidavit, substantially as follows:" (Here follows a form of affidavit.)

You will observe that among the necessary allegations of said affidavit is that the alleged insane person "has a legal settlement in ---------- township, *in this county.*"

Section 1966 G. C. says:

> "In cases requiring an escort, if neither the patient nor his friends are financially able to bear the expense of his removal, the superintendent shall give notice to the probate judge of the county of which the patient is an inhabitant, who shall forthwith issue his warrant to a suitable person, giving the friends of patients the preference, which shall read as follows:
>
> The State of Ohio ---------- County, ss.,
> Office of the Probate Judge of said county.
>
> The proper authority having directed that----------, a patient from this county, in the state hospital for the insane at -------- ---------- be removed therefrom, you are commanded forthwith to remove such patient and return him to his home in this state.
> Witness my hand and official seal this ---------- day of----------, 19------ ----------A. D. ----------Probate Judge."

Notice particularly in said section the phrase "the county of which the patient is an inhabitant."

There is, I apprehend, but one exception to the rule that the probate judge has no jurisdiction to adjudge insane a nonresident of the county, and that refers to a nonresident of the *state*, whose admission into a state hospital has been authorized by the Ohio board of administration under section 1950 G. C. (103 O. L. 447), after the proceedings prescribed by section 1819 (103 O. L. 446) and section 1820 G. C. (103 O. L. 446) have been taken. The proceedings relating to insane convicts, authorized by sections 2216 and 2217 G. C., terminate in an "order of transfer," rather than an order of commitment.

The foregoing discussion is, I realize, not precisely responsive to your question, yet it was thought desirable in view of the first paragraph of your letter which rests your question upon the assumption that the non-resident of a county has been *adjudged* insane by the probate court. The point is that, as a general proposition, the probate judge has no authority to adjudge insane a non-resident of the county, and that no question as to the transfer to another county of the state of a person so adjudged could, strictly speaking, arise.

The second paragraph of your letter, however, puts the question properly; that is, it deals with a situation where a probate judge ascertains, after a lunacy affidavit is filed, that the alleged insane person is not a resident of the county wherein the lunacy proceeding is instituted, but of another county of the state. The question is, whether or not the probate judge under such circumstances is authorized by law to "transfer" such person to the place of his legal residence. By "transfer" you mean, I presume, the transportation of said alleged insane person, under proper custody and restraint, to the probate court of the county of his residence, without personal expense to the person exercising the custody and restraint.

I am unable to find any statute which authorizes such a transfer to be made, although the desirability of a law of that nature is apparent. Section 3482 G. C. provides for the removal of a pauper from a county of non-residence to the county of residence, but this section would hardly be available for the transfer of an alleged insane person, unless the misfortune of such person comprehended poverty as well as insanity.

Upon discovering that the alleged insane person is a non-resident of the county, the probate judge may communicate that fact to the probate judge of the county of such alleged insane person's residence. A lunacy affidavit could then be filed with the probate judge of the county of residence, and a warrant issued by said judge, under section 1954 G. C., to a suitable person, commanding him to bring the person alleged to be insane before him.

Construing section 1954 G. C., the attorney-general, in opinion (No. 1486) rendered on September 28, 1918, to Hon. Homer Z. Bostwick, probate judge, Columbus, O., said:

> "It will be noted that the probate judge may issue his warrant for the arrest of the person alleged to be insane to a 'suitable person.' This person may or may not be the sheriff of the county. I am of the opinion that when this warrant is issued to such suitable person, such warrant is authority for such person to take the alleged insane person into custody in any county in the state of Ohio, and the expense of arresting such insane person and bringing him before the court may be paid, if the person to whom the warrant was issued is a person other than the sheriff or deputy sheriff, under the provisions of section 1981 G. C., * * *."

Respectfully,
JOHN G. PRICE,
Attorney-General.

240.

BOARD OF EDUCATION—CAN RENT OR LEASE SCHOOL ROOMS—CAN NOT PURCHASE OR CONSTRUCT SCHOOL BUILDING UNLESS MONEY IN TREASURY OR IN PROCESS OF COLLECTION.

A board of education can rent or lease suitable school rooms, but cannot enter into a contract to purchase or construct a school building at some future time unless the money for the same is in the treasury to the credit of the proper fund, and so certified by the clerk of the board.

A board of education can purchase a building to be used for school purposes, but money required for the same must be in the treasury or in process of collection.

COLUMBUS, OHIO, April 26, 1919.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of April 7, 1919, in which you submit the following:

> "The Warren Acreage & Investment Company of the city of Warren, has an allotment in the eastern part of the city, and while a rapidly growing section of the city, does not have a sufficient number of pupils to warrant the building and equipping of a school house, at once, by the board of education of said city.
>
> The said company are willing to build a school building and rent the same to the board of education of the city of Warren, Ohio, until such time as the board of education would be willing to purchase it.
>
> Our understanding of the law would be that the Warren Acreage &

Investment Company can build a school house and that the board of education may rent it for school purposes, but can the board of education enter into a contract to purchase the school house at some future time? Also can a board of education purchase a school building already built?"

Attention is invited to section 7620 G. C., which reads:

"The board of education of a district may build, enlarge, repair and furnish the necessary schoolhouses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as playgrounds for children, or rent suitable schoolrooms, provide the necessary apparatus and make all other necessary provisions for the schools under its control. It also shall provide fuel for schools, build and keep in good repair fences inclosing such school houses, when deemed desirable plant shade and ornamental trees on the school grounds and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

You are correct in your statement that the board of education "can rent suitable schoolrooms" and this applies whether the building containing such rooms is completely new or has been used for other purposes.

As to your question "Can the board of education enter into a contract to purchase the school house at some future time?", such query is answered in section 5660 G. C., which reads:

"The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force."

Section 5661 G. C. provides:

"All contracts, agreements or obligations, and orders or resolutions entered into or passed contrary to the provisions of the next preceding section, shall be void, but such section shall not apply to the contracts authorized to be made by other provisions of law for the employment of teachers, officers, and other school employes of boards of education."

It is therefore clear that before the board of education can enter into *any* agreement of any kind relative to the building in question, and involving the expenditure of money on the part of the board it is necessary that the certificate of the clerk of the board be filed and recorded, certifying that the money is in the treasury to meet the conditions of such obligation as the same is due and payable. However, the renting of rooms, or the leasing or purchasing of the same are not the exceptions men-

tioned in section 5661 G. C., so the provisions of section 5660 G. C. apply to the matter in question.

In a case in which the facts were partially similar to this one, the Attorney-General, in opinion 1580, issued November 29, 1918, said by way of suggestion:

> "I might suggest, however, that your board of education could take a lease, say for one year if you have sufficient money in the treasury to pay the rental for that time, and place in said lease an option in the board of education to have the use of said property from year to year for a period of five years and, as the board of eduaction would exercise the option each year, the certificate of the clerk could be filed that the money was in the treasury to cover the obligation of said annual rental."

As to your last question, "can a board of education purchase a school building already built? ", attention is again invited to section 7620 G. C., above quoted, which says in two places in the same section:

> "The board of education may * * * make all other provisions necessary for the convenience and prosperity of the schools * * *."

There might be many cases in which it would be more "convenient for the board to purchase an erected building to be used for school pueposes, than to erect a new building, and such action might rebound to the "prosperity" of the schools, both financial and otherwise. And if this is the case, in the judgment of the board, then under section 7620 G. C. it can purchase a satisfactory building to be used for school purpose, for the same section says the board may "enlarge or repair", the central idea being adequate facilities for the school of which the board is the judge in its own locality. Such building when leased or purchased should conform to the building code requirements on school houses.

The opinion of the Attorney-General, therefore, is that a board of education can rent or lease suitable school rooms, but cannot enter into a contract to purchase or construct a school building at some future time unless the funds for the same are in treasury and so appropriated. Further there is nothing in the law to prevent a board of education from purchasing a proper building to be used for school purposes, provided the funds to do so are in the treasury and so certified by the clerk.

Respectfully,
JOHN G. PRICE,
Attorney-General.

241.

APPROVAL OF BOND ISSUE OF CLEVELAND HEIGHTS IN THE SUM OF $10,770.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 28, 1919.

242.

APPROVAL OF BOND ISSUE OF CLEVELAND HEIGHTS IN THE SUM OF $6,095.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 28, 1919.

243.

APPROVAL OF BOND ISSUE OF WADSWORTH VILLAGE SCHOOL DISTRICT IN THE SUM OF $15,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 28, 1919.

244.

MIDDLETOWN CHARTER—LIMITATION OF BONDED INDEBTEDNESS—CHARTER AND STATUTE PROVISIONS CONSTRUED.

The limitation placed upon the amount of bonded indebtedness by section 3 of article XII of the Middletown charter cannot be exceeded by the city in taking advantage of sections 4000-16 to 4000-28, inclusive, of the General Code.

COLUMBUS, OHIO, April 29, 1919.

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

GENTLEMEN:—Your letter of April 17, 1919, requesting my opinion as to the authority of Middletown to issue bonds for the construction of a street railway system under sections 4000-16 to 4000-28 G. C., inclusive, in excess of the amount authorized by section 3 of article XII of the city's charter, was duly received.

With your letter you enclosed a copy of a communication from the city solicitor, dated April 8, 1919, and reading as follows:

> "The city commission of the city of Middletown are inquiring into the feasibility and possibility of establishing a street railway system by virtue of the authority of sections 4000-16 to 4000-28 inclusive.
>
> In the matter of financing such a proposition I find section 4000-23 G. C., reads:
>
> 'The aggregate amount of such bonds authorized by vote of the people or total indebtedness created under the authority of this act shall not be limited by the provisions of any act or statute of Ohio or law, except by the

limitation herein set forth, and such aggregate or total indebtedness shall not exceed two per cent of the total value of all property in such municipal corporation as listed and assessed for taxation.'

The city of Middletown is operating under a charter, section 3 of article 12 of which reads as follows:

'The total indebtedness of the city for any bonds issued or to be hereafter issued, shall never exceed 4% of the total value of all property within the city of Middletown, as listed and assessed for taxation, not including bonds issued in anticipation of the collection of assessments, specially assessed, against abutting property for the improvement of any street, alley or public highway.'

While the provisions of the above quoted statute of Ohio seem extremely comprehensive, it is my opinion that the charter provision above quoted is binding upon our legislative body, and that such bonds, if issued, could not be disregarded in the aggregate amount which the city is permitted to issue; in other words, that the charter provision would be binding in a home rule city.

I would very highly appreciate your opinion in this matter for prompt use if you will so favor me."

Under section 2 of article I of the charter, as set forth in volume 1 of the supplement to Page & Adams' General Code, pages 1120, 1121, it is provided that "all general laws of the state of Ohio applicable to municipal corporations, now existing or hereafter enacted, not in conflict with the provisions of this charter," shall apply to the government of the city of Middletown, etc.

Under section 2 of article XII of the charter the city may issue bonds from time to time for such purposes as are now or may hereafter be authorized by the general assembly, but subject, of course, to the limitation prescribed by section 3 of the same article.

By reason of the charter and statutory provisions above referred to, a conflict might arise with respect to the amount of bonds that Middletown could lawfully issue in the construction of a street railway system under section 4000-16 et seq. G. C. If the statutory provision is to govern as to the amount, then the four per cent. charter limitation on the city's bonded indebtedness might be exceeded, whereas if the charter provision is to control, the bonds issued under section 4000-16 et seq. G. C. must be counted in making up the city's total bonded indebtedness.

It is my opinion that the conclusion reached by the city solicitor is correct, and I therefore advise you that the limitation placed upon the amount of bonded indebtedness by section 3 of article XII of the Middletown charter cannot be exceeded by the city in taking advantage of sections 4000-16 to 4000-28, inclusive, of the General Code.

Respectfully,
JOHN G. PRICE,
Attorney-General.

245.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY, OHIO, IN THE SUM OF $108,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 30, 1919.

246.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF DOVER IN THE SUM OF $20,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, April 30, 1919.

247.

APPROVAL OF LEASES OF CANAL LANDS TO THE SEARS AND NICHOLS CANNING COMPANY OF CHILLICOTHE, W. F. & C. W. WAGNER OF MASSILLON, M. J. DONOVAN OF CHILLICOTHE AND MRS. ELSIE BARBER OF NELSONVILLE, OHIO.

COLUMBUS, OHIO, April 30, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of April 22nd, in which you enclose for my approval leases of canal lands, in triplicate, as follows:

	Valuation.
To the Sears & Nichols Canning Company, lease of a portion abandoned Ohio Canal property at Chillicothe	$24,000 00
To W. F. & C. W. Wagner, Ohio Canal lands at Massillon, Ohio	5,333 33
To N. J. Donavan, lease for a small tract of abandoned Ohio Canal lands at Chillicothe, Ohio	766 66
To Mrs. Elsie Barber, small tract of abandoned Hocking Canal at Nelsonville, Ohio	100 00

I have carefully examined said leases and find them correct in form and legal, and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,

JOHN G. PRICE,

Attorney-General.

248.

BANKS AND BANKING—SURETY ON BOND TO SECURE STATE DEPOSITS—LIABLE REASONABLE TIME AFTER EXPIRATION OF PERIOD OF DEPOSITORY'S QUALIFICATION.

The surety on a bond given to secure deposits made in a state depository is answerable for the due payment of moneys deposited in such depository during the period of its qualification and allowed to remain there for a reasonable time after the expiration of such period in the event of the failure of the depository to requalify, together with interest on daily balances accruing both before and after the expiration of such period.

COLUMBUS, OHIO, May 2, 1919.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—The receipt of your letter of April 25th requesting the opinion of this department on the question therein submitted is acknowledged. The question is as follows:

> "The Minerva Banking Company of Minerva had on deposit $3,000.00 of state funds at a rate of four per cent. for which they bid in 1917. This deposit was secured by a surety bond of the Maryland Casualty Co. of Maryland, dated December 21, 1917, in the amount of $3,150.00. The Minerva Bank bid for state funds at the recent letting and the rate they bid was so low that it necessitated calling in their present funds and redepositing them in a bank at a higher rate. These funds were withdrawn April 22nd, and their account closed.
>
> Was the Maryland Casualty's bond ample security on this deposit up to and including the day their funds were withdrawn or did its liability cease on April 1st?"

Attached to your letter are letters from the general agent of the Maryland Casualty Company, in which he contends that the suretyship undertaking of his company covered under the law a period of time expiring on April 1, 1919. You also attach forms of bonds in use to secure the deposit of state funds and funds belonging to the state insurance fund, respectively.

It is familiar law that a surety is entitled to stand on the letter of his undertaking, and is not liable for any default of the principal not covered thereby; and that he is discharged by any alteration of the contract between the principal obliger and the obligee made without his consent.

The forms of bonds submitted by you do not show an express undertaking on the part of the surety company a surety limited in point of time. The following is quoted from the conditions of the several bonds as they appear:

> "The condition of this obligation is such, that whereas, the said (Bank) * * * has been duly designated and approved as a state depository for the purpose of receiving on deposit funds or moneys, of the State of Ohio, * * *.
>
> AND WHEREAS, The treasurer of the state of state of Ohio has * * * duly selected and designated the (bank) * * * as a state depository, and has agreed with, and to award to, the said (bank) * * * a portion of the public moneys of the state of Ohio, and * * * has required of the said (bank) * * * a bond to be executed and deposited with him, as treasurer aforesaid, with surety thereon, * * *.

NOW THEREFORE, if the said the (bank) * * * shall pay over to the treasurer of state for the use of said state of Ohio, upon demand made therefor, or upon his written order, any and all moneys which now are in the custody of said bank belonging to the state of Ohio, or which from time to time hereafter may come into the custody of such (bank) * * * under and by virtue of said acts, free from any discount or deduction of any kind therefrom, and shall further pay to the treasurer of state, for the use of the state of Ohio, interest upon the daily balances on such deposit or deposits, at the rate of _____ per centum per annum, payable at the time mentioned in said acts without demand therefor, and shall do each and every act as required of such depository by the terms of said acts, and shall save the state of Ohio free from any loss whatsoever upon such deposit or deposits made with the said (bank) * * * and if the said (surety) shall pay to and settle with the state of Ohio the amount due in full (including interest) to the state of Ohio from the said (bank) * * * within sixty (60) days after notice is given said (surety) that such (bank) * * * has failed, refused or neglected to pay to the treasurer of state of Ohio any and all moneys which may be in the custody of said (bank) * * * belonging to the state of Ohio and covered by this bond, then this obligation shall be void, otherwise it shall be and remain in full force and effect."

But one of the blank forms has been quoted, but the others are similar in tenor and effect. So far as the bonds themselves are concerned, therefore, there is no warrant for the claim made by the surety company that its undertaking is limited in anywise to any period of time.

It is assumed, however, that the contention of the general agent of the company is based upon inferences to be drawn from the law authorizing and requiring the deposit of state funds. The following provisions of that law as they appear in the General Code are quoted:

"Sec. 323. It shall be the duty of said board (of deposit) to meet on the first Monday in April 1911, and every two years thereafter, or as often as it is necessary at the call of the chairman, after this bill becomes operative, and designate such national banks within the state and banks and trust companies doing business within this state, and incorporated under the laws thereof as the board deems eligible to be made state depositories.

Sec. 324. Application of banks and trust companies to be made a state depository for the deposit of moneys of the state shall be made in writing and be filed with the chairman of the board of deposit. Such application shall contain a sworn statement showing the financial condition of the bank or trust company at the date of application. Such application shall also specify the kind of bond or bonds it will furnish as security."

Sec. 328. All awards for the deposit of state funds shall be made upon competitive bidding; bids shall be received by the treasurer of state every two years, beginning between one o'clock p. m. on the first Monday in March and closing at one o'clock p. m. on the third Monday in March, 1911, and every two years thereafter.

Sec. 329. Each bid shall state whether it is for an active or inactive deposit, amount bid for and rate of interest, and must be accompanied by an application and shall be sealed and plainly marked on the outside 'BID FOR DEPOSIT.' Beginning at one o'clock p. m. on the third Monday in March of each bidding period the bids shall be opened by the treasurer of state at his office in the presence of the public; all bids shall be preserved and be open to the public inspection at all times.

Sec. 330. After bids have been opened the treasurer of state shall on or before the first Monday in April of each bidding period award the state funds to the highest bidders. The treasurer of state shall deposit the state funds in such banks and trust companies after such applications have been approved by the board of deposit. Should additional state funds become available at any time during the two years or until the next bidding period, it shall be awarded to the highest bidders; first to the banks and trust companies from which deposits have been withdrawn to meet obligations of the state, second to those who failed to receive the full amount of their original award, and then to the next highest bidders.

Sec. 330-3. The treasurer of state before making such deposits shall require that each and every approved bank or trust company to deposit with him United States government bonds, bonds of this state, county, township, school district, road district, or municipal bonds of this state at not less than their par value, in an amount equal to the amount of money to be deposited with such banks or trust companies, or surety company bonds, which when executed shall be for an amount equal to the amount deposited plus 5 per cent., conditioned for the receipt and safe keeping and payment over to the treasurer of state or his written order of all moneys which may come into the custody of such bank, or trust company under and by virtue of this act, and the interest thereon when paid shall be turned over to the bank or trust company so long as it is not in default. And further, said bonds so given shall include a special obligation to settle with and pay to the treasurer of state for the use of the state interest upon daily balances on said deposit or deposits, at the rate bid for, but not less than 3 per cent. per annum for inactive deposits and 2 per cent. per annum for active deposits (on a 365 day basis) payable quarterly on the first Monday of February, May, August and November of each year, or any time when withdrawals are made or the account is closed.

"Section 330-6. If, on demand or order of the treasurer of state, a state depository fails or refuses to pay over the deposit, or any part thereof made therein as provided by law, the treasurer of state shall sell at public sale any or all of the bonds deposited with him as collateral security for such deposits. Thirty days notice of such sale shall be given in a newspaper published and of general circulation at the seat of government. Surety bonds shall contain a clause obligating said surety company to pay and settle with the state the amount due in full including interest within sixty days after notice is given."

Repeated reference is made in these sections to a "bidding period," which must be understood in the light of sections 323 and 330 above quoted as being a biennial period beginning and ending with the first Monday in April of the odd numbered years (not the first day of April, as seems to be assumed). But the law merely specifies that at each succeeding bidding period new awards shall be made. It fails to specify, either expressly or by inference, that on the first Monday of April of each succeeding odd numbered year banks qualifying during the preceding biennium shall immediately pay over the balances on hand, nor that they shall be discharged from the payment of interest for any period after the first Monday in April of that year. On the contrary, the express provision of the statute is that all sums deposited shall be payable on demand, and the special undertaking of the surety is to "pay and settle with the state the amount due in full including interest within sixty days after notice is given." In other words, the principal obligor does not by virtue of the award of funds to it promise to pay those funds to the state on or before the first Monday of April of the odd numbered year next ensuing after the making of the deposit. Therefore,

it is not an extension of time to the depository nor otherwise an alteration of the implied contract which is entered into when a deposit is made for the treasurer of state, for his own convenience, to allow the balance of a deposit to remain with a depository beyond the end of a bidding period.

What, then, is the purpose of the bidding period? It is submitted that such purpose is to fix a period of time within which the treasurer of state is authorized to deposit and the successful bidder is authorized to receive on deposit moneys of the state in the amount indicated by the law with respect to the particular depository. In other words, after the expiration of the bidding period the depository has no right to receive under the expired award nor has the treasurer of state any right to deposit by virtue of such expired award any further sums whatever. So that if the treasurer of state, after the expiration of a bidding period, should deposit additional moneys with a depository which had failed to qualify at the new bidding, such a deposit would be unauthorized by law and would not be within the terms of the implied contract or indeed the express undertaking of the surety on the original deposit; so that the surety would not be liable for any default in respect of the amount so deposited after the expiration of the bidding period.

But for the due payment of all moneys deposited during the two-year period and remaining on deposit at the end thereof, with interest on daily balances accruing both before and after the end of the period on such deposits, the depository and its surety remain liable until the undertaking is discharged by performance.

The facts stated by you show that funds to the amount of $3,000 were on deposit with the Minerva Banking Company at the expiration of the bidding period, and remained so on deposit for a period of about three weeks thereafter, when they were withdrawn by you because the bank had not qualified as a depository for the incoming bidding period. There is no showing that any moneys were deposited in the bank by the treasurer of state after the first Monday in April, 1919. Under these circumstances, it is the opinion of this department that the Maryland Casualty Company is liable on its bond for the due payment of this amount, with interest.

Respectfully,
JOHN G. PRICE,
Attorney-General.

249.

SHERIFF—APPOINTMENT OF DEPUTIES—JURISDICTION OF COMMON PLEAS COURT OVER SUCH APPOINTMENTS.

Where a sheriff appoints two deputies to serve during his term of office, and such appointments are approved by the common pleas court, an allowance for deputy and clerk hire by the court upon the application of the sheriff for such allowance in addition to the maximum allowance which may be authorized by the commissioners, such allowance thereby becomes available to the sheriff, and a recital in the journal entry purporting to find a necessity for the services of one of the deputies for a period of only two months, is not effective as a limitation upon the tenure of said appointee, nor as a sequestration of the funds for the payment of particular salaries stipulated.

COLUMBUS, OHIO, May 2, 1919.

HON. H. W. KUNTZ, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—I have your communication of April 2, 1919, asking for my opinion upon the state of facts set forth in a communication received by you from the sheriff

of Muskingum county, and certain journal entries from the court dockets of your county accompanied by your ruling upon the question presented.

The communications are somewhat lengthy, and therefore not set forth in full herein, but such as are essential to be considered in a determination of the question involved are as follows:

The appointment of two deputy sheriffs and the approval of their appointment by the judge of the common pleas court as evidenced by entries appearing at Vol. 59, page 87 of the journal of the court, the entries being in the following form:

'IN THE COURT OF COMMON PLEAS, MUSKINGUM COUNTY, OHIO.

Appointment of Deputy Sheriff — JOURNAL ENTRY
February 10, 1919.

THE STATE OF OHIO, MUSKINGUM COUNTY, SS: Vol 59, page 87.

To All To Whom These Presents Shall Come, Greeting:

Know Ye, that by virtue of the authority vested in me by the constitution and laws of the state of Ohio, and reposing special trust and confidence in Wm. A. McFarland, a duly qualified elector of said county, I do appoint him to be a deputy sheriff for said county, to serve during my term of office, unless otherwise ordered.

(Signed) Harvey Garrett,
Sheriff of Muskingum County.

The above appointment approved this 6th day of January, 1919.
C. C. Lemmert,
Judge, Common Pleas Court of Muskingum County, Ohio."

The entry appointing O. E. Bradford and the approval of the court is in the same form as in the case of the appointment of Wm. A. McFarland, supra.

Your communication next discloses that the county commissioners upon application of the sheriff allowed for deputy and clerk hire for the year 1919 the sum of $1,540.00, which was the maximum authorized under the provisions of section 2980-1 G. C. and that thereafter the sheriff filed an application in the court of common pleas of Muskingum county for an additional allowance for deputy and clerk hire for said year; that the county commissioners were duly notified of the pendency of said application and filed their answer approving of the allowance prayed for; that said matter then came on for hearing to the court and was adjudicated as evidenced by the entry appearing at Vol. 59, page 115 of the journal as follows:

"IN THE COURT OF COMMON PLEAS, MUSKINGUM COUNTY, OHIO.

Ohio ex rel. Harvey Garrett, Sheriff, etc., Plaintiff, vs. The Board of County Commissioners, Muskingum County, Ohio, Defendant.	Case No. 18264, Vol. 59, page 115, February 28, 1919.

ENTRY.

This day this cause came on to be heard upon the application of the plaintiff and the answer of the defendant and the evidence and the court

being fully advised in the premises, finds that the said defendant has had due and legal notice of the pendency and prayer of the said application and have entered their consent thereto. The court further finds that the allowance of $1,540.00 made by the said county commissioners for the compensation of deputies and clerk in the said office, is not sufficient to maintain the necessary deputies and clerk in said office, and the court finds that it is necessary in order to conduct the duties of said office, that the said sheriff have two deputies for the months of February and January on a salary of $110.00 a month; and one deputy for the balance of the year 1919 on a salary of $110.00 a month; one clerk during the entire year at a salary of $60.00 a month and one pound keeper during the entire year at a salary of $15.00 a month.

The court further finds that it is necessary that the said sheriff have at his disposal for the payment of compensation of the deputies and clerk in his said office, the sum of $2,440.00 of which the county commissioners have heretofore allowed the sum of $1,540.00.

It is therefore by the court ordered, adjudged and decreed, that the said sheriff be allowed by the county commissioners for the purpose of paying deputies and clerks of the said office during the year 1919."

It is further disclosed by your communication that both the deputy sheriffs so appointed are still acting, and neither of them have been discharged by the sheriff; and that on March 31, 1919, the sheriff certified the following payroll to the county auditor:

"Wm. A. McFarland, for services as deputy sheriff for the month of March.....$110.00

O. E. Bradford, for services as deputy sheriff for the month of March.....$110.00

Miss Rinehart, for services as clerk, for the month of March.....$60.00"

The sheriff's communication further recites:

"Said auditor gave to Wm. A. McFarland and to Miss Rinehart, their vouchers, and the same have been paid. The auditor refused and still refuses to O. E. Bradford, his voucher in the sum of $110.00 for his services as such deputy for the month of March.

What right, if any, has said auditor to refuse the said voucher to O. E. Bradford, when he has not been discharged by me as such deputy sheriff, and when there are still ample funds with which to pay him, to my credit in the sheriff's funds?"

The foregoing discloses the question to be determined as well as the way it has arisen.

I have carefully examined your opinion accompanying the papers submitted with your communication and find myself in accord with the conclusion which you have reached.

Section 2830 G. C. provides for the appointment of deputy sheriffs, and is as follows:

"The sheriff may appoint in writing one or more deputies. If such appointment is approved by a judge of the court of common pleas of the sub-division in which the county of the sheriff is situated, such approval at the time it is made, shall be indorsed on such writing by the judge. Thereupon, such writing and indorsement shall be filed by the sheriff with the clerk of his county, who shall duly enter it upon the journal of such court. The

clerk's fees therefor shall be paid by the sheriff. Each deputy so appointed shall be a qualified elector of such county. No justice of the peace or mayor shall be appointed such deputy."

The copies of the entries which you have furnished me indicate a substantial compliance with the provisions of said section in the appointment of the two deputy sheriffs named in the entries, and the statement of facts recites that both of said deputies are still acting and neither has been discharged by the sheriff. The sheriff's application to the court for an allowance of deputy and clerk hire in addition to the previous allowance by the commissioners, as evidenced by the copy submitted, appears in proper form to invoke the jurisdiction of the court for that purpose, and the transcript from the record of the proceeding discloses that by the notice and the answer of the board of commissioners, the matter properly came on for hearing, and the entry of the court's action thereon discloses a finding by the court that the allowance made by the commissioners in the sum of $1,540.00 is not sufficient to maintain the necessary deputies and clerk in the office of the sheriff, and

"The court further finds that it is necessary that the said sheriff have at his disposal for the payment of compensation of the deputies and clerk in his said office the sum of $2,440.00 of which the county commissioners have heretofore allowed the sum of $1,540.00.

It is therefore by the court ordered, adjudged and decreed, that the said sheriff be allowed by the county commissioners for the purpose of paying deputies and clerks of the said office during the year, 1919."

So much of the entry indicates a finding by the court of the necessity for allowance for additional clerk and deputy hire in the sum of $900.00, and an order therefor, although a reading of the last paragraph of the entry suggests a possible typographical omission of proper language to complete the sense and purport of the paragraph, by way of stipulation of the amount found by the court. However, the effect of the language is such as to indicate the court's order allowing the sum of $900.00 in addition to that theretofore allowed by the county commissioners.

Other language of the entry requires consideration and undoubtedly has raised the doubt in the auditor's mind which led to his refusal to issue voucher to one of the deputies, and is as follows:

"and the court finds that it is necessary in order to conduct the duties of said office, that the said sheriff have two deputies for the months of February and January on a salary of $110.00 a month; and one deputy for the balance of the year, 1919, on a salary of $110.00 a month."

Thus the question is raised as to the competency of such finding by the court as a limitation upon the previous appointment by the sheriff of the two deputies during the term of the sheriff, and the general approval of the court of such appointments.

In this connection it is to be noted, of course, that the particular subject before the court in the matter of the sheriff's application for additional funds was that disclosed by the application, and that the issue was not changed by the answer of the commissioners or other procedure in the case, and to the extent that the court found a necessity for allowance of additional funds for deputy and clerk hire and so ordered, I am of the opinion that the allowance is available to the sheriff without the limitation imposed in the portion of the recitals from the entry last above set out, and imposing a direction as to tenure of service of the deputies.

The essential and governing factors are the appointment of deputies by the sheriff and the approval thereof by the court, the allowance and availibility of funds for deputy

and clerk hire and the continued service by the deputies in the office of the sheriff, which seem to satisfy the requirements of the law for entitling the deputies to receive their proper vouchers, and I therefore hold in concurrence with the conclusion reached by yourself, that it is the duty of the auditor to issue a proper voucher upon available funds to the credit of the sheriff for deputy and clerk hire, pursuant to the authorization evidenced by the appointment of the deputies by the sheriff and approval thereof by the court, and that likewise it would be the duty of the treasurer to honor the voucher so to be issued.

Respectfully,
JOHN G. PRICE,
Attorney-General.

250.

BOARD OF EDUCATION—WHEN SCHOOL JANITORS CAN AND CANNOT COLLECT SALARY FOR DAYS SCHOOL CLOSED ON ACCOUNT OF EPIDEMIC * * * BONDS CAN BE ISSUED TO FUND OBLIGATIONS WHICH ARE EXISTING, VALID AND BINDING AT THE TIME THE TAX LIMITATION REACHED.

1. *School janitors cannot collect salary for days on which no service was rendered, where schools have been closed by the board of health on account of epidemic.*

2. *Boards of education can issue bonds under 5656 G. C. to fund obligations which are existing, valid and binding at the time, though the tax limitation may have been reached.*

COLUMBUS, OHIO, May 2, 1919.

HON. W. W. BECK, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following two questions:

> "Is the board of education liable for salary of a janitor employed by resolution for the school term at a stated salary per month, during the period the schools are closed on account of an epidemic?
>
> Can the board of education under 5656 G. C. when the limitation has already been reached issue bonds for payment of money for items mentioned in said section?"

Answering your first question it may be said that school janitors (while presumed to be on duty on the days when teachers are there) are not provided for in the law, as teachers are, in case of epidemic and closing of schools, for section 7690 reads:

> "Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries. If deemed esssential for the best interest of the schools of the district, under proper rules and regulations, the board may appoint a superintendent of buildings, and such other employes as it deems necessary, and fix their salaries; provided, that if the board has adopted an annual appropriation resolution as provided by section 4752-1 of this act, then it may, by general resolution, authorize the superintendent to appoint truant officers and the director or other officer having the powers and duties

of a director, to appoint janitors, superintendents of buildings and such other employes, as may be provided for in such annual appropriation resolution. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity."

Teachers are paid during such closing of schools because the statute makes it mandatory. As regards other employes the board has full control and management and "fixes their salaries." So the janitors come within the class of drivers of school vehicles used for transportation where such employment is by the month. In opinion No. 68 issued by this department on February 25, 1919, it was held that the drivers were entitled to the full term of the contract except for such days as school was prevented from opening by the order of the health authorities.

In arriving at such conclusion after a full discussion and citation of authorities it was held:

"* * * neither party can restrain the act of God or the act of governmental authority by process of law, the health officials not being subservient to either of the parties in question, but above the board of education and the driver in questions of epidemic and the physical well-being of a community where their authority is absolute in these matters. The board of health is a legal governmental authority and their acts in closing schools during the recent epidemic of influenza was an act of officials under the law. The authorities seem to be agreed that this relieves parties from the obligations of contracts * * *."

"The rule seems to be unanimous that unless there is some statutory provision to the contrary, recovery may be had on a *quantum meruit* basis for services performed where part performance is excused on account of sickness or otherwise. So that in this case the board of education was compelled to close the schools by the order of the board of health. The driver was prevented from performing his services by the order of the board of health and neither is at fault. The driver is excused from performing and the board is excused from paying. It was within the power of the driver to contract in relation to this emergency. As far as teachers are concerned, the law makes the contract for them by declaring that 'teachers shall be paid during the time the schools are closed on account of an epidemic.' No such provision is contained in our laws in relation to drivers."

The same reasons for opinion No. 68, bearing on school drivers who did not perform on certain days due to order of the board of health, would apply to school janitors, except that there might be cases in which the janitor did work at the school building though the school was closed, or if an epidemic were prevalent at a time when weather was severe and it was absolutely necessary that the building be heated to care for pipes and plumbing. In such cases the board should consider the services that might have been rendered by the janitor though schools were closed, for the board has control of employes and their compensation (section 7690 G. C.), but if no services were rendered on certain days during an epidemic, then the board is not liable for payment for those days.

As to your second question, a board of education can issue bonds under section 5656 G. C. when the tax limitation has been reached, but such bonds must be issued for an existing, valid and binding obligation, as required in section 5658 G. C. which reads:

"No indebtedness of a township, school district or county shall be funded, refunded or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such township, school district or county by a formal resolution of the trustees, board of education or commissioners thereof, respectively. Such resolution shall state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of their maturity, the rate of interest they shall bear and the place of payment of principal and interest."

On the two questions submitted, then, the opinion of the Attorney-General is:

(1) School janitors cannot collect salary for days on which no service was rendered, where schools have been closed by the board of health on account of epidemic.

(2) Boards of education can issue bonds under 5656 G. C. to fund obligations which are *existing, valid* and *binding* at the time, though the tax limitation may have been reached.

Respectfully,
JOHN G. PRICE,
Attorney-Geueral.

251.

JUSTICE OF PEACE—MAY NOT REMIT A PENALTY—WITHOUT AUTHORITY TO SUSPEND SENTENCE AFTER COMMITMENT.

A justice of the peace may not remit a penalty imposed by him and order a person sentenced to a term of imprisonment to be released after such sentence has gone into execution.

COLUMBUS, OHIO, May 2, 1919.

HON. CHARLES R. SARGENT, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—I have your inquiry of March 6, 1919, requesting my opinion as follows:

"I would appreciate your advice on the following situation. Upon conviction in justice court of a misdemeanor, the defendant was sentenced to one hundred and eighty days in the county jail and a fine of fifty dollars and costs.

The man was committed to the county jail. After serving two months of his time, the justice of the peace on an order issued by him, purported to put the defendant on probation and suspend the execution of the sentence. The justice of the peace claimed authority to take this action under the provision of section 13711 G. C.

I have held in my advice to the sheriff that the justice of the peace had no authority to suspend sentence and place a man on probation after he had committed the defendant to the county jail to commence his sentence. That is, I held that the justice of the peace lost jurisdiction. In your opinion am I correct in so holding? I would appreciate your advice as this is a situation which will probably arise again in the near future in another matter."

Section 13711 G. C., to which you refer, is as follows:

"When the sentence of the court or magistrate is that the defendant

be imprisoned in a workhouse, jail, or other institution, except the penitentiary or the reformatory, or that the defendant be fined and committed until such fine be paid, the court or magistrate may suspend the execution of said sentence and place the defendant on probation, and in charge of a probation officer named in such order, in the following manner:

1. In case of sentence to a workhouse, jail or other correctional institution, the court or magistrate may suspend the execution of the sentence and direct that such suspension continue for such time, not exceeding two years, and upon such terms and conditions as it shall determine;

2. In case of a judgment of imprisonment until a fine is paid, the court may direct that the execution of the sentence be suspended on such terms as it may determine and shall place the defendant on probation to the end that said defendant may be given the opportunity to pay such fine within a reasonable time; provided, that upon payment of such fine, judgment shall be satisfied and the probation cease."

It is held in Lee v. State, 32 O. S., 113:

"Where a court, in passing sentence for a misdemeanor, has acted under a misapprehension of the facts necessary and proper to be known in fixing the amount of the penalty, it may, in the exercise of judicial discretion and in furtherance of justice, at the same term, and before the original sentence has gone into operation or any action has been had upon it, revise and increase or diminish such sentence within the limits authorized by law."

The rule so announced in the Lee case, supra, was quoted with approval in the case of Tracy, et al. v. State, 8 O. C. C. (n. s.), 357, where the court said:

"This rule is established beyond controversy by the case of Lee v. State, 32 O. S., 113, * * *."

While upon authority of the statute above quoted as well as judicial decisions of the State, notably, Weber v. State, 58 O. S. 616, and the recent unreported case of State v. Whiting, 83 O. S. 447, the power of courts and magistrates to suspend the execution of sentences pronounced in cases properly pending before them, is well established, and further that such tribunals may modify their judgments when the jurisdiction is properly invoked in that regard, in conformity with the doctrine of the Lee case, supra, yet the authority to recall or remit a sentence after the same has been put into execution raises an entirely different question.

In an opinion of my predecessor reported at page 1979 of the Opinions of the Attorney-General for 1915, it was said:

"It is well to suggest that the two words "remit" and "suspend" cannot be used synonymously, and that a justice of the peace can only remit a fine or a sentence before the same has gone into operation or any action taken thereon, and then only within the limits authorized by law. In other words, it is only before the execution of a sentence has begun that a justice may amend, revise or vacate it and render a new sentence, which must impose at least the minimum penalty provided by law in such case."

In another opinion of this department found at page 431 of the Opinions of the Attorney-General for 1915, in answer to an inquiry as to the authority of mayors or justices of the peace to remit fines in cases brought for violation of the statutes, it was said:

"In reply thereto, I advise you that former Attorney-General, Hon. Wade H. Ellis, was asked the same question by the bureau of inspection and supervision of public offices, and on October 24, 1907, gave his opinion thereon, holding that there is no authority for a mayor to remit any fines due the state of Ohio.

In concluding his opinion Mr. Ellis stated:

'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 preceedings for such purpose.'

I approve this opinion, found on page 161 of the Attorney-General's reports for the year 1907."

And again, in an opinion of this department found at page 685 of the Opinions of the Attorney-General for 1915, my predecessor advised with reference to the power of a magistrate or mayor in the remission of a sentence:

"In no case can he remit a fine due to the state of Ohio. Neither can the magistrate, or mayor, impose or collect a fine less in amount than the minimum fine fixed by the statutes. The magistrate or mayor has no authority to disregard the express provisions of the statutes as to the amount of the fines he shall impose."

These various opinions were reviewed and again approved in the later opinion of October 3, 1917, found at page 1841 of the Opinions of the Attorney-General for 1917.

While the power of courts and magistrates to suspend the execution of sentences at the time of pronouncing the same was not questioned, but was expressly affirmed and recognized in the discussion of my predecessors in the opinions above cited, yet it was held that such power was not a continuing one to be invoked or exercised after the sentence had been put into execution.

I quote further from the opinion first above cited:

"The latter part of your first inquiry and the whole of your last are limited to the question of the right of a justice of the peace, after execution of sentence has begun and the defendant is confined in the jail or workhouse, to suspend the remainder of such sentence. The authority to so suspend a sentence under such circumstances is one of great doubt, and while supported by some courts the tendency of modern decisions is against it. It seems now to be the prevailing opinion that after a court has sentenced a prisoner, and execution of said sentence has begun, the court has lost all jurisdiction. This conclusion may be due to the fact that under our recent statutory laws ample provisions for parole and other similar measures have been made, which, to a great extent, supply the loss of such authority by the trial court.

In the case of State v. Perrill, 59 Law Bulletin, 371, it was held that after a sentence to the penitentiary or reformatory the entire jurisdiction and control of the prisoner rests with the board of management of those institutions. The opinion of the court in this case may with equal reason be applied to the case presented by your inquiry.

As before noted, county commissioners have authority to parole prisoners confined in the county jail for non-payment of fines and costs, and county auditors may discharge prisoners under like circumstances upon proof of

insolvency. Workhouse directors are also authorized under their general powers to parole prisoners. In view of these considerations I incline to the opinion that justices of the peace do not have a continuing jurisdiction and therefore cannot modify, change or suspend any sentence imposed by them after the same has gone into effect and the prisoner has been committed to a county jail or workhouse and thereby placed under the control of other authority."

The doctrine that courts have control over the judgments and records during the term at which they are entered, has been applied to the matter of suspension of sentence in a criminal case by the court of appeals of Mahoning county, in the recent case of Antonio v. Milliken, Sheriff (Law Rep., Feb. 10, 1919), 29 O. C. A. 305. The syllabus is as follows:

"In misdemeanor cases the trial court has power under favor of section 13711, General Code, to suspend, in whole or in part, the execution of a sentence, at any time during the term at which sentence was passed, even though the defendant had entered upon the imprisonment ordered by the sentence."

A reading of the opinion discloses that this court considers the fact of sentence having gone into execution as not determinative of the power to modify or suspend, but rather that the power is co-extensive with the term of court.

It is pointed out in the opinion that the municipal court of Youngstown is a court having statutory terms and several cases are cited in support of the doctrine that the control over its records and judgments abides with the court during the term. The following is quoted as indicative of the court's reasoning:

"The statute provides that the municipal court of the city of Youngstown shall have four terms of court each year, beginning on the first day of January and continue for a period of three months each, so that it is clearly disclosed that the charge, sentence, commitment and the order for release were all made during the first term of said municipal court in this year A. D. 1918; therefore, there is no question but that the court sought to modify or suspend the sentence during the term at which the judgment was entered."

Again the court points out that the limitation upon said power is one arising solely from the limit of the term.

"The 'time limit' has been held to be the term at which judgment is entered and this for the chief reason that after term time a record is presumed to have been made of all orders and judgments of the preceding term; that such record is complete, and the term having been adjourned, formally or by operation of law, the record imports absolute verity and is unalterable except as specifically provided by law."

The court's conclusion is announced as follows:

"Therefore, for the reasons above given, and upon the theory that a court has control over its judgments and orders during the term at which they are made, the judge of the municipal court had a right in the case at bar to direct the release of the prisoner."

It is considered that the holding in the above case is hardly applicable to the

case of a justice of the peace court, or effective to alter the rule announced in the previous opinions of this department above noted, for the reason that a justice of the peace has no "terms of court," and it could not be said that the power is to be exercised without time limitation. In fact, it has been judicially determined that inferior courts having no terms do not come within the purview of the statutes or the common law rule recognizing the authority of courts of general jurisdiction over their records during term time.

The case of In re Blake, 14 O. D. 89, involved the power of the probate court of Franklin county to vacate its former judgment of commitment of a person to the children's home, during the same term. Bigger, J., in considering the question, observed that the child had been regularly and legally committed to the custody of the superintendent of the children's home and therefore his custody is lawful unless the subsequent order of the probate court is valid, by which the court undertook to modify and suspend its judgment previously entered.

The first branch of the syllabus is as follows:

> "Since the probate court is a court of limited jurisdiction, having no terms except as provided by statute, the doctrine that courts of general jurisdiction, having terms, have power to vacate or modify their judgments during the term does not apply to it, and it has no power to set aside or modify its judgments legally entered except as authorized by statute."

Again the court said:

> "The probate court having no terms, except for the purposes provided by statute, and being a court of limited jurisdiction, does not seem to be empowered to set aside or modify its judgment legally entered, except as it is authorized to do so by statute.
>
> * * * * * * * * * * * * *
>
> The doctrine that courts of general jurisdiction have control over their judgments during the term and may vacate and modify them, can not be made to apply to the probate court, it being open at all times and having no terms."

The determination of the case was made in the following language:

> "Where a minor child has been taken from its parents and committed to a children's home in a regular and legal manner by the probate court under section 3140a, Rev. Stat., such court can not vacate or modify its judgment regularly entered therein except on an application made and rehearing granted after the term under sections 5354 to 5365, Rev. Stat., and an order based upon the application and rehearing before the expiration of the term, as designated in section 5365, Rev. Stat., suspending the former judgment regularly entered and directing the return of the child to its parents, is void *and a writ of habeas corpus to regain possession of the child under such order will be refused.*"

The same view was entertained by the court in Kinsella v. DeCamp, 15 O. C. C. 494. The second branch of the syllabus is as follows:

> "Where a judgment has been rendered or an order made at one term of the court, which has been correctly entered upon the journal, and no motion for a new trial has been filed, but the court, on reflection or otherwise, be-

comes satisfied that it should not have been made or entered, it may at the same term of the court be vacated by it, under the general power of courts of general jurisdiction to control its judgments during the term at which they were rendered. *But this only applies to courts of general jurisdiction which have regular terms.*"

In pointing out that the power to modify its judgments could not be recognized in courts having no terms, the court said:

> "If the court had a right to do this when it did, and as it did, it would have the right to do it ten years after that time, which would be contrary to settled and acknowledged principles of law, and could not be properly done by any court of general or special jurisdiction without express authority to do it conferred by statute."

In Building & Loan Co. v. Spiegel, et al., 12 O. C. C. 761, the court said, with reference to the jurisdiction of the court of limited jurisdiction, being the probate court in that case:

> "When a matter has been controverted and the court has decided the question, and the judgment of the court has been correctly placed on the journal, it is final as to the power of the court to change, except as pointed out by the statute."

In Kingsborough v. Tousley, 56 O. S. 450, the court, in considering the statutes providing for modification or vacation of judgments (Sections 5354 to 5360 R. S.) said:

> "Neither in their terms nor in their nature are these provisions of the statutes applicable to justices courts."

From what has been said I conclude that the general power to suspend the execution of sentence, or modify judgments during the term at which they are entered, is not an attribute of the courts of limited and special jurisdiction and without terms, such as justices of the peace, and therefore I advise that in the case presented in your inquiry the justice of the peace was without authority to issue the order in question.

Respectfully,
JOHN G. PRICE,
Attorney-General.

252.

APPROVAL OF BOND ISSUE OF GALENA RURAL SCHOOL DISTRICT IN THE SUM OF $2,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 2, 1919.

253.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY IN THE SUM OF $16,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 2, 1919.

254.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY IN THE SUM OF $12,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 2, 1919.

255.

APPROVAL OF BOND ISSUE OF OTTAWA COUNTY IN THE SUM OF $8,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 2, 1919.

256.

DISAPPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY IN THE SUM OF $58,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 2, 1919.

257.

ROADS AND HIGHWAYS—CLAIMS FOR LABOR, LEASING OF MACHINERY AND TOOLS AND PURCHASE OF MATERIAL—COUNTY COMMISSIONERS ALLOW BILLS UPON CERTIFICATE OF COUNTY SURVEYOR—COUNTY AUDITOR WITHOUT AUTHORITY TO ISSUE HIS WARRANT UNLESS ABOVE PROCEDURE COMPLIED WITH.

Claims arising under the action of the county surveyor, in the employment of labor, the leasing of machinery and tools, and the purchase of material, under the provisions of section 7198 G. C., must be allowed by the county commissioners, as provided for in section 2460 G. C., and the county auditor is not authorized in law to issue his warrant in favor of the claimants, without the county commissioners first having allowed said claims.

COLUMBUS, OHIO, May 3, 1919.

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

GENTLEMEN:—I have your communication of April 18, 1919, which reads as follows:

> "We respectfully request your written opinion upon the following matter: When the county commissioners authorize the county surveyor to employ laborers, etc., and to purchase material in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts, as provided by section 7198 G. C., as amended, 107 O. L., 115, can the auditor issue warrant for the labor and materials, etc., upon the certificate of the county surveyor, or must these bills be allowed by the county commissioners before payment?"

The section principally to be considered in answering your question is section 2460 G. C., which reads as follows:

> "No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim. No public money shall be disbursed by the county commissioners, or any of them, but shall be disbursed by the county treasurer, upon the warrant of the county auditor, specifying the name of the party entitled thereto, on what account, and upon whose allowance, if not fixed by law."

The question is as to whether claims against the county, of the nature set out in your communication, might come within the exceptions set out in section 2460 G. C. There are two exceptions to the general rule that no claim against the county shall be paid otherwise than upon the allowance of the county commissioners, and they are (1) those cases in which the amount due is fixed by law, and (2) those claims in which the amount due is authorized to be fixed by some other person or tribunal. If the claims can be brought within one of the other of these two exceptions, then they may be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the same, without the necessity of having the same allowed by the county commissioners. Keeping in mind the provisions of this sec-

tion, let us turn to the provisions of section 7198, 107 O. L., 115, with a view to ascertaining whether the claims which arise under and by virtue of said section might be brought within the exception, as set forth in section 2460 G. C. Section 7198 G. C. reads as follows:

> "The county surveyor may when authorized by the county commissioners employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account."

From a mere reading of this section it is quite evident that we can eliminate from our consideration the first of the exceptions above noted, for the reason that section 7198 does not at all fix the amount due on claims arising under this section. The only question, then, to be considered, is as to whether the claims arising under section 7198 G. C. might be such as could be brought within the second exception, above noted; that is, that the claims arising under section 7198 G. C. are such that the amount due for the same is authorized to be fixed by some other person or tribunal than the county commissioners. Section 7198 gives the county surveyor, when authorized by the county commissioners so to do, power to "employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account." It can be said, at least, that this section does not specifically authorize the county commissioners to confer power upon the county surveyor to fix the prices at which laborers are to be employed and material purchased. If this power may be authorized by the county commissioners, it must be inferred from the power given the county surveyor to employ laborers and to lease implements and to purchase material. In order to ascertain whether such power might be inferred from the powers granted in said section, it might be well for us to note the trend of the decisions of our courts in reference to this matter.

In State of Ohio ex rel. v. Ratterman, 3 C. C., p. 626, the court was passing upon a question somewhat similar to the one we are considering. In this case the court was placing a construction upon section 2928 R. S., which authorized the sheriff to "provide at the expense of the county, a sufficient number of ballot boxes for use in said county" and providing further that "said ballot boxes shall not cost more than $25.00 each." The sheriff purchased a number of ballot boxes and certified to the correctness of the bill for the same, which claim against the county was not presented to the county commissioners for allowance, but was directly presented to the county auditor with the request that he issue his warrant in favor of the party furnishing the ballot boxes. The court held in the syllabus as follows:

> "The auditor of Hamilton county was not authorized by law, to issue, on the certificate of the sheriff of said county, not approved by the board of county commissioners thereof, a warrant upon the treasurer for the amount of a bill claimed to be due for ballot boxes furnished by such sheriff under the provisions of section 2928, Rev. Stat. And a mandamus will not be issued against the treasurer at the instance of the holder of such warrant, requiring him to pay the same, on his refusal to do so."

In the opinion, on page 628, the court uses the following reasoning:

> "It is manifest that the amount to be paid for the ballot boxes, when procured by the sheriff under the provisions of section 2928, is *not* 'fixed by law.' Neither the number of them, or the price to be paid therefor, is so

determined. A *sufficient* number is to be provided, and the price is not *to exceed* $25.00 each. It only remains then to determine whether under this section, the sheriff is authorized definitely to determine the number which will be sufficient, and to fix the amount to be paid for them, and to allow the claim therefor. If so, the auditor was right in drawing his warrant for the amount, and the treasurer is bound to pay it. But it is clear that the statute under consideration does not in *express* terms confer any such power upon the sheriff. If he has the right, it can only be *implied* from the authority conferred upon him to procure the necessary number, at a price not to exceed that named in the statute.

For good and sufficient reasons it is the policy of our statutes upon this subject, that the management of the official affairs of the county should be entrusted to a board elected by the people for that purpose, and that as a general rule, no claim shall be allowed against the county, unless first submitted to and approved by them, and unless their decision is appealed from or otherwise reviewed by the courts."

It occurs to me that the statute upon which the court was placing a construction in this case was more favorable to the point that a county auditor might issue his warrant in payment of a claim against the county, without the county commissioners first allowing the same, than are the provisions of section 7198 G. C.

In State of Ohio ex rel. vs. McConnell, auditor of Hardin County, 28 C. S., 569, the court was placing a construction upon the section of the statutes which reads as follows:

"The county commissioners shall furnish to the clerk of the courts of their respective counties all blank books, blanks, stationery and all other things necessary to the prompt discharge of their duties, all of which articles the clerks may themselves procure and shall be allowed and paid for upon their certificate."

Here is language very similar to the language which we have under consideration. If anything, it is also more favorable to the proposition that claims arising thereunder might be paid without first submitting them to the county commissioners for allowances, than is the language of section 7198 G. C. The clerks were authorized not only to procure the necessary supplies, but the section also provided that the bills arising thereunder should be allowed and paid for upon the certificates of the clerks, while section 7198 G. C. merely authorizes the county surveyor to employ and procure, but makes no provision whatever in reference to the claims arising under and by virtue of his acts as to whether they might be paid upon his certificate. The court in this case held, in the syllabus, as follows:

"Clerks of courts in the several counties of this state are not authorized by law to fix conclusively the amounts which shall be paid by their county for blanks, or other things necessary to the prompt discharge of their duties, which they may have procured.

Therefore, where a claim or account against a county for blanks furnished on the order of such clerk is presented to the county auditor, which account has been certified by the clerk to be correct, but has not been allowed by the county commissioners, it is not the legal duty of such auditor, on demand made, to draw his warrant on the treasurer of his county in favor of the claimant for the amount of such account."

In the opinion on page 594 the court uses the following language:

"Has the relator a right to demand payment of his account without first obtaining its allowance by the county commissioners? We think not. The statute does not in terms authorize the clerk, on behalf of the county, to fix the price to be paid from its treasury for the articles procured by him. Nor do we think the authority to procure the articles necessarily implies a power to bind the county to pay whatever price he may think proper. He may procure them on his own responsibility, or he may agree that the county shall pay for them whatever they are reasonably worth; and in either case, if they be articles necessary to the prompt discharge of his duties as clerk, he may thereby create a liability or obligation on the part of the proper county officers to allow and pay a fair and reasonable price for them. But we are not satisfied that the certificate of the clerk, in such a case, was intended to be evidence of anything more than the fact that the articles for which payment is demanded from the county were procured by him, for the purpose of being used in the discharge of his official duties. Suppose the clerk is a stationer or printer, and furnishes his own stationery or blanks. Is his certificate to be conclusive evidence to the auditor that the prices charged by him for such articles are fair and just?"

Further along in the opinion the court say:

"It is true that the statute requires that articles of a certain kind, when procured by the clerk, *shall* be allowed and paid for upon his certificate. But this mandatory form of expression is not inconsistent with the intention that the persons or tribunal allowing the claim should exercise such judgment and discretion, in regard to the *amount* proper to be paid, as an act of *allowance* necessarily implies."

The findings of the courts in the two cases herein noted are clearly against the idea that claims arising under the acts of the county surveyor, as provided in section 7198 G. C., might be honored by the county auditor and warrants issued in favor of the parties holding the same, without their first having been presented to the county commissioners for allowance. The court in State of Ohio ex rel. vs. McConnell, supra, held as follows:

"A power so liable to great abuse ought not to be raised by doubtful implication. To justify its recognition, the terms which confer it should be clear and unmistakable."

It can hardly be said that the language used in section 7198 G. C. is clear and unmistakable to the point that the county surveyor has authority to fix the amounts to be paid under the different provisions of said section and have the same paid upon his certificate.

There is another thing to which I desire to call attention in reference to the matter about which you inquire. The one exception in section 2460 is to the effect that if the amount due is authorized to be fixed by some other person or tribunal, then the county commissioners are not required to pass upon the claim. What body is to give the authority to fix the price at which articles may be purchased? Is the authority to come from the legislature itself or may it come from some body or tribunal other than the legislature? The power conferred upon the county surveyor, under section 7198 G. C., comes not from the legislature, but from the county commissioners. In State of Ohio ex rel. vs. McConnell the court uses language which would seem to imply that the principle enunciated in section 2460 G. C. would not apply excepting in those cases where the authority to fix prices is granted by the legislature. On page 591 of the opinion the court say:

"It can, then, only be paid on the allowance of the county commissioners, unless 'some other person or tribunal' *has been authorized by law to fix the amount*, and has accordingly so fixed, allowed, and duly certified the same."

If this language were given its full import and meaning, it is quite evident that the only body which could grant such authority to an officer or tribunal to fix prices would be the legislature itself. But when we consider the nature of the case which the court had before it, it is possible that such a construction should not be placed upon the language of the court. But at any rate, I am of the opinion that this principle should prevail, that inasmuch as the legislature has seen fit to delegate power to the county commissioners, to authorize the county surveyor to transact certain business which otherwise would have to be transacted by the county commissioners themselves, the power or authority granted to the county commissioners should be limited to the exact language of the statutes, and inasmuch as the statute does not delegate power to the county commissioners to authorize the county surveyor to fix the prices absolutely at which he will employ labor and lease machinery and tools and purchase material, the county commissioners could not assume this power. That is, the county commissioners could not authorize the county surveyor to do the things set out in section 7198 G. C., and also grant him power to fix the prices at which the different things might be procured, with a view to bringing it within the exception set forth in section 2460 G. C. In other words, the power delegated to the county commissioners must be limited strictly to the matters set out in section 7198 G. C.

Of course the county surveyor, in the first instance, no doubt, would be compelled to fix a price at which he would employ labor, lease machinery and tools and purchase material. But this was so in the case in which the sheriff was given the authority to purchase ballot boxes at a price not to exceed $25.00 each, and also in the case where the county clerks were given authority to procure the necessary stationery, etc., for their office. So, notwithstanding the fact that the county surveyor has, in the first instance, the right to fix the price at which the different things may be secured under section 7198 G. C., the county commissioners, nevertheless, have the final right and duty, under section 2460 G. C., to pass upon the claims so arising under the acts of the county surveyor, and the county auditor would not be authorized to issue his warrant in favor of claimants against the county, merely upon the certificate or requisition of the county surveyor.

Respectfully,
JOHN G. PRICE,
Attorney-General.

258.

MUNICIPAL CORPORATION—SEWER CONSTRUCTED IN PUBLIC STREET BENEATH TRACKS OF RAILWAY COMPANY CROSSING SUCH STREET—WHO LIABLE FOR SUPPORTS WHILE SEWER IS BEING CONSTRUCTED.

When a municipality constructs, in an ordinarily careful manner, a sewer within the limits of a public street in such municipality, and beneath the tracks of a railway company crossing such street, the duty of furnishing supports for such tracks, if necessary while the sewer is being constructed thereunder, rests with the railway company and not with the municipality.

COLUMBUS, OHIO, May 3, 1919.

Bureau of Inspection and Supervision of Public Offices.

GENTLEMEN:—You have requested the opinion of this department upon the following:

> "A municipality in a sewer construction improvement runs such sewer beneath the existing tracks of a railroad company necessitating considerable work which had to be done to support the tracks of such railway company above the sewer.
>
> Is the city or the railroad company obligated to bear expense in connection with the work of supporting these tracks owing to the sewer?"

Inquiry of your bureau, through letters and personal interviews, has developed the fact that your question is the outgrowth of a certain expenditure made by the city of Youngstown in connection with sewer construction beneath the tracks of a railroad company, the validity of which expenditure has been questioned by one of your examiners. Because of this circumstance, your bureau desires an opinion for its future guidance in like matters.

The control of municipalities over streets is made a matter of statute in Ohio. Section 3714 G. C. reads as follows:

> "Section 3714. Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

The authority of municipal corporations to construct sewers is found in section 3647 G. C., appearing in the chapter devoted to enumeration of powers. Said section reads in part:

> "Section 3647. To open, construct and keep in repair sewage disposa works, sewers, drains and ditches, * * *."

It is well settled in Ohio that the construction of sewers in a street, in pursuance of the power thus given, is not an added use or servitude and does not require additional compensation. In the case of Cincinnati v. Penny, 21 O. S. 499, decided in 1872, the fourth branch of the syllabus reads:

> "Under the laws of this state, sewerage is one of the legitimate uses to

which the public streets and alleys of the city of Cincinnati may be appropriated by its municipal authorities."

In the case of Elster v. Springfield, 49 O. S. 82, the court say in the course of the opinion (pp. 96-97):

> "The laying of sewers, like that of gas and water pipes beneath the soil, and the erection of lamps and hitching posts, etc., upon the surface, is a street use, sanctioned as such by their obvious purposes, and long continued usage, and that such is one of the legitimate uses to which a street may be devoted is distinctly held by this court in *Cincinnati v. Penny*, 21 Ohio St. 499. For such purpose, it would seem that the right of the municipality in the street could not be inferior to the right of a private owner over his own land. If the title comes by appropriation, all right to damages by reason of the acquisition of the land for street uses, in favor of abutting owners, must be held to have been taken into the account and compensation therefor awarded in the original taking, and, if by dedication, the same result would follow as an incident of the grant. That a city's power over its streets for legitimate street purposes is as great as that of a private individual over his own land, is recognized in *Nevins v. Peoria*, 41 Ill. 502; *Dixon v. Baker*, 85 Ill. 518; *Yearney v. Smith*, 86 Ill. 391, and appears to be sustained by sufficient reason. It necessarily follows that for all such public uses the right of the municipality is paramount to any property right of the abutting owner in the street. Dillon on Munic. Corp., section 656."

Again, in the case of City v. Bristor, 76 O. S. 270, the Penny case, supra, is given (at p. 277 of the opinion) as authority for the statement that "the construction of a public sewer in the streets is an authorized use of the streets."

Judge Dillon thus states the rule (Municipal Corp., 5th Ed., Sec. 1148):

> "The construction of sewers is a lawful use of the street as against an abutting proprietor, whether the fee of the street be in him, or in the city in trust for street use. Although the fee of the street may be in the abutting proprietor, the use of the street for the purposes of sewers is not the imposition of a new use or servitude entitling the owner of the fee to compensation."

The practical application of the principle that the city may make use of a public street in constructing a sewer may be shown, so far as an abutting or adjoining owner of the fee is concerned, by reference to the case of Keating v. Cincinnati, 38 O. S. 141, and by a further examination of the Penny and Elster cases, above quoted.

In the Keating case, the city, in making a street along a hillside, had so excavated the ground as to cause the land above to slide. Injury resulted to plantiff's lot, which did not abut on the street wherein the excavation was made. Injury was also caused to the buildings of plaintiff on his said lot. The supreme court, at p. 147 of the opinion, quotes the testimony of the city civil engineer, as follows:

> "The cut caused the slip, and we did nothing to stop the slip; I saw it at the time. A retaining wall would be the only way to stop a land slide, to put it in by sections as the cut progressed. We made no wall in front of Keating's lot."

The court further says that it was admitted that the city built no retaining walls opposite any of the property on the avenue at the time in cotroverersy.

Upon such state of facts, the jury returned a verdict for plaintiff, and judgment was entered on this verdict. The district court reversed the judgment. The supreme court, in disapproving this action of the district court, first makes reference to earlier Ohio cases based on the rule: "So use your own property as not to injure that of another," and states that the case then under consideration is not one involving mere inconvenience to the owner, leaving the corpus of his property intact, but "is one of the invasion or injury of the property itself;" and then, in concluding its opinion, makes use of the following language at pp. 148-149:

> "The case of *Gilmore vs. Driscoll* (122 Mass. 199), relied upon by the defendant, fully supports the verdict in this case, and would have warranted the jury in allowing the damages to the improvements as well as to the lands, where the plaintiff is not chargeable with negligence in making them. On page 205, referring to the former case of *Foley v. Wyeth*, it is said, 'that the right of support from adjoining soil for land in its natural state stands on natural justice, and is essential to the protection and enjoyment of property in the soil, and is a right of property which passes with the soil without any grant for the purpose. It is a necessary consequence from this principle, that for any injury to this soil, resulting from the removal of the natural support to which it is entitled, by means of excavation of an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskillfulness, but upon the violation of a right of property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining lands, an action can only be maintained when a want of due care or skill, or positive negligence, has contributed to produce it.'
>
> It is upon this principle that the *City of Cincinnati v. Penny* (21 Ohio St. 499) was decided. The city in that case was held exempt from liability for damages to buildings, because it was free from negligence in making the excavation. The same rule of liability from want of proper care and skill is held in *City of Quincy v. Jones*, 76 Ill. 232.
>
> The evidence in this case would have warranted the jury in finding that the city failed to exercise such care and skill in making the avenue in question; and hence the judgment of the court of common pleas ought not to have been reversed."

The syllabus in the case reads:

> "A municipal corporation in making a street along a hillside, so excavated the ground in the street as to cause the land above to slide and injure the lot of the plaintiff. *Held*:
>
> 1. That the fact that the plaintiff's lot did not abut immediately on the street did not exempt the corporation from liability. Its liability did not depend upon the ownership of the injured property, but upon the extent of the injury of which its removal of the lateral support of the hill was the efficient cause.
>
> 2. That the liability extends to damages to buildings as well as to the land in its natural state, where the owner is not chargeable with negligence in making such improvements, and such damages result from want of due skill and care in making the street."

Recurring to the Penny and Elster cases, supra, we find that in the first of these cases the plaintiff's claim was based on injuries to his dwelling alone, and did not include a claim of injuries to land. It appeared from the special verdict of the jury that plaintiff's building was injured by reason of an excavation about thirteen feet deep, made by the defendant city in constructing a sewer; that plaintiff's foundation was about four feet in the ground and that the defendant city, in making the excavation, had used all reasonable and ordinary care to avoid injury to plaintiff's property. Judgment was rendered for plaintiff in the trial court. The supreme court, in holding such judgment erroneous, say in the course of the opinion at pp. 507-508 (21 O. S.):

> "How, then, stands this case? In 1867, the defendant below constructed a sewer in Borden alley, as it had a right to do; and in doing so it took all reasonable and ordinary care to avoid injury to the plaintiff's property. By making the excavation for the sewer, the lateral support to the plaintiff's house from the street was withdrawn, so that the foundation walls gave way. These foundations walls were suitable for sustaining such a structure at the time the house was built, which was several years before. At the time the house was built, and for many years before that time, Borden alley, by the laws of this state, was in the possession and under the control of the city for the purpose of drainage; and sewerage was a legitimate mode of drainage, within the scope of its authority. Before the plaintiff below built his house, the city had not, in any manner, as far as the record shows, indicated the nature or extent of drainage by sewers or otherwise that would be required for the public use. The plaintiff, without exercising any judgment or discretion as to the reasonable and proper future use of the alley for sewerage purposes, erected his house on a foundation suitable only for sustaining such a structure at that time, and under the then existing condition of the alley. This was his own wrong, and he has no right to complain of an injury from the construction of the sewer (which was built in a proper manner), having neglected on his own part to exercise reasonable precautions against such injury."

The first branch of the syllabus reads:

> "As a general rule, a municipal corporation is not liable for injuries to buildings on lots abutting upon streets and alleys, resulting from the improvement of such streets or alleys, or from their appropriation to a public use, provided its officers and agents, in making such improvements or appropriation, act within the scope of their authority, and without negligence or malice."

In the case of Elster v. Springfield, supra, the facts are stated in detail in the syllabus. Plaintiff was claiming damages against the city because the latter, in constructing a sewer in a street, had removed from the street certain pipes which had been in place for more than twenty-one years and which plaintiff used for the purpose of conveying water from a spring to a manufactory; and further because the excavation of the sewer trench had entirely destroyed the spring. "The pipes were taken up by the city with care, after notice to the plaintiff, at the commencement of the work of excavating for the sewer."

The trial court instructed the jury to return a verdict for defendant city; and in finding this course to have been proper, both as concerned the removal of pipes and consequent interruption of flow of water, and as concerned the destruction of the spring by draining it, the court held, among other things, after stating the facts (1st branch syll.):

"Section 1692, Revised Statutes, gives to cities the power to build sewers, and Center Street being a public street, and sewerage being one of the legitimate uses to which a public street may be devoted, the construction therein of a sewer, if done in a lawful manner, was an authorized use by the city of that street."

If the principles underlying the several cases just discussed were to be applied to the situation existing at the point of the crossing of a municipal street by the tracks of a railroad company, the result would seem to be that the municipality, in constructing a sewer under the tracks, would be liable to the railroad company in damages if in doing the work it injured the right of way by removing the lateral support, and this regardless of the question whether the sewer construction work itself was negligently done; and would further be under the duty of furnishing supports for the tracks, the supreme court having held, in effect, in the Keating case, that the city was negligent in that it failed to erect retaining walls and was liable to the owner for the injury to his building arising from such failure. But, do these principles apply to the situation now being considered; or, on the other hand, are the rights and occupancy of the railway company subject to the rights of the public in the street to the extent that the municipality has a free hand in constructing its sewer and may leave to the railway company the matter of protecting its tracks while the sewer construction work is going on? The precise question does not seem to have had the attention of the courts although many reported cases may be found, relating to the mutual rights of railroads and municipalities in the matter of opening streets across railroad rights of way.

In considering our questions, we need not concern ourselves with the matter of whether the railroad tracks were put across the street, or the street across the tracks by condemnation; for in the one case the railroad company's right to cross is acquired subject to the right of the public to the continuing use of the street for ordinary street purposes (Rockport v. Railroad Co., 85 O. S. 73, 82), and in the other the railroad company is presumed to have been adjudged full compensation and damages for the burdens that may have been thrown upon it by reason of the crossing of the tracks by the street for all ordinary street purposes (Grant v. Village of Hyde Park, 67 O. S. 166; Railway v. Railway, 5 O. C. C. (N. S.) 583, 16 O. C. D. 180). For similar reasons, no importance need be attached to the matter of which of the two public uses came first in point of time—the street or the railroad tracks.

Coming to the question whether one of the limitations or burdens, imposed upon the crossing of a municipal street by the tracks of a railroad company, is a duty on the part of the company to put in supports for its tracks, if necessary to their safety, while the municipality is constructing a sewer beneath them.

In the case of Gas Light & Coke Co. v. Columbus, 50 O. S. 65, the question involved was whether a gas company, which had laid its pipes in a municipal street under authority granted it by defendant city to do so, was entitled to damages because a change in the grade of the street by the city necessitated the abandoning of such pipes and the relaying of others to conform to the new grade. The supreme court held that such a claim might not be maintained. The syllabi read as follows:

"The power to grade and improve streets is conferred upon municipal authorities for the public benefit. It is a continuing power, and is not exhausted by the first exercise of it; nor can it, in the absence of statutory authority, be ceded nor bargained away; nor can one council, by its exercise, abridge the capacity of its successors to perform their duties in that behalf as the public interest may demand.

A gas company laying its pipes in the streets of a city, under a grant from the city, in conformity with an established grade, does so subject to the right

of the city to change the grade of the street whenever the necessities of the public require it, and, in the absence of wantonness or negligence on the part of the city, the company cannot maintain an action for damage occasioned by the necessity of taking up and relaying its pipes in order to accommodate them to the new grade."

In the case of Railroad Company v. Defiance (City), 52 O. S. 262, the facts were that in the year 1887 the track of the railway company crossed two municipal streets at about eighteen feet below the street grade, the streets being carried over the track by two wooden bridges. By an ordinance passed in 1887, the city council authorized the railway company to construct new bridges in the place of said wooden bridges. The railway company constructed the new bridges. Six years later, the city council passed ordinances for the improvement of said two streets and ordering the grade thereof changed so that the streets would pass over the track at the same grade as that of the track. The railway company sought to enjoin the enforcement of the terms of said ordinances upon the grounds, among others, that said bridges would be destroyed, the property rights of the railway company impaired, and an additional burden cast on the company in the maintenance of new grade crossings, all without compensation to the company. In holding that the company was not entitled to an injunction, the court stated the following propositions as shown in the fifth, sixth and seventh branches of the syllabus:

"5. The powers conferred on municipal corporations with respect to the opening, improving, and repairing of their streets and public ways, are held in trust for public purposes, and are continuing in their nature, to be exercised from time to time as the public interests may require; and they cannot be granted away, or relinquished, or their exercise suspended, or abridged, except when, and to the extent legislative authority is expressly given to do so; such authority is not given by section 3283, of the Revised Statutes.

6. Every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restrictive of the control of the proper agencies of the municipal body over them, or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond its express terms when not indispensable to give effect to the grant.

7. An ordinance which in terms authorizes a railroad company to erect new bridges of a specified description over the track of its railway where it crosses designated streets, the bridges to be kept in repair by the company, does not divest the municipal authorities of their control over the streets, nor impair their power to improve the same, nor entitle the railroad company to perpetually maintain the bridges as constructed; but the ordinance and privilege granted by it are subject too a proper exercise by the municipal body, of its power to improve the streets, and make such changes in the grades as may be necessary to subserve the public interest."

The judgment of the Supreme Court of Ohio was affirmed by the Supreme Court of the United States in an opinion found in 167 U. S. 88, of which opinion the syllabi are as follows:

"In 1887, the municipal authorities of Defiance authorized the erection of bridges over the Wabash Railroad, and about eighteen feet above its track, by the railroad company, to take the place of two existing bridges. In 1893, the common council of Defiance changed the grade of the streets crossing

on said bridges to the level of the railroad, and changed the approaches to it by causing them to descend to the level of the railroad. *Held*, that the common council acted within its powers in changing the grade of the streets in question, and that the railroad company had no legal right to complain of its action.

The legislative power of a city may control and improve its streets, and a power to that effect, when duly exercised by ordinances, will override any license previously given, by which the control of a certain street has been surrendered.

In this case, it was purely within the discretion of the common council to determine whether the public exigencies required that the grade of the street be so changed as to cross the railroad at a level."

In the case of Village of Rockport v. Ry. Co., 85 O. S. 73, the supreme court again had occasion to consider said section 3283 R. S. (now section 8763 G. C.) and to review the Ohio authorities in the matter of the crossing of streets by railway tracks. The point at issue was whether the railway company might appropriate a municipal street for a railroad yard. The court say in the course of the opinion (at pp. 81-82):

"The right of the railroad company to make this appropriation does not depend alone upon its authority to appropriate public streets to the uses of its road, but it also depends upon the nature of the property sought to be appropriated and the uses to which the railroad company seeks to subject that property. It must also be borne in mind that the state has already appropriated this land to public purposes, and it could not without first vacating these streets appropriate the same land to any use inconsistent with or destructive of the present rights of the public therein, and if the state itself could not, without first vacating and abandoning these streets, appropriate this property to a use that would be destructive of or a substantial interference with the public easement therein, then neither could it delegate to a railroad company any such right. The property having been devoted to a public purpose, the principle obtains that the public use is the dominant interest in the street, and the village authorities could not grant any right to the railroad company under the provision of section 3283, Revised Statutes, that would be destructive of these rights or amount to a material or substantial interference with the same or have the effect of excluding the public therefrom. This proposition seems to be well settled in this state. (Cases cited here) * * *. It necessarily follows that the railway company can acquire no further rights by appropriation than the village council could grant it by ordinance or contract."

Again, in Railroad v. Cleveland (city), 15 O. C. C. (N. S.) 193; 23 O. C. D. 482 (affirmed by the supreme court without opinion, 87 O. S. 469), the matter of the rights of a municipality in its streets, as against their occupancy by a railroad company with its tracks, was involved.

After referring (at p. 204 of the opinion) to the rule in Ohio that under authority of section 3283 R. S. (section 8763 G. C.), a railroad company might acquire by agreement or appropriation only such rights as should not interfere with the use of the street as such, or "with the full control and supervision thereof by the municipal authorities," the court takes up the claim of estoppel made by the railroad companies upon the ground that they had been permitted to expend large sums of money through a long series of years under color of absolute ownership of the land for their railroad purposes. After reviewing the authorities on this point, the court thus states its conclusion at p. 206 of the opinion:

"It being once established that the premises in controversy were originally dedicated to the public for street purposes, no grant, nor prescription, nor mere non-user, nor equitable estoppel can change its status."

In the case of Railway Co. v. Railway Co., supra, the court refused an injunction against the crossing on a public street of a steam railway company's tracks by a street railway company's tracks, after the right to construct such latter tracks had been given by the municipality. The holding was that even though the steam railway company's tracks had been in place for many years and the company would be put to expense in the way of providing for the crossing, yet said railway company had no such ownership of or title to the lands in question as required the street railway company to proceed by appropriation or otherwise as a condition precedent to laying its tracks across those of the steam railway.

A case very similar to that just cited, both as to the facts and the conclusions of law, is Railway v. Railway, 21 C. C. R. 391; 12 O. C. D. 113, which case was affirmed by the supreme court without opinion (64 O. S. 550).

In view of these very broad holdings of our Ohio courts, both as to the rights of the public in a street, and to the effect that the matter of expense to a railway or other company having an easement in a street is not a factor to be taken as diminishing such rights of the public, we are led to the conclusion that the construction of a sewer is one of those ordinary uses of the street such as the railway company's occupancy is subject to. From a purely practical standpoint, the temporary burden and incidental expense involved in supporting the tracks during sewer construction, is not nearly so heavy a one as that involved in providing for a permanent crossing by a street railway.

The cases of Railway Co. v. Com'rs., 63 O. S. 23, and Railroad Co. v. Troy (city), 68 O. S. 510, are not out of line with other Ohio authorities. In the first of these cases, while the holding was that the company was entitled to compensation for supporting its tracks while a county ditch was being constructed thereunder, yet the question of a municipal street was not involved. The Troy case was an original proceeding for appropriation of a street across a railroad right of way; hence the holding that the railway company was entitled to compensation for the cost of a bridge or viaduct necessary to carry its trains over the street.

Your question may therefore be answered by the statement that if a municipality proceeds in an ordinarily careful way to construct a sewer within the limits of one of its public streets and beneath the tracks of a railway company crossing such street, it is the duty of the railway company to furnish supports, if necessary, for its tracks while the sewer is being constructed thereunder.

Respectfully,
JOHN G. PRICE,
Attorney-General.

259.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN LICKING, MEDINA, VINTON, WASHINGTON AND WILLIAMS COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, May 3, 1919.

260.

APPROVAL OF BOND ISSUE OF WYANDOT COUNTY IN THE SUM OF $21,652.31.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 6, 1919.

261.

APPROVAL OF LEASE OF CANAL LANDS IN MASSILLON, OHIO.

COLUMBUS, OHIO, May 7, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your communication of May 3, 1919, in which you enclose for my approval lease for canal lands, in triplicate, as follows:

	Valuation
"Being a portion of the Ohio Canal Lands, Massillon, Ohio	$8,400 00"

I have carefully examined said lease and find it correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

262.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN JEFFERSON COUNTY.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, May 7, 1919.

263.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN MONROE AND VAN WERT COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, May 8, 1919.

264.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN AUGLAIZE, DEFIANCE, MORGAN AND VAN WERT COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, May 8, 1919.

265.

APPROVAL OF ARTICLES OF INCORPORATION OF THE DRIVERS MUTUAL INDEMNITY COMPANY OF MARION.

COLUMBUS, OHIO, May 8, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication of May 5, 1919, with which you transmitted to me for examination and approval the articles of incorporation of The Drivers Mutual Indemnity Company, of Marion, was duly received.

It is proposed to organize this company under sections 9607-1 et seq. G. C., and on examination I find the articles to be in conformity with the law governing the organization of such companies.

I am returning the articles to you with my certificate of approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

266.

COUNTY BOARD OF EDUCATION—AUTHORIZED TO PAY EXPENSES OF TEACHERS' MEETINGS FOR ONE CERTAIN WEEK—SECTION 7872 G. C. LIMITING AMOUNT TO BE PAID TEACHERS APPLICABLE TO CITY DISTRICTS ONLY—HOW RECOVERY OF MONEYS ILLEGALLY PAID OUT BY COUNTY BOARD CAN BE MADE.

1. *County boards of education are unauthorized to pay the expenses of teachers' meetings other than the annual teachers' institute which must be held during one certain week.*

2. *The grant of power in Section 7872 G. C. that "the board of education of any district" may expend for instruction of teachers any sum not to exceed five hundred dollars, is limited to city districts only.*

3. *Moneys illegally paid out by a board of education can be recovered from the members voting for such expenditure or from the persons receiving the same.*

COLUMBUS, OHIO, May 9, 1919.

HON. A. V. BAUMANN, JR., *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following statement of facts:

"A county board of education has allowed certain bills for which no provision is made by law. Upon the warrant of the president of that board of education and its secretary, the county superintendent of schools, these bills were paid from the county treasury. Are the members of the county board of education and their clerk, the county superintendent,or either of them, liable in a suit for recovery?"

You later say in reply to a request for further information:

"Teachers' institutes were held on Saturdays during the winter months and the bills are for expenses of these institutes, rent, fees of speakers, etc. Persons against whom findings are made are spread all over the state and the amounts of the individual findings are very small so that it would be more expensive to collect them in that way than the amount the findings will warrant."

Attention is invited to section 4752 G. C., which reads in part:

"A majority of the members of a board of education shall constitute a quorum for the transaction of business. Upon a motion * * * to pay any debt or claim * * * the clerk of the board shall publicly call the roll of the members composing the board and enter on the record the names of those voting 'aye' and those voting 'no.' If a majority of all the members of the board vote aye, the president shall declare the motion carried."

In construing the above section in opinion No. 267, vol. 1, 1911, page 272, the Attorney-General (in a case where there was no authority in law for an expenditure of school funds), said:

"By virtue of section 4752 supra, it is the duty of the board of education to pass on the payment of debts and claims, and I assume that the payment to the newspaper was made upon the motion duly adopted by the board of education. Such payment being illegal, the members who voted for it were guilty of malfeasance in authorizing the payment, and the money so paid out was misappropriated under the provisions of section 286, supra.

I am, therefore, of the opinion that the members of the board of education who voted for the payment to the newspaper as set forth above should be held liable for the funds so misappropriated.

From a reading of section 4768 supra, and section 4782 supra, I am of the opinion that the duties of the president, clerk and treasurer, as therein set forth, are purely ministerial in character, and that they were not required, if acting in good faith, to inquire into the question of the legality of the motion passed by the board authorizing the payment to the newspaper, but were fully protected in signing, countersigning and paying the order issued in pursuance of said motion."

In the above opinion it was held, however, that no recovery could be made from the newspaper, that is, the third party who received the money, and such was the general view until the decision of the Ohio Supreme Court in the case of State ex rel Smith, Prosecuting Attorney vs. Maharry, 97 O. S., 272, wherein the court said:

"It should be noted that the statute covers 'any public money * * * illegally expended * * * or any public property * * * converted or misappropriated.' When either of these two facts appear, that is (a) illegal

expenditure of public money or (b) any public property converted or misappropriated, then there is warrant and authority in law for bringing the action under these statutes.

But it is claimed that such actions can only be brought when the 'public money' has been unlawfully paid to some officer, or when the 'public property' has been unlawfully misappropriated by some public officer.

These statutes do not place any such limitation upon actions brought under them. They are manifestly in the interest of conserving 'public money' and 'public property,' and he who wrongfully takes such 'public money' or 'public property' may be, and should be, sued under these statutes."

* * * * * * * * * *

"Manifestly the wrongful acts contemplated by this statute, that is. the wrongful taking of public money or public property, if limited only to public officers, would emasculate and destroy 95 per cent. of the virtue of the statute.

This court does not feel warranted in giving the statute such a narrow and technical construction as would paralyze this important safeguard to the protection of the public trust in more than nine-tenths of the cases arising thereunder.

* * * Public authorities have their option as to which section they will utilize in protecting public money and public property."

From this later construction of the law it is apparent that the person receiving funds illegally appropriated is liable for recovery as well as the officers making such illegal appropriation and it is within the power of the prosecuting attorney to elect from which of the parties liable he desires to recover.

In your later statement you say that such payments in question were made "for expenses of these institutes, rent, fees of speakers, etc.," such teachers' institutes "being held on Saturdays during the winter months," and it is entirely possible that such expenditures were made by the county board of education under a misapprehension of Section 7872 G. C., which reads:

"The expense of such institute shall be paid from the city institute fund hereinbefore provided for. In addition to this fund the board of education of any district annually may expend for the instruction of the teachers thereof in an institute or in such other manner as it prescribes, a sum not to exceed five hundred dollars, to be paid from its contingent fund."

It is found that the attorney-general, on page 275, Opinions of 1911, Vol. I, held that section 7872 applied (in the expenditure of five hundred dollars "for instruction of teachers"), to *any* board of education in the state, the language being as follows:

"You will note the reading of the above section is this, that it provides that in addition to the regular institute fund the board of education of *any* district annually may expend for the instruction of the teacher thereof in an institute *or in such other manner* as it prescribes, a sum not to exceed five hundred dollars, etc."

This opinion was reversed by the same Attorney-General on April 29, 1913, in opinion No. 232, wherein he said relative to section 7872 G. C.:

"In answer to your second question, with reference to my opinion of November 22, 1911, I beg to say that, taking the language of that opinion strictly, it would have application only to village boards of education. The facts of that opinion, however, were very indefinitely stated, and I may well say that it should be read with reference to city boards of education in the light of the modifications stated herein."

This latter view, that section 7872 G. C. refers to city districts only, is the opinion of the present Attorney-General, and such section does not empower either county boards, rural boards or village boards of education to expend money for the instruction of teachers in such districts. The section must be read in conjunction with section 7871 G. C., which precedes it, and was part of the same act passed in 98 Ohio laws, 378, the subject being teachers' meetings in city school districts.

The provision for the improvement of teachers in their profession, where such teachers are not in city school districts, is found in section 7859 G. C., which reads:

"A teachers' institute may be organized in any county, by the association of not less than thirty practical teachers of the common school residing therein, who must declare their intention in writing to attend such institute, the purpose of which shall be the improvement of such teachers in their profession."

The above section creating an annual teachers' institute is followed by language in the succeeding sections 7860, 7865, 7868, 7868-1, 7869 and 7870, which indicate clearly that but one institute can be paid for by the county board of education under section 7860 G. C., which reads:

"The county teachers' *institute, annually,* shall elect * * *. The expenses of conducting *such institute* shall be paid out of the county board of education fund upon the order of the president of the county board of education."

Section 7868 G. C. reads:

"* * * Such boards (county) shall decide by formal resolution at any regular or special meeting held prior to February first of each year whether a county institute shall be held in the county *during the current year.*"

Thus we find that, while teachers' meetings aside from the regular county institute are to be commended, there is no provision in law for county boards of education to pay for rent, fees of speakers, etc., of teachers' meetings held at a time other than the one institute contemplated in section 7860 G. C.

While a board of education has broad power under section 7620 G. C., which says:

"The board of education may * * * make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

it cannot be said that such provisions cover the holding of teachers' institutes, the latter being treated specifically in other sections of the statutes.

It is possible that the board may have acted under supplemental section 4744-3a passed in 107 O. L., 621, which reads:

"The county board of education is authorized to pay for the printing of programs, examinations and other necessary printing supplies for the use of the county superintendent and the superintendents and teachers of the county school unit. The county board of education is authorized to pay the expenses of its educational meetings required by law."

It will be noted that the section says the "educational meetings *required by law*" and no others. This is a mere repetition of the language of section 7860, which provides for the payment of the expenses of the annual county teachers' institute herein discussed, that being the only "educational meeting" of teachers *required by law*. Educational meetings arranged by the school authorities voluntarily at various times would not come within those required by law. Attention is invited to opinion 342, issued by the Attorney General June 6, 1917 (Vol. I), the syllabus of which reads:

"The county board of education is authorized to order but one institute held in the county during any one year and such institute must be held during some one certain week. If other institutes are held the expense thereof cannot be paid from the county board of education fund."

It is therefore the opinion of the Attorney-General that there is no provision in law for a county board of education to pay expenses of teachers' meetings other than the annual teachers' institute; that money so paid out can be recovered from the members of the board who voted for the action, or from the person receiving such pay; that the president of the board and its secretary (as such officers) performed a ministerial act in drawing such warrants, if directed by aye and nay vote by the board to do so; that section 7872 G. C., which empowers certain boards of education to "expend for the instruction of the teachers thereof, in an institute or *in such other manner as it prescribes* a sum not to exceed five hundred dollars," refers and is applicable to city school districts only.

Respectfully,
JOHN G. PRICE,
Attorney-General.

267.

BOARDS OF EDUCATION—JANITORS—NOT REQUIRED TO BE PAID SEMI-MONTHLY—MAY UNDER SECTION 7690 G. C.

Under section 12946–1 *G. C., boards of education are not required to pay school janitors semi-monthly, but have the privilege of doing so under section* 7690 *G. C.*

COLUMBUS, OHIO, May 9, 1919.

HON. WALTER S. RUFF, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of April 24, in which you ask the opinion of the Attorney-General on the question:

"Does section 12946 G. C. require boards of education to pay janitors twice each month?"

Section 12946-1 G. C. reads as follows:

"That every individual, firm, company, co-partnership, association or corporation *doing business* in the state of Ohio, who employ five or more

regular employes, shall on or before the first day of each month pay all their employes engaged in the performance of either manual or clerical labor the wages earned by them during the first half of the preceding month ending with the fifteenth day thereof, and shall on or before the fifteenth day of each month pay such employes the wages earned by them during the last half of the preceding calendar month; provided, however, that if at any time of payment an employe shall be absent from his or her regular place of labor and shall not receive his or her wages through a duly authorized representative, such person shall be entitled to said payment at any time thereafter upon demand upon the proper paymaster at the place where such wages are usually paid and where such pay is due. Provided nothing herein contained shall be construed to interfere with the daily or weekly payment of wages."

Is is found that as far as governing the act of a board of education, in the pay of its employes, is concerned, the section in question has never been passed upon by this department, but an opinion was rendered by the attorney-general in 1913 (Vol. II, Ann. Rep. of Atty. Gen., 1913, p. 1537), as to its effect upon municipalities. The then attorney-general said:

"Section 1 of said act provides that every individual, firm, co-partnership, association or corporation *doing business* in the state of Ohio, who employs five or more regular employees, shall pay as provided therein.

* * * * * * * * *

A municipality cannot be considered as *doing business* in this state. It is solely a political subdivision of the state and not in any sense an individual, etc., as set forth in section 1 of the act.

I am, therefore, of the opinion that said section would not apply to municipalities."

Seemingly, the section in question was passed to protect those wage earners whose employers were private individuals or corporations, and not the employes of municipalities or boards of education, for neither of these can be considered as doing business in this state.

Inasmuch as practically all employes of boards of education in Ohio are paid at the end of the school month for the services rendered during *that* month, and nothing is held back on them, they might gain very little under a strict construction of section 12946-1 G. C. by a board of education, for a careful reading shows that it does not provide for paying employes for services *up to date*, as is now the case on pay days of school boards, but does provide that "shall on or before the fifteenth day of each month pay such employes the wages earned by them during the *last half* of the *preceding* calendar month," and similarly on the first day of the month to pay the wages earned by them "during the *first half* of the *preceding* month ending with the fifteenth day thereof;" that is to say, the employer can hold back fifteen days under section 12946-1 G. C., which is not done by school boards, but employes are paid at the end of each school month up to date. To illustrate, a board of education, if operating under section 12946-1 G. C., could on October 1 pay a janitor for only the days of the term prior to September 15, instead of paying for the whole school month when the first four school weeks were up as is now the case, and the janitor would receive his first month's pay on October 15, though he may have worked six weeks. So there is little in favor of school employes in section 12946-1 G. C., as compared to present method of payment, for under such section fifteen days can be held back.

Further, it is found that the school month is not the calendar month, as mentioned in section 12946-1 G. C., for the school month is but four school weeks, and

under such computation a board of education can not govern its pay days by such dates as the first and fifteenth of the month, for while such dates would operate uniformly in a calendar month, there would be confusion in calculating them in a school month, if it were desired to pay for services up to date.

However, boards of education have full power to pay their janitors twice each school month and up to date for services rendered if they care to do so, for section 7690 G. C. says:

> "Each board of education shall have the management and control of all the public schools of whatever name or character in the district. It may appoint * * * janitors and *fix their salaries.* * * *."

In view of the fact that practically all the federal, state and municipal employes, *in practice,* are now paid twice a month, much might be said in favor of paying all public employes at such intervals, where the statute does not say monthly. Considering present economic conditions and the small wage paid certain public employes, little objection would lie against paying such employes at lesser intervals than one month, though the statute does not compel it to be done. But where monthly reports might be required (as in the case of teachers) before the clerk can issue warrant (section 7786 G. C.), a semi-monthly payment could not be made; and again, section 4752 G. C., provides for the payment of teachers monthly, but does not restrict time of payment of other employes, that being a matter left to the board of education in its fixing of salaries and control of schools (section 7690 G. C.)

It is therefore the opinion of the Attorney-General that under section 12946-1 G. C., boards of education are not required to pay school janitors semi-monthly, but have the privilege of doing so under section 7690 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

268.

APPROVAL OF BOND ISSUE OF WILLIAMS COUNTY IN THE SUM OF $38,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 9, 1919.

269.

APPROVAL OF BOND ISSUES OF CITY OF ST. MARYS, OHIO, IN THE SUMS OF $1,000 AND $6,280.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 9, 1919.

270.

APPROVAL OF BOND ISSUES OF BELLE CENTER VILLAGE SCHOOL DISTRICT IN THE SUMS OF $27,500 AND $7,500.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 9, 1919.

271.

PROHIBITION AMENDMENT—WHAT LAWS EFFECTIVE ON MAY 27, 1919—WHEN LIQUOR LICENSE YEAR ENDS—LICENSES MAY BE GRANTED FOR ONE DAY, MAY 26, 1919.

The prohibition amendment to the constitution becomes effective coincident with the beginning of the day May 27, 1919, and is effective on and after said date.

The present liquor license year terminates at the end of the day preceding the fourth Monday of May, specifically, at twelve o'clock P. M. May 25th.

The last business day of the present license year is Saturday, May 24th.

Applications for license for the ensuing license year may be filed after March 15th, but action may not be taken thereon for the granting or rejection of licenses until after the beginning of the license year, to wit, on and after the fourth Monday of May, which licenses so granted would be effective until superseded by the prohibition amendment on Tuesday, May 27th.

Procurement of license is a necessary prerequisite to engaging in the sale of liquor as a beverage on May 26th.

The sections of the statute providing penalty for sales to minors, sales on Sunday on election days, sales within prohibited proximity to agricultural fairs and state institutions, and kindred sections, and for keeping a place where liquors are sold in violation of law will be operative and available for prosecution of alleged offenders after the prohibition amendment becomes effective on May 27th; the penalty sections of the liquor license law and local option laws will be inoperative after said date.

COLUMBUS, OHIO, May 9, 1919.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—I have yours of April 30th submitting for written opinion an inquiry as to the time at which the present liquor licenses will expire and also as to the authority for granting licenses upon applications that may yet be filed.

Inquiries have also been received from a number of sources as to what sections of the statutes will be available for prosecutions in case of sales of intoxicating liquor for beverage purposes *after May* 27, 1919. Also as to the exact time when statewide prohibition becomes effective.

All of said inquiries involve questions of more or less general moment under the impending state of the law, and I am, therefore, considering same together in a general opinion directed to your department.

Your inquiry is as follows:

> "Numerous inquiries have come to this department from licensees in the state asking for definite information regarding the last day on which liquor can

be sold without violating the provisions of the constitutional amendment prohibiting the sale and manufacture of intoxicating liquors in the state of Ohio, and what is the last business day of the license year.

Before giving definite answer to these inquiries, we would be pleased to have you advise us if you have made any ruling on the subject and if not, to favor us with an opinion as to the last day and hour under which licensees can operate under their present license issued by county boards under authority of section 1261-33 G. C.

In the event that you should decide that May 24, 1919, is the last business day of the license year, would it be necessary for a saloonist to secure a license to do business on Monday, May 26th, and if so, would it be possible for county boards to act upon applications that may yet be filed and grant licenses accordingly for the one day?"

The other inquiries may be thus summarized:

What statutes will be available for prosecutions for alleged unlawful sales of intoxicating liquor after the constitutional amendment providing statewide prohibition becomes effective?

What is the exact time at which statewide prohibition will become effective?

For convenience the last question submitted will be considered first.

The prohibition amendment to the constitution as adopted at the November election 1918 is as follows:

"Article XV.

Section 9. The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited. The general assembly shall enact laws to make this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental, or other non-beverage purposes.

Schedule.

If the proposed amendment be adopted, it shall become section 9 of Article XV of the constitution, and it shall take effect on the 27th day of May of the year following the date of the election at which it is adopted, at which time original sections 9 and 9a of Article XV of the constitution and all statutes inconsistent with the foregoing amendment shall be repealed."

The schedule to Article XV, as submitted at the 1918 election and adopted by vote of the electors, stipulates with clearness the time at which the article becomes effective, viz. "*on the 27th day of May* of the year following the date of the election at which it is adopted."

The language is apparently unambiguous, and falls clearly within the rule announced by the supreme court in the case of State ex rel. v. Roney, 82 O. S. 376, the first branch of the syllabus being as follows:

"The presumption is that the legislature intends a statute to take effect at the time it declares the statute shall be in effect, and a court may not by construction substitute a different time merely to correct defective legislation. The province of construction is to ascertain and give effect to the intention of the legislature, but its intention must be derived from the legislation and may not be invented by the court. To apply the intention and then give the statute effect according to such intention would not be construction but legislation."

The court in said case was considering the application of the Paine law to a state of facts before the court and the law provided that the *act shall take effect and be in full force on and after August* 1, 1909, excepting that the civil service provisions shall be in full force and effect from and after January 1, 1910.

Referring to the unreported case of State ex rel. v. Slabaugh, 81 O. S. 550, the court said:

> "It was held that the act went into effect on August 1, 1909 as therein expressly provided."

And again—

> "As already stated the repeal of the sections providing for the board of public safety was *in effect on August* 1, 1909."

A reading of the opinion discloses that the substance of the holding is that a provision that a law shall go into effect on a stated date is not open to construction and that the law is effective and in operation on said date.

It is not perceived that any different rule of construction could be sustained with respect to the time when a constitutional provision becomes effective than that applied in case of an act of the legislature, where the language is in substance the same.

Taken in connection with the familiar rule that the law does not regard fractions of a day in the application of provisions of the character under consideration, it follows that the prohibition amendment will be effective immediately after the close of the day preceding May 27, 1919, specifically immediately after twelve o'clock P. M. of May 26th.

Akin to the question just considered is that presented by your board as to "the last day and hour on which liquor can be sold by licensees under their present licenses issued by county boards under authority of section 1261-33 G. C."

I note also that your inquiry embodies the question as to the last day on which liquor can be sold without violating the provisions of the constitutional amendment, which question of course is answered by what has already been said as to the time at which the constitutional amendment becomes effective.

Considering then your inquiry as to the time when the present liquor licenses expire, as an authorization to engage in the sale of intoxicating liquor as a beverage, it is necessary to note the provisions of the liquor license law defining the license year.

Section 1261-33 G. C., as amended in 1917 and found at page 23 of 107 Ohio Laws, is as follows:

> "From and after the fourth Monday in May, 1918, the license year shall begin on the fourth Monday of May and extend to the fourth Monday of May in the following year. From and after the termination of the current license year, which ends on the fourth Monday in November, 1917, there shall be an intermediary license period extending to the fourth Monday in May, 1918, which, for the purposes of the laws regulating and licensing the traffic in intoxicating liquors, shall also be regarded as a license year. Nothing contained in this act shall operate to modify or affect the rights, obligations or status of licensees granted license prior to the fourth Monday in November, 1917."

It is to be noted that the language of the foregoing section as to the time when the license year begins is the same as that above considered in connection with the constitutional amendment. It is provided that the license year shall begin *on the*

fourth Monday of May, and under the doctrine of the Roney case, supra, the conclusion is at once apparent that the license year begins coincident with the beginning of the fourth Monday of May, and the language of the statute is equally clear as to the termination of the license year, the provision being "and extend to the *fourth Monday of May* in the year following."

If it were contended that the language just quoted is open to a construction that would include the fourth Monday of May at the end of the period, there are cogent factors which are strongly conducive of a contrary construction.

First, it is obviously intended that the license year should only be a yearly period, and not a period of one year and one day, which would be the consequence of a construction including both the Monday upon which the year begins and the Monday named as the termination of the license year, and that the first Monday must be included as a part of the license period we think is clear from what has previously been pointed out in that regard.

Again, upon inquiry at your office I find that it has been the practical construction placed upon the statute from its first enactment for licensees to engage in their business during the first Monday of the period and at each successive issuance of new licenses for the renewal to become operative on said first Monday thereby excluding the Monday at the termination of the period as a part of the preceding license year.

In State v. Ridgeway, 73 O. S. 31, the court said:

> "A long established and uniform practice is an authority of but little, if any, less weight than an adjudication to the same effect."

Again, in State v. Kaiser, 18 O. C. C. 349, the court said:

> "When the practice in the department in interpreting a statute is uniform, and the meaning of the statutes, upon examination, is found to be doubtful or obscure, the court will accept the interpretation by the department as the true one."

In Smith v. State, 71 O. S. 13, it was said:

> "While the practical construction thus adopted cannot be admitted as absolutely controlling, it is nevertheless, we think, deserving of consideration, and should, perhaps, be regarded as decisive in a case of doubt, or where the obligation imposed or the duty enjoined is not plain and specific."

I am not unmindful of the rule that in the computation of time the first day shall be excluded and the last day included, as recognized both by statute and judicial decision, but in adhering to said rule, the Supreme Court in State v. Elson, 77 O. S 489, said:

> "The courts could not depart from or change the language used * * *"

And also:

> "Either or both days may be either included or excluded, if the language of the provision for time is such as to require it."

In fact the rule is only applicable in determining the beginning or ending of a stated space of time, while in the statute we have under consideration the beginning and ending of the period is specific and is not to be fixed from a consideration of a stated space of time as the basis.

I conclude that the license year includes all of the fourth Monday of May upon which the license is issued and terminates at twelve o'clock P. M. on Sunday night preceding the fourth Monday of May of the year following, subject of course to the provisions of law which are in force pursuant to the authorization of the constitutional provision known as the license amendment, section 9 of Article XV, which provides in part as follows:

> "Section 9. License to traffic in intoxicating liquors shall be granted in this state and license laws operative throughout the state shall be passed with such restrictions and regulations as may be provided by law * * * and nothing herein contained shall be so construed as to repeal, modify or suspend any such prohibitory laws or any regulatory laws now in force or hereafter enacted * * *."

This leads to a consideration of your question as to "what is the last business day of the license year?"

Neither the license amendment to the constitution nor the license law or other act of the legislature now operative has repealed the provisions of section 13050 G. C which prohibits the trafficking in intoxicating liquor on Sunday, and requires all places where such liquor is sold on other days of the week to be closed. Said section is as follows:

> "Whoever, on Sunday, sells intoxicating liquor, whether distilled, malt or vinous, or permits a place, other than a regular drug store, where such intoxicating liquor is sold or exposed for sale on other days to be open or remain open on Sunday, shall be fined not less than twenty-five dollars nor more than one hundred dollars, and for each subsequent offense, shall be fined not more than two hundred dollars or imprisoned in jail or in a city prison not less than ten days nor more than thirty days, or both."

Therefore, answering your last inquiry specifically I have to advise that the last business day of the present license year is Saturday, May 24th.

Your inquiry as to the necessity for a licensee to secure a license to do business on Monday, May 26th, is therefore answered by what has just been said in answer to your last inquiry, and I advise that it would be necessary to secure such license as an authorization to engage in the sale of liquor on said date.

Coming next to consider your inquiry as to the authority for issuance of licenses upon applications that may yet be filed, it is necessary again to consider the provisions of the liquor license law in this regard.

Section 24 of said act, being section 1261-39 G. C., provides in part:

> "The county board shall grant licenses to the full number allowed by the constitution if applications are made therefor * * *."

The procedure for making application for and granting liquor licenses is somewhat loosely provided.

Section 20 of the act, being section 1261-35 G. C., provides, in so far as pertinent:

> "Applicants for the license to sell intoxicating liquors during any given license year shall file their applications with the county licensing board upon uniform blanks obtained from said county board and furnished to the latter by the state liquor licensing board. No application for a saloon license filed with the said county board before the first day of March preceding the said license year and after the fifteenth day of March preceding the said license

year may be considered by the board until after the beginning of the said license year. * * *"

After the filing of the application it is provided in section 25 of the act, section 1261-40 G. C.:

"The county licensing board shall, *without delay*, cause to be published once in a newspaper of general circulation in the county notices of the application for license, transfer or removal filed hereunder. * * *"

It is further provided by subsequent sections that every applicant at the time of filing his application shall pay the county board a fee of $5.00.

It is provided by section 1261-43 G. C.:

"Not later than the fifth day of the month in which the license year begins, and in the case of a license applied for after the beginning of the license year, ten days after said application, the board shall announce the names of those to whom said board proposes to grant licenses * * *.

As soon as the names of those to whom licenses are proposed to be granted are announced such persons shall forthwith transmit to the secretary of the state liquor licensing board, at its office in Columbus, Ohio, a registration fee of one hundred dollars * * *."

It is then further provided that the state board shall issue a receipt to the applicant and notify the county board of the payment of the said fee and that upon the delivery of said receipt to the local board at the beginning of the license year the applicant shall be entitled to his license.

The foregoing are substantially all the provisions governing the issuance of licenses and it is to be noted that there is no provision governing the case of an application made after the 15th of March and before the beginning of the license year.

It is provided that no application filed after the 15th day of March shall be considered by the board until after the beginning of the license year, but it is obviously contemplated by the provisions of the act that applications may be filed and acted upon in case the quota of licenses has not been issued in full in pursuance of applications filed between the 1st and 15th of March, and it is provided that the board shall announce its ruling on applications filed after the beginning of the license year within twenty days. But as before noted there is no provision in terms applicable to the case of a license applied for during the interim between March 15th and the beginning of the license year.

There is the apparently mandatory direction that county boards shall grant licenses to the full number allowed by the constitution and also shall, without delay, cause to be published the notices of applications for licenses, so I am of the opinion the board may receive applications, publish notice thereof and perform the ministerial functions directed by the law up to the point of considering the application with a view to allowance or rejection, which function may not be performed until after the beginning of the license year, which would be on and after the fourth Monday of May.

From what has been said it follows that if the payment of fees to the state board and the transmission of the receipt to the local board can be accomplished, the board may act upon the application immediately on Monday morning within the authorization of the law, and I advise that the law does not exclude the filing of applications during the interim between the 15th of March and the beginning of the license year, and that it is the determination to grant or reject the license which is postponed by the law until after the beginning of the license year while the taking of the intermediary steps is not restricted in point of time.

I come next to a consideration of the question—what statutory law of the state, as now in effect, will be operative for the prosecution of persons engaging in the sale of intoxicating liquor for beverage purposes after May 27th, the time at which the prohibition amendment becomes effective.

At the outset it is to be noted that the bulk of the statutes for the regulation of the liquor traffic as now in force consists of those enacted in pursuance of the license amendment to the constitution (so-called) and the various local option statutes (so-called), both of which classes or groups of legislation are operative only within portions of the state; the local option statutes having in the main been first enacted and adopted by particular local communities, wherein alone they are operative, and the later license system of regulation being expressly limited by the constitution to such territory as had not availed itself of the regulatory provisions afforded by the local option legislation; the constitutional amendment providing:

> "Where the traffic is or may be prohibited under laws applying to counties, municipalities, townships, residence districts or other districts now prescribed by law, the traffic shall not be licensed in any such local subdivision while any prohibitory law is operative therein. Nothing herein contained shall be so construed as to repeal, modify or suspend any such prohibitory laws * * *"

The prohibition amendment of 1918 provides in its schedule—

> "If the proposed amendment be adopted it shall become section 9 of Article XV of the constitution and it shall take effect on the 27th day of May of the year following the date of the election at which it is adopted, at which time original sections 9 and 9a of Article XV of the constitution and all statutes inconsistent with the foregoing amendment shall be repealed."

The substantive provision of the prohibition amendment itself is

> "The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited."

Obviously the prohibition amendment is in letter and spirit repugnant to and inconsistent with the system of licensing the traffic in intoxicating liquor as a beverage and manifestly the provisions of the license law, so-called, looking to and providing for the licensing of the traffic must fall with the advent of the prohibition amendment.

And equally in my opinion are the provisions of the several local option laws inconsistent with the provisions of the prohibition amendment, for the reason that the mandate of the prohibition amendment is that the sale and manufacture for sale of intoxicating liquor as a beverage shall be prohibited generally throughout the state while with that general mandate and the further general mandate of the constitution that

> "all laws of a general nature shall have a uniform operation throughout the state." (Sec. 26, Art. II.)

the purport and effect of the local option legislation is to impose restrictions and penalties operative only in the particular localities wherein the local option laws have been adopted, thus raising the situation, if the local option laws be said to remain in force, that a particular sale of intoxicating liquor in one part of the state entails liability to answer to different statutes and a different penalty than may be operative in an adjoining or other locality of the state.

As much may also be said in regard to the various provisions of the licensing law, so-called, which likewise does not purport to be operative in all parts of the state, and for the reasons just pointed out it is my opinion that when the prohibition amendment becomes effective providing a general and mandatory rule on the given subject for the entire state, reinforced by the uniform operation provision of the constitution, the general structure of the local option and licensing systems will fall for constitutional reasons.

Further, the penalty sections of the license law, being sections 48 and 49, aside from the fact of their obvious inadaptability to the condition which will prevail when license may not be granted by virtue of the constitutional mandate, are otherwise inadequately constructed for usefulness after the advent of general prohibition, for the reason that aside from providing a penalty only for sales without a license, even this provision is not of general application and a number of classes of sales are specifically exempted such, for example, as sales by the manufacturer in quantities of one gallon or more at one time at the factory, or sales by the manufacturer from the wagon or by the manufacturer to the holders of liquor licenses or to individual consumers at their homes, and a number of other exemptions.

How could the statute stand as properly adaptable to the enforcement of prohibition when by its terms special classes of sales are expressly excepted from its operation?

In short, I may say that the penalty sections of the liquor license act are adapted by specific language to the one offense of selling without a license, the fundamental theory of which is repugnant to and inconsistent with the prohibition amendment of the constitution and, further, the sections are not uniformly operative upon all sales prohibited by the constitution and for such reasons are not available as an authorization for prosecutions or penalty after the prohibition amendment to the constitution becomes effective. And for similar reasons as above noted the provisions of the various local option laws are likewise unavailable.

Certain other regulatory provisions providing penalties for stated classes of sales of intoxicating liquors remain to be considered, among which are the sections applicable to sales to minors, sales on Sunday, Sunday closing, election days, sales within prohibited proximity to agricultural fairs, state institutions and perhaps other kindred sections, without undertaking an exhaustive enumeration of which, I may say do not suggest any apparent inconsistency with the prohibition amendment to the constitution, but are in fact calculated to render it effective and secure obedience to its mandate, and therefore it is my opinion that said sections will remain in full force and effect and may be employed for prosecutions for sales coming within their terms.

It so transpires that the operation of said sections, however, is comparatively limited as to the subjects or classes of sales comprehended and there remains the large class of offenders commonly known as bootleggers, etc., which presents the more important phase of your inquiry. In other words, what statutes may be applied in prosecutions for sales otherwise than to a minor and outside the restrictions as to the limited number of prohibited days and places comprehended by the sections above noted.

Such offenders have heretofore been prosecuted mainly under section 48 of the license law and section 13195 G. C., the first of which I have found to be unavailable and must say that the latter is by no means free from doubt. This section provides in so far as pertinent:

> "Whoever keeps a place where intoxicating liquors are sold, furnished or given away in violation of law shall be fined not less than one hundred dollars nor more than five hundred dollars and for each subsequent offense shall be fined not less than two hundred dollars nor more than five hundred dollars * * *."

This section does not furnish the complete definition for the offense in itself, inasmuch as the definition of unlawful sales of liquor must be sought elsewhere, and it has been the holding of the courts that the section comprehended the keeping of a place where liquors were sold to minors, on Sundays, without a license, and in such other ways as the unlawful sale of liquor had been defined by statute.

The question now presents itself whether the constitutional provision might be looked to to supply the definition of unlawful sale of liquor, and thereby furnish a complete provision for the prosecution of the keeper of a place where liquors are sold as a beverage generally.

It is significant, of course, to note that in all the long history of this section since its enactment in 1854 occasion has never arisen for looking to a constitutional provision to supplement the terms of the statute for a complete definition of the offense and it may well be argued that the phrase in this section, "in violation of law" imports statutory law as distinguished from constitutional provision. It is a familiar doctrine that we have no common law crimes in Ohio and it probably would be difficult to cite a case of conviction for crime except as defined by statute. There is also the rule that criminal statutes must be strictly construed which might be invoked in determining the construction of the phrase "in violation of law" on the question of its inclusion of a constitutional definition of unlawful sales.

However, constitutional provisions are to be read into and considered a part of statutes in determining their proper construction, and I incline to the opinion that the provision of the prohibition amendment is so clear and specific "the sale and manufacture for sale of intoxicating liquor as a beverage are hereby prohibited" that legislative action is not essential to complete or provide a definition of unlawful sale.

Of course it is further provided "the general assembly shall enact laws to make this provision effective" which suggests the necessity for legislation, and it is said by Blackstone

> "The main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws."
> 1 Blackstone Commentaries, 57.

While the question is much incumbered with doubt, I advise that until the question has been judicially determined, the provision of the prohibition amendment may be looked to as furnishing the definition for unlawful sales as contemplated by the provisions of section 13195 G. C. providing a penalty for the keeper of a place where liquor is sold in violation of law.

My difficulty in reaching a conclusion has been further augmented by the fact that in frequent instances the constitution provides the substantive rule of conduct with the further language that same shall be administered "as provided by law," apparently used in the sense of legislative enactment which might be said to furnish warrant for a distinction between the primary meaning of the terms "law" and "constitution."

To summarize, then, briefly it follows from what has been said that prosecutions may be made under the sections providing a penalty for sale to minors, selling on election days, on Sundays, or the other limited provisions which have been suggested above, including the keeping of a place where intoxicating liquors are sold as a beverage.

As to the larger question of prosecution for the unlawful sale, not coming within the provisions of the foregoing sections of limited application, such as a common case of bootlegging, I am unable to advise of any provision applicable to such case, nor of course is there any provision for enforcing the prohibition of Article XV of the constitution against the manufacture for sale of intoxicating liquors.

Respectfully submitted,
JOHN G. PRICE,
Attorney-General.

272.

JUVENILE COURT—DUTIES OF PROBATION OFFICER FOR JUVENILES COMMITTED BY SAID COURT—NOT ENTITLED TO FEES IN SUCH CASES.

1. *The probation officer may be directed by the juvenile court to take juvenile delinquents to such places as they are by such court lawfully committed.*

2. *For the performance of such services, such probation officer is not entitled to the fees provided by law for sheriffs in like cases.*

COLUMBUS, OHIO, May 9, 1919.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren; Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter dated April 25, 1919, as follows:

> "Our juvenile court frequently has cases in which delinquent children are sent to the boys school at Lancaster. The court would like to have these delinquent children taken to the school by the probation officer. However, there is a question as to any authority under our Code for permitting the probation officer to serve in such cases.
>
> The question which I wish to have you consider is as to whether the probation officer may take the child upon commitment papers and thereupon receive the fee ordinarily allowed a sheriff for such work. If this can possibly be done, please advise .If not, what would you suggest as to a remedy whereby the probation officer could do the work?"

It is noted that your letter involves two questions: (1) May the probation officer legally take delinquent boys to the Boys' Industrial School at Lancaster, Ohio, upon receipt of commitment papers from the juvenile court for that purpose, and (2) for such services may such probation officer receive the fee ordinarily allowed a sheriff for such work.

Sections 1662, 1663 and 1682 of the juvenile court act are pertinent and by these sections it is in part provided:

> "Section 1662.—The county auditor shall issue his warrant upon the treasury and the treasurer shall honor and pay the same, for * * * expenses provided for in this act, * * *.
>
> Section 1663.—The probation officer * * * shall serve the warrants and other processes of the court within or without the county, *and in that respect is hereby clothed with the powers and authority of sheriff* * * * and performs such other duties incidental to their offices, as the judge directs.
>
> Section 1682.—Fees and costs in all such cases, with such sums as are necessary for the incidental expenses of the court and its officers, and costs of transportation of children to places to which they have been committed, shall be paid from the county treasury upon itemized vouchers, certified to by the judge of the court."

Consideration of the purpose of the juvenile court act generally, and particularly its policy to avoid the treatment of juvenile delinquents as criminals, and further consideration of the special provisions of the sections of that act, above quoted, lead to the conclusion that the probation officer may be directed by the juvenile court to take the juvenile delinquents to such places to which they are legally committed, and your first question is, therefore, answered affirmatively.

Your attention is also directed to Opinion No. 1037, rendered by the Attorney-General February 28, 1918, which, although raised on different facts, reaches the same general conclusion.

As to the probation officer receiving the fees allowed by sheriffs for like services involved in your inquiry, this department is of the opinion that the compensation provided for in section 1662, as amended in 103 O. L., 874, was intended to compensate the probation officer for all of his services in juvenile court work and there is no provision in that section, or in any other part of the act that I am aware of, which provides for payments to such probation officer of fees equivalent to those received by sheriffs for like services, and your second question is, therefore, answered in the negative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

273.

ROADS AND HIGHWAYS—CONSTRUCTION OF SECTION 6919 G. C. —"WITHIN ONE HALF MILE ON EITHER SIDE THEREOF."

The expression "within one-half mile on either side thereof," in section 6919 G. C., referring to road improvement and lands to be assessed, means lands lying on the right and left of the road to be improved, and does not embrace lands bordering on the "far side" of another road which the improved road meets at right angles.

COLUMBUS, OHIO, May 9, 1919.

HON. ROBERT E. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—The receipt is acknowledged of your letter dated April 7, 1919, wherein you submit for opinion a question which may be stated as follows:

A road running north and south, designated as road A, terminates in a road running east and west, designated as road B. Road A is improved and part of the cost is to be provided for on the assessment plan. In making such assessment, in accordance with the terms of paragraph 4 of section 6919 G. C., "against the real estate situated one-half mile of either side thereof" (referring to the road which is improved), is the assessment to be confined to lands lying east and west of road A, or may the lands lying north of road B be included in the assessment zone?

Said section 6919 reads in part:

> "The compensation, damages, costs and expenses of the improvement shall be apportioned and paid in any one of the following methods, as set forth in petition:
> * * * * * * * * *
> 4. All or any part thereof shall be assessed against the real estate abutting upon said improvement, or against the real estate situated within one half mile of either side thereof, or against the real estate situated within one mile of either side thereof, or against the real estate situated within two miles of either side thereof, according to the benefits accruing to such real estate and the balance thereof, if any, shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of all the taxable property in the county or from any funds in the county treasury available therefor."

It will be noted that the first reference in said paragraph 4 to assessable real estate is to that "abutting upon said improvement." Hence, if in the improvement of road A, the plan adopted for the assessment specified "the real estate abutting upon said improvement," there would be no question that the assessment could be made only against lands immediately adjoining road A on the east and west, and could not embrace that adjoining road B on the north, since the latter real estate abuts on road B and not on road A.

Keeping this proposition in mind, as well as the fact that one of the plans of assessment long in use in Ohio is the foot frontage plan, it would seem that the intention of the legislature in using the expression "within one-half mile on either side thereof." etc., immediately following the expression "against the real estate abutting said improvement," was merely to enlarge upon the "foot frontage" or "abutting land" idea. At any rate, the expression "on either side thereof" is akin to that of "abutting upon said improvement."

The proposition that the legislature in using the words "on either side thereof" had reference only to lands on the right and left of the improvement, finds further support in the use of the word "either" rather than the word "any," and also in a comparison of the terms of section 6919 with those of section 3812. In this latter section, which authorizes assessments by municipal corporations, this language appears:

> "The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost and expense connected with the improvement of any street," etc.

For these reasons it is concluded that the expressions "against the real estate situated within one-half mile on either side thereof," etc., as used in section 6919, permit the assessment of such lands only as lie to the right or left of the improvements, and do not embrace lands bordering along the "far side" of a road which the improved road meets at right angles.

Respectfully,
JOHN G. PRICE,
Attorney-General.

274.

APPROVAL OF LEASE OF STATE LANDS TO THE UNION FURNACE OIL COMPANY.

COLUMBUS, OHIO, May 9, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter dated April 28, 1919, with which was transmitted to this department for its approval the lease of the Union Furnace Oil Company, for certain lands in section 16.

From a careful examination of the lease and consideration of the provisions of section 3209, General Code, this department is of the opinion that this lease is authorized by said section.

It is to be noted also that this lease has been executed to carry into effect the understanding and agreement referred to in the second paragraph of your letter dated April

11, 1919, relative to the transmission of a supplemental agreement which was with the letter of that date submitted to this department for approval.

As stated in your letter of April 28th, this department was unable to approve of such modification, as in its opinion such supplemental contract was not authorized by law. But it appearing that the original lease provided for the lessee surrendering and cancelling said lease, and it further appearing that such surrender and cancellation has been made as so provided for, and it further appearing that the execution of the lease now submitted to this department for approval is, under the circumstances surrounding this lease, for the best interest of the beneficiary of said section 16, you are hereby advised that said lease is approved by this department.

Respectfully,
JOHN G. PRICE,
Attorney-General.

275.

BOARD OF EDUCATION—JOINT HIGH SCHOOL FORMED BY RURAL SCHOOL DISTRICT AND AN ADJOINING VILLAGE SCHOOL DISTRICT—HOW TAXES ARE TO BE APPORTIONED AND LEVIED FOR PURCHASE OF SITE AND ERECTION OF BUILDING AND SUPPORT OF SAME.

When a joint school district is formed for high school purposes by a rural school district, and an adjoining village school district, such combined territory becomes one district for high school purposes, and taxes levied for the purchase of a school site and the erection of the school building, and the support of such joint high school thereafter must be borne by the respective joined districts in proportion to the total valutaion of the property in each, notwithstanding the fact that the village district has the smallest valuation and sends the most pupils.

COLUMBUS, OHIO, May 9, 1919.

HON. HOMER HARPER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Acknowledgment is made of your request of April 19, 1919, for an opinion on the following statement of facts:

> "Madison village and Madison rural school districts propose to form a union high school district, and to purchase land and erect a high school building thereon. Sections 7669 and 7671 O. S. L. define how such a school is to be supported and maintained, but do not say anything about the construction of the building and purchase of land therefor. Now, the village board is willing to submit a bond issue to the people of the village district sufficient to pay one-half of the cost of the building and grounds, although the tax duplicate of said village is about one-third of the total duplicate of the combined districts. Can the village board legally levy a tax for such purpose, under such conditions?"

Section 7669 G. C. reads:

> "The boards of education of two or more adjoining rural school districts, or of a rural and village school district by a majority vote of the full membership of each board, may unite such districts for high school purposes.

Each board may submit the question of levying a tax on the property in their respective districts, for the purpose of purchasing a site and erecting a building, and issue bonds, as is provided by law in case of erecting or repairing school houses; but such question of tax levy must carry in each district before it shall become operative in either. If such boards have sufficient money in the treasury to purchase a site and erect such building, or if there is a suitable building in either district owned by the board of education that can be used for a high school building it will not be necessary to submit the proposition to vote, and the boards may appropriate money from their funds for this purpose."

Section 7671 G. C. reads:

"The funds for the maintenance and support of such high school shall be provided by appropriations from the tuition or contingent funds, or both, of each district, in proportion to the total valuation of property in the respective districts, which must be placed in a separate fund in the treasury of the board of education of the district in which the school house is located, and paid out by action of the high school committee for the maintenance of the school."

Upon the question raised by you as to whether the two districts can agree on the amount each is to pay in the erection of a high school building, attention is invited to a very similar case upon which the Attorney-General rendered an opinion in 1911 (Vol. II, page 1042), copy of which is presumed to be in your office.

The question submitted was as follows:

"Can the board of the township and the board of the adjoining village agree upon the amount the township and the village shall use in erecting the buildings and purchasing a site, or must the village and township bear the burden in proportion to the total valuation of the property in the respective school districts?"

The then Attorney-General in discussing the above question said:

"The sections above quoted, really need no interpretation on the point raised by you, as they are silent with regard to it. Section 7670 refers to the high school district established as provided by section 7669 as a 'joint district'; therefore, it is to be regarded as one district—a joint high school district; section 7672, General Code, provides that 'boards of education exercising control for the purpose of taxation over territory within a township or joint township high school district may levy upon all the taxable property within such territory; section 7669, quoted above, provides that the bonds shall be issued as is provided by law in case of erecting or repairing school houses; this provision is found in section 7625 of the General Code; and section 7628 General Code, provides the method for leving taxes to pay the bonds issued under section 7625 and is as follows:

'When an issue of bonds has been provided for under the next three preceding sections, the board of education, annually, shall certify to the county auditor or auditors as the case may require, a tax levy sufficient to pay such bonded indebtedness as it falls due together with accrued interest thereon. Such county auditor or auditors must place such levy on the tax duplicate. It shall be collected and paid to the board of education as other taxes are. Such tax levy shall be in addition to the maximum levy for school purposes,

and must be kept in a separate fund and applied only to the payment of the bonds and interest for which it was levied.'

Therefore, as all taxes must be uniform; as the district when established under section 7669 is one district; and no express authority is given by the statute for the board of the township and the board of the village agreeing upon the amount the township and the village shall use in erecting buildings or purchasing a site, it is my opinion that the same must be borne in proportion to the total valuation of property in the respective districts, and levied in the manner provided in section 7628 of the General Code."

In the above view, the present Attorney-General concurs, for while section 7669 G. C. was amended since 1911 in 104 O. L. p. 225, the part that bears on this question was not changed; that is, that the territory becomes *one district* for high school taxation purposes.

Bearing upon the practical side of your inquiry you say the village of Madison is willing to pay one-half of the cost of building and grounds, in order that such project may be consummated. Section 7669 G. C. provides in part:

"If such boards have sufficient money in the treasury to puchase a site * * * it will not be necessary to submit the proposition to vote, and the boards may appropriate money from their funds for this purpose."

Thus, the boards might have a site deeded to them and no bond issue would be necessary for purchasing a site, though it would be necessary for a building fund, and any levy for the latter must be uniform on all territory concerned.

Similarly, if the municipal corporation of Madison is sufficiently interested in this matter in the degree indicated, attention is invited to section 7644-1 G. C. which reads:

"A municipal corporation, may by ordinance duly passed authorize the transfer and conveyance by deed, of any real property owned by it and not needed for municipal purposes to the board of education of any such municipality, to be used by said board of education as an athletic field, a play ground for children or for school sites, upon such terms and conditions as are agreed to between the municipal corporation and the board of education and when such property is so conveyed, the same shall be under the control and supervision of such board of education."

Under this section the municipal council of Madison could convey by deed any real property it did not need for municipal purposes, and of which it was owner, to *the board of education of such municipality* after which such village board of education could convey a joint half interest in such site to the board of education of Madison rural school district, in which event both boards would have joint title to the site and the bond issue would be for the building only. In other words, a board of education may accept any gift under section 4755 G. C. which reads:

"By the adoption of a resolution, a board of education may accept any bequest made to it by will or may accept any gift of endowment from any person or corporation upon the conditions and stipulations contained in the will or connected with the gift or endowment. For the purpose of enabling the board to carry out the conditions and limitations upon which a bequest, gift or endowment is made, it may make all rules and regulations required to fully carry them into effect. No such bequest, gift or endowment shall be accepted by the board if the conditions thereof shall remove any portion of the public schools from the control of such board."

So while Madison village might offer a site, or make a gift of funds from its citizens to the boards of education concerned and the same could be legally accepted, on the single proposition of levying a tax to pay for both site and building, such tax must operate uniformly in the village and outside.

Section 7669 G. C. supra, says:

> "Each board also may submit *the question* of levying *a tax* on the property in their respective districts for the purpose of purchasing a site and erecting a building * * *; but *such question* must carry in each district before it shall be operative in either."

It must be inferred manifestly that "the question" is the same in one portion of the territory to be joined as in another portion; that is to say, that if in Madison village the ballot said $30,000 as a bond issue, and in Madison rural school district some other amount was on the ballot, the *same question* would not have been submitted in all the territory affected, which is necessary for uniformity of operation of taxes.

It is therefore the opinion of the Attorney-General that when a joint school district is formed for high school purposes by a rural school district, and an adjoining village school district, such combined territory becomes one district for high school purposes, and taxes levied for the purchase of a school site and the erection of the school building, and the support of such joint high school thereafter must be borne by the respective joined districts in proportion to the total valuation of the property in each, notwithstanding the fact that the village district has the smallest valuation and sends the most pupils.

Respectfully,
JOHN G. PRICE,
Attorney-General.

276.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN COLUMBIANA, FAIRFIELD, MONROE, PICKAWAY, PREBLE AND RICHLAND COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, May 9, 1919.

277.

DISAPPROVAL OF BOND ISSUE OF CITY OF DELAWARE IN SUM OF $14,942.92—NOT AUTHORIZED TO ISSUE BONDS IN ANTICIPATION OF COLLECTION OF STREET ASSESSMENT FROM THE COLUMBUS DELAWARE & MARION RAILROAD COMPANY.

COLUMBUS, OHIO, May 9, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

Re bonds of the city of Delaware, in the amount of $14,942.92, in an-

ticipation of the collection of special assessments for the improvement of South Sandusky Street, being 1 bond of $442.92 and 29 bonds of $500 each.

GENTLEMEN:—I have examined the transcript of the proceedings of council and other officers of the city of Delaware, relative to the above bond issue and hereby decline to approve the legality and validity of said bonds for the reason that the transcript reveals that a part of the funds to be derived from the sale of said bonds is to be used to pay the cost and expense of constructing the portion of said improvement which by law the Columbus, Delaware & Marion Railroad Company is required to construct.

The assessment ordinance provides that $6,271.16, being the portion of the cost of said improvement which said railroad company should pay, shall be assessed against the Columbus, Delaware & Marion Railroad Co., and subsequent proceedings disclose that this amount is included in the bond issue to pay the property owner's share of said improvement.

Although the Columbus, Delaware & Marion Railroad Co., under the terms of its franchise set forth in the transcript, can doubtless be required to pay the full amount of the cost and expense of said improvement charged against it, and although, under the terms of its franchise, this charge is deemed and may be treated as an assessment yet I know of no section of the General Code of Ohio which authorizes a municipality to issue its bonds in anticipation of the collection of such charge or assessment.

Section 3914 G. C., under authority of which the bonds in question are issued, provides that "municipal corporations may issue bonds in anticipation of special assessments."

Section 3812 G. C. provides in part as follows (107 O. L. 629):

> "* * * The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost and expense connected with the improvement of any street, alley, * * *."

The easement of the Columbus, Delaware & Marion Railroad Co. in the street to be improved is not embraced within the description of the character of property which may be assessed under authority of the section of the General Code above referred to and quoted from.

I am, therefore, of the opinion that the city of Delaware is not authorized to issue bonds in anticipation of the collection, from the Columbus, Delaware & Marion Railroad Co., of its share of the cost and expense of said street improvement, and I therefore advise you not to accept the bonds above referred to.

Respectfully,
JOHN G. PRICE,
Attorney-General.

278.

APPROVAL OF BOND ISSUE OF THE CITY OF DELAWARE IN THE SUM OF $8,305.27.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 9, 1919.

279.

CONTRACT WITH GLUTRIN PAVING COMPANY ENTERED INTO WITH STATE HIGHWAY DEPARTMENT CONSIDERED AND PASSED UPON.

A contract of the state highway department considered and passed upon.

COLUMBUS, OHIO, May 10, 1919.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your letter of April 14, 1919, regarding a claim for material (glutrin) furnished the state for improvement of section "K," National road, I. C. H. No. 1, and submitting a copy of Mr. C. H. Duncan's letter to you of April 8, has had my attention. You request my opinion as to the validity of this claim.

The facts in the matter may be summarized as follows:

The state, through its agent, Harness Renick, contracted with the Glutrin Paving Company for a certain quantity of glutrin at the price of $16\frac{1}{2}$ cents per gallon applied. The original of this contract cannot be found.

The Glutrin Company delivered in 1917 under this contract about one-fifth of the quantity of glutrin called for therein, and was paid $798.16 on account. Thereafter the Glutrin Company became involved in financial difficulties and was unable to carry out its contract to supply the remaining glutrin and apply all the glutrin—that delivered in 1917 not having been applied. Previously to its having furnished any material at all, the Glutrin Company had assigned to a third party its right to receive compensation under the contract.

When the time came for using glutrin, the assignee made an arrangement with your department whereby the quantity remaining undelivered would be delivered at the shipping point nearest the work, the state in return to pay the freight on the glutrin and haul and apply the entire quantity and charge the cost of freight, haulage and application against the amount due for the glutrin, applied, under the orginal contract between the state's agent and the Glutrin Paving Company. At the time the Glutin Company made its assignment of right to compensation it deposited with the assignee a copy of its contract with the state, which copy was certified to and approved by Mr. H. M. Sharp, who was chief highway engineer at the time. In this certified copy appears a clause reading "charge for barrel, $1.25 each." The high way department and the assignee in making the arrangement noted, used in their negotiations such certified copy, and assumed that it represented the contract entered into between the department and the Glutrin Company. The Glutrin Company was represented as to all matters in connection with the contract, by its agent, Mr. Whitelaw.

The remainder of the glutrin having been delivered and all of the glutrin having been applied in accordance with the arrangements between the department and the assignee, your department in checking over the files with the assignee, found in the files a carbon copy of the original contract. An inspection shows that this carbon copy is identical with the certified copy furnished by Mr. Sharp, except that in the carbon copy an ink line had been run through the above quoted clause.

You inquire whether the barrel charge should be included in calculating the gross amount accruing under the original contract,—such gross amount, as has already been indicated, being the agreed basis of settlement with assignee.

Assuming, for the moment, that the original contract had been carried out by the Glutrin Company itself, without the intervention of any action on the part of the assignee, the only question would be one of fact, namely, whether the original contract is correctly set out in the carbon copy found in the files. There can be no

question that in its form as signed by the parties, the contract provided that the barrels should be paid for,—a fact which in the first place is demonstrated by Mr. Sharp's certified copy furnished to the assignee, and in the second place is conceded as a necessary premise to the only explanation offered for the striking of the clause from the carbon copy. Hence, the carbon copy is not to be accepted as representing the contract unless it clearly appears that the clause in question was either inserted by oversight in the first instance, or was stricken out by mutual consent subsequent to the signing of the contract.

That the barrel charge was not inserted in the first instance by mistake is shown by the letter of Mr. Sharp of date December 17, 1918, which is here quoted in full:

> "Have your favor of the 16th in reference to agreement between the Glutrin Paving Company and Harness Rennick for furnishing glutrin on section "K" of the National road in Guernsey county.
>
> My recollection is that the agreement was approved by me in the early spring of 1917. At this time, the charge for barrels of $1.25 each, was brought up and Mr. Whitelaw agreed that the Glutrin Paving Company would have to make this charge for the barrels but after they were emptied, he would credit the state $1.25 for each barrel in good condition when loaded and returned to the factory. It is not clear to me at this time who was to stand the freight on the returned barrels but if there is no notation on this point, I would say that the state would be called upon to pay the freight on the barrels returned.
>
> It is further my recollection that the agreement did carry the charge of $1.25 each for the barrels and that it was not erased or scratched out on the contract that I approved.
>
> I trust that this information is in line with what you wanted and I give it as my best recollection of the agreement approved. If I can be of further service in this matter, I will be glad to do so."

It may be noted in passing that Mr. Sharp had severed his connection with the highway department some time before the above letter was written.

As to the point whether the clause was stricken out by mutual agreement, the following is quoted from letter of R. F. Darnell, division engineer, highway department, to yourself, dated April 23, 1919:

> "My memory in connection with this matter is that I took our file copy of the contract dated March 20, 1917, between the Glutrin Paving Company and Harness Rennick to the office of Mr. Whitelaw and discussed with him the meaning of the word 'applied' which appears in the contract after the price per gallon. During this interview it is my memory that the barrel charge was called to Mr. Whitelaw's attention and that he first marked this out with a lead pencil and at my suggestion used a pen and ink, as I did not believe a lead pencil would make a permanent record of the cancellation. As I recall it, Mr. Whitelaw's explanation for making this change was that it was a mistake in typewriting. Upon referring to our file after you gave me Mr. Duncan's letter, I found a memorandum of this interview written by me at the time as follows:
>
> 'Mr. Whitelaw says there will be no charge for the barrels. This was a mistake in typewriting.
>
> By "applied" they mean cost of handling job, cost of supervision, and cost of sprinkler will be paid by Glutrin people. They do not construe this to include hauling from R. R. to the job.
>
> They have told Rennick to notify them several days ahead.
>
> Darnell.' "

As compared with Mr. Darnell's statement, the following is quoted from Mr. Duncan's letter to you of date of April 8, 1919:

> "Mr. Whitelaw tells me that he has no recollection of this occurrence. He says he never consented to the elimination of the barrel charges, that the charge was in the contract when it was made, that his company could not have afforded to furnish the barrels without charge and that he never knowingly scratched out the barrel charge."

These seemingly conflicting statements of Mr. Darnell and Mr. Whitelaw may perhaps be reconciled on the theory that Mr. Whitelaw supposed that in striking out the clause in question, he was conforming to the "verbal agreement" referred to by Mr. Sharp as having been made at the time the written contract was executed, under which so-called verbal agreement the Glutrin Company was to take back at the same price the state was being charged for them the barrels found in good condition after they were emptied.

But after all, it is entirely unnecessary to speculate upon the legal effect of these several versions of what occurred; for it is evident that from the mere fact that there is a difference of opinion we must go back to the original written contract containing the barrel charge clause, which document, as is plain enough from Mr. Sharp's letter, expressed the intent of the parties at the time the obligation was entered into.

We may therefore safely conclude that if we had no other ground for payment of the barrel charges than a rejection of the carbon copy as it was found with the clause stricken out, there would be ample reason for such payment.

But an even stronger reason may be given as to why the payment should be made. It will be remembered that the Glutrin Company was unable to fulfill the terms of the contract, and that the assignee offered to do so. The state, being in need of the glutrin to finish the work in accordance with the specifications therefor, proceeded to deal with the assignee. Both parties, in good faith, resorted to the certified copy which had long before been furnished to the assignee by Mr. Sharp. As the assignee was in no wise bound to deliver the material, the state cannot now be heard to say that the material was bought from the assignee on some basis other than that on which both parties were dealing, or in good faith believed they were dealing.

The opinion of this department therefore is that the barrel charges should be paid.

Respectfully,
JOHN G. PRICE,
Attorney-General.

280.

AGRICULTURE—CONSTRUCTION OF SECTIONS 12 AND 13 OF SENATE BILL 11 RELATIVE TO INSPECTION AND ANALYSIS OF SEEDS.

Sections 12 *and* 13 *of the act known as S. B. No.* 11 (83 *General Assembly*) *are not unconstitutional because section* 13 *provides that the license fee exacted by section* 12, *for the purpose of defraying the costs of inspection and analysis under said act, shall be paid into the state treasury to the credit of the general revenue fund, no other part of said act indicating any legislative intention to use such license fees for purposes other than defraying such expenses.*

COLUMBUS, OHIO, May 10, 1919.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of a letter of Professor V. C. Smith, of the College of Agriculture of Ohio State University, accompanied by your

note of the same date, in which the opinion of this department is requested. Professor Smith's letter is as follows:

> "Attention has been called by Mr. Curtis Nye Smith, counsel for the American Seed Trade Association, to what might be considered a conflict between sections 12 and 13 of the amended senate bill No. 11, known as the Demuth Seed Bill, which has been passed by the present general assembly. The following is a quotation from his communication:
>
> 'I note by section 13 that for the purpose of defraying the costs of inspection and analysis, an occupation and license tax of five dollars per annum is charged against the dealers of agricultural seeds sold in Ohio. I also note by section 12 that these license fees, etc., are paid by the secretary of agriculture into the state treasury to the credit of the general revenue fund. Will you kindly ascertain from official sources, if possible from the Attorney-General's office, how it is possible in these two sections above noted, to apply the license fees to the purpose of defraying the costs of inspection and analysis of agricultural seeds?'
>
> I beg to request a formal opinion on the question involved in the above paragraph. Also if these sections should be conflicting how the wording should be changed in order to be constitutional.
>
> If this matter could be given your earliest attention, the law could doubtless be amended before the adjournment of the present general assembly."

It is noted that the particular question relative to senate bill No. 11, is as to the constitutionality of sections 12 and 13 of said bill, and this opinion is restricted to that particular question.

Section 12 provides:

> "All monies received from license fees, fines and costs imposed and recovered under the provisions of this act, shall be paid to the secretary of agriculture or his agents and by him paid into the state treasury *to the credit of the general revenue fund.*"

Section 13 in part provides:

> "For the purpose of defraying the costs of inspection and analysis * * * under * * * this act, it is hereby further provided that before any person * * * shall sell * * * in this state any of the agricultural seeds, except as provided in * * * this act, he * * * shall pay each year a license fee to the secretary of agriculture of ten dollars."

It is also noted that the purpose of the bill in the title is declared to be "to regulate the selling, offering and exposing for sale, of agricultural seeds."

It is noted that this legislative recital of its purpose and intention for the imposition of this fee, while not decisive, must be given great weight in the determination of the purpose of sections 12 and 13.

This department is convinced that this act being for the protection of the public in the purchase of agricultural seeds, if otherwise in conformity to law, is a valid exercise of the police power of the state as defined in Board of Health vs. Greenville, 86 O. S., 1, where the police power is described as including everything which is reasonable and necessary to secure the peace, health, morals and best interests of the public.

However, it is also noted that the license fee provided for in section 13 is for the avowed purpose of defraying the costs of inspection and analysis of agricultural seeds under the provisions of this act.

In numerous decisions in this state its power to regulate occupations and to require persons engaged therein to secure a license to pay a fee therefor is clearly established. However, in the exercise of this power, in exacting the payment of a license for such purpose, the amount of the license must be reasonably consistent with the special benefit conferred upon the licensee or the special burden which his occupation places upon the public. As said in Marmet vs. State, 45 O. S., 63;

> "The general assembly has power to regulate occupations by license, and to compel, by imposition of a fine, payment of a *reasonable fee*, where a special benefit is conferred by the public upon those who follow an occupation or where the occupation imposes special burdens on the public."

It may be observed, however, that it has been held by the courts of this state that the general assembly, in the guise of exercising this police power, and the exaction of a license fee, cannot indirectly use such means for providing general revenue.

In the case of Graves vs. Janes, 18 C. C. (n. s.) 488, the constitutionality of the automobile license tax law was successfully challenged. That act, passed in 1913 103 O. L., 763, provided for the registration of motor vehicles and the payment of certain registration fees.

Section 3609 of that law provided that the

> "revenues derived by registration fees provided for in this chapter shall be applied * * * toward defraying the expenses incident to carrying out and enforcing the provisions of this chapter and any surplus thereof shall be paid by him (secretary of state) monthly into the state treasury. One-third of the revenue paid into the state treasury shall be used for the repair * * * and patrolling of the public roads and highways of this state."

In stating the case, in his opinion at page 489 Judge Allread observed that:

> "The constitutionality of the act under consideration is challenged chiefly upon the following grounds: * * *
> 3. Illegality and unreasonableness in the amount and the purpose of the fee exacted."

After disposing of the other objections to the law, and coming to consider the one above quoted, the court at page 492 says:

> "This brings us to a consideration of the amount and legality of the license charge. This feature is the most difficult of solution. The identification and registration of motor vehicles has a legitimate purpose, but it is clear that the charge provided for in the act under consideration goes far beyond this purpose. The act clearly contemplates other purposes and such purposes must be ascertained and their legality determined by constitutional limitations. * * * The imposition of a reasonable charge for reimbursement for road maintenance and repair and for policing the road, in view of the special uses contemplated by the act, is warranted by the general grant of legislative power. This is not a property tax but a privilege tax. The reasonableness of a privilege tax is confined largely to the discretion of the general assembly, but for the abuse of such legislative power a final review is in the courts."

Considering section 3609, supra, and quoting therefrom, the court in question, on page 493, says:

"The act provides that one-third of the revenue paid into the state treasury 'shall be used for the repair, maintenance, protection, policing and patrolling of the public roads and highways of this state under the direction, supervision and control of the state highway department.' No special provision having been made for the other two thirds of this revenue, *it remains in the general fund.* It is true that the general revenue fund is subject to special appropriation for any lawful purpose. But we cannot escape the conclusion that *the manifest purpose* of the general assembly in appropriating expressly for highway purposes, including both maintenance and policing, but one-third of such revenue, and leaving *the other two-thirds in the general revenue fund of the state,* clearly discloses an intention on the part of the general assembly to raise the larger portion of this fund for general revenue purposes. The act is, therefore, to that extent, a revenue measure."

The court distinguishes the cases of State ex rel. vs. Ferris, 53 O. S., 314, and Ashley vs. Ryan, 53 O. S., 504, from the automobile case in that those cases cited were excise tax cases and that the vehicle tax does not rest upon the same basis.

Without quoting further from the decision in the automobile tax case, it is sufficient to state the court's conclusion, which was:

"We are, therefore, forced to the conclusion that the act under consideration, so far as it applies to the owners and users of motor vehicles, is, in large part, a general revenue measure, *and to that extent* is unconstitutional and void."

The court indicated a reluctance in expressing an opinion as to whether the act may have been cured by *an expression of the necessity to raise the entire fund for highway purpose* and an appropriation of the entire amount for that purpose, less the cost of maintaining the department, which, it may be noted, would have been more responsive to our present question.

It may be contended that section 3609 of the automobile tax law was held to be unconstitutional because two-thirds of the revenue raised under that act, after the expenses of such automobile registration was paid, was unappropriated and placed to the credit of the general revenue fund. But this is only partly true as the court's reasoning is that by having specifically appropriated the one-third for highway purposes, and then turning over two-thirds to the general revenue fund unappropriated, the general assembly clearly disclosed an intention to raise the larger portion of the fund for revenue purposes. Had there been no special appropriation for the highways there would have been no expression of the legislature to indicate to what extent such fees were to be used for the related highway purposes, in the absence of which it may be suggested the court could not have logically concluded that the legislative purpose to raise general revenue was so clearly disclosed.

In this connection sections 12 and 13, supra, may be distinguished from section 3609 under consideration in the Graves case, in this, (1) that the use and purpose of the fees of the former are explicitly stated to be for "defraying the costs of inspection and analysis * * * under * * * this act." In the latter there is no such declaration of legislative intention; (2) the former provides for all fees to be paid into the general revenue fund, which, as stated in the Graves case, is subject to specific appropriation for any lawful purpose.

Obviously this would permit the payment of the expenses of inspection and analysis from that fund; the latter section having indicated a limit to the highway appropriation, turned over the larger part of the balance with nothing to indicate its application to uses and purposes related to the subject matter of the license.

There is nothing in senate bill 11 to indicate an intention to use these fees for

any such unrelated purpose. The fees are to be credited to that fund from which the cost of inspection and analysis shall be paid. Here it is pertinent to recall that it is presumed that public officials will administer this fund according to law and that every intendment in favor of the validity of this statute is to be given it in determining its constitutionality and, as stated in Sipe vs. State, 86 O. S., 87,

> "True, the intention of the legislature is important in determining the proper construction to be given it, but that intent must be ascertained, first, if possible, from the language used and where that language is clear and unambiguous courts have no authority to change it."

In view of the terms of section 13, declaratory of its purpose, how can it be claimed that this section is clearly violative of any constitutional limitation and, therefore, invalid, for, before a court will declare it so, it must be clearly unconstitutional. As held in Board of Health vs. Greenville, 86 O. S., page 20:

> "A court is not authorized to adjudge a statute unconstitutional where the question of its constitutionality is at all doubtful. The question of the constitutionality of every law being first determined by the legislature, every presumption is in favor of its constitutionality. It must, therefore, clearly appear that the law is in direct conflict with inhibitions of the constitution before a court will declare it unconstitutional."

Whether the amount of the fee is so excessive as to be arbitrary, unreasonable and disproportionate to the expense of the enforcement of this law, is purely a question of fact concerning which your letter does not enlighten this department. However, it is suggested that for the purpose of this opinion, and at this time, such facts are unnecessary, as this question could hardly be determined until in its actual operation the amount of fees and the costs of inspection and analysis are ascertained.

Consistent with the foregoing principles, this department concludes that the sections involved in your inquiry are not unconstitutional.

Respectfully,
JOHN G. PRICE,
Attorney-General.

281.

SOLDIER BURIAL COMMITTEES—SECTIONS 2950 TO 2957 G. C. CONSTRUED AND DISCUSSED—COUNTY COMMISSIONERS' AUTHORITY RELATIVE TO SAID STATUTES.

1. *The township or ward committee appointed by the county commissioners under section* 2950, *by the provisions of sections* 2950 *or* 2957, *inclusive, are empowered and authorized to enter into a contract for the burial of the deceased soldier or other person named in section* 2950, *at a cost not to exceed* $75.00.

2. *When such committee has so contracted for such burial, in conformity with the provisions of the above sections, and in the absence of fraud or collusion, the county commissioners are not authorized to review the action of said committee or modify their contract so made.*

3. *By virtue of the passage of house bill No.* 8, *signed by the governor March* 19, 1919, *the maximum amount of the expense which may be incurred under section* 2950,

upon the expiration of the referendum period, will be $100.00 *instead of* $75.00, *as above stated.*

COLUMBUS, OHIO, May 10, 1919.

HON. C. A. WELDON, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter of April 25, 1919, as follows:

> "I shall be pleased to have you give me your opinion concerning the construction of section 2952 of the General Code with reference to the powers of the soldiers' burial committee as therein provided. The statute provides among other things that the committee shall satisfy themselves beyond a reasonable doubt that the family of the deceased is unable, for want of means, to defray the expenses of the burial of the soldier, or that the family may be deprived of means actually necessary for their immediate support, if the family bears the expenses. It sometimes happens that the family of the deceased may have some means, but insufficient to bury the deceased soldier and maintain or defray their own expenses. Under such circumstances if the committee decides that the whole expenses of the burial of the deceased soldier should be borne by the county, would the county commissioners have a right to review the decision of the committee, and modify it in any respect?
>
> "I have enclosed herewith a copy of the letter which was written by Fred Clark, an undertaker of this city, and handed to me, in which the facts are set forth about which the controversy has arisen concerning the effect of the committee's decision and the right to review the same."

It is to be noted that the extent of the powers and authority of the soldiers' burial committee, under section 2950 G. C., is involved, with the further question of the power and duty of the county commissioners to review the action of such committee in the matter of burial of deceased soldiers.

Sections 2950, 2951, 2952, 2954, 2955, 2956 and 2957 of the General Code are pertinent.

Section 2950 provides in part:

> "The county commissioners * * * shall appoint two suitable persons in each township and ward in the county, * * * who shall *contract*, at a cost not to exceed seventy-five dollars, with the undertaker * * * and cause to be interred * * * the body of any honorably discharged soldier."

Section 2951 in part is:

> "The committee so appointed shall use the forms of *contracts* herein prescribed, and abide by the regulations herein provided."

Section 2952 in part provides:

> "Before they assume the charge and expense of any such burial, the persons so appointed *shall satisfy themselves beyond a reasonable doubt*, by careful inquiry, that the family of the deceased is unable, for want of means, to defray the expenses, or that the family may be deprived of means actually necessary for their immediate support. Thereupon they shall cause to be buried such person, and make a report thereof to the county commissioners, setting forth * * * an accurate itemized statement of the expenses *incurred* by reason of such burial."

Section 2954 provides in detail the form of contract to be used in such cases. Section 2955 in part provides:

"The undertaker shall present his itemized bill and contract to the county auditor * * * in order to obtain his warrant."

Section 2956 in part is:

"If a saving of money is effected by reason of donations of carriages, * * * the amount of such saving shall go to the family of the deceased, * * * or remain in the general fund of the county, *at the discretion of the committee.*"

Coming more directly to the duties of the commissioners, when the report and statement is filed with them, section 2957 in part provides that the commissioners shall "certify the expenses thus incurred, to the county auditor, who shall draw his warrant therefor * *."

The opinion of the former Attorney-General, found in volume 2, Annual Report of the Attorney-General, 1911-1912, page 1471 (referring particularly to section 2950 G. C.) that

"the statute certainly is one to be construed liberally in favor of the soldiers,"

is approved.

These sections impose the duty of careful investigation of each case by the local committee. In fact, by the terms of section 2952, supra, before "they assume the charge and expense," the committee is bound to satisfy itself "beyond a reasonable doubt" as to the indigency of the family of the deceased. It may be noted that the degree of certainty as to this latter fact is the same as the law requires for the conviction of the person accused of a crime; a wholly meaningless phrase and an absurd proceeding if, after so finding such indigency to exist, and entering into what these sections term a contract with the undertaker, and causing the burial to be made, the commissioners were obliged to pass on the amount of compensation thus contracted for after consideration had been furnished by the undertaker.

Section 2957, supra, provides that the commissioners shall "certify the expenses thus incurred, to the county auditor, who shall draw his warrant therefor."

It is apparent that these sections come within the exceptions of section 2560 G. C., which prohibit the payment of claims against the county otherwise than upon the allowance of the county commissioners and is one of "those cases in which the amount due * * * is authorized to be fixed by some other person" as therein provided.

Consideration of the purpose of these statutes and of their express provisions, lead to the conclusion that such committee is authorized to contract for and bind the county up to the maximum of $75.00 in the matter of such burials, and in the absence of fraud or collusion the commissioners are not authorized to review their decision or to modify their contract in such matters.

This opinion is rendered upon the law now in force, but it is proper to call your attention to the fact that by house bill No. 8, signed by the governor March 19, 1919, the maximum amount to be charged was increased from seventy-five dollars to one hundred dollars.

Respectfully,
JOHN G. PRICE,
Attorney-General.

282.

BOARD OF EDUCATION—TUITION—PRIVATELY SUPPORTED SCHOOL CANNOT COLLECT FROM BOARD OF EDUCATION—CANNOT PAY TUITION TO A BOARD OUTSIDE OF OHIO.

Tuition contracts and agreements must be made between boards of education representing school districts and any school privately supported cannot collect tuition from a board of education (sections 7750-7752 G. C.), and tuition can be paid only to boards of education within the state of Ohio.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your letter of recent date in which you request the opinion of this department, as follows:

> "1. May a board of education legally pay tuition for a pupil attending an educational institution of any nature whatsoever, if such institution is not a part of the public school system of Ohio?
>
> 2. May a board of education legally pay tuition for a pupil attending a school outside of the state of Ohio.?"

Upon careful analysis it will be observed that the first question really includes the second, if a negative answer be given thereto.

There are two ways in which a board of education may become obligated to pay the tuition of a pupil residing in the district under its control, at some other school: These are by contract and by operation of law. Authority to enter into contracts creating an obligation to pay tuition is found in sections 7734 (as to common schools) and 7750 G. C. (as to high schools). These sections, so far as material in this connection, reads as follows:

> "Sec. 7734. The board (of education) of any district may contract with the board of another district for the admission of pupils into any school in such other district, on term agreed upon by such boards. * * *"
>
> Sec. 7750. A board of education not having a high school may enter into an agreement with one or more boards of education maintaining such school for the schooling of all its high school pupils. * * *"

Under these sections it is perfectly clear that a contract can be made only with a board of education of the state of Ohio. Both parties must be "boards of education" (section 7750) or "boards of (school) districts" (section 7734). These terms can have no application to the trustees or other managing authorities of a private institution, nor to the board of education or other similar governmental authority of another state.

An obligation to pay tuition may arise by operation of law under sections 7735 and 7736 (elementary schools) and 7747 to 7752, inclusive, of the General Code (high schools). The following provisions of these sections may be quoted:

> "Sec. 7735. When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school *in another school district*, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect. But a *board of education* shall not collect tuition for such at-

tendance until after notice thereof has been given to the board of education of the district where the pupils reside. * * *"

Sec. 7736. Such tuition shall be paid from either the tuition or the contingent funds and the amount per capita must be ascertained by dividing the total expense of conducting the elementary schools of the district attended, which shall include interest charges not to exceed five per cent. per annum, based upon the actual value of all property used in conducting said elementary school, by the total enrollment in the elementary schools of the district, such amount to be computed by the month. * * *"

Under these sections, which relate to tuition of elementary school pupils, it is very clear that the obligation to pay tuition without an agreement to that effect can only run in favor of a board of education of this state. In the first place, the school to be attended in order to create such obligation must be one "in another school district"; in the second place, the collector of the tuition must be "a board of education"; in the third place the amount of tuition must be computed upon the basis of the "total expense of conducting the elementary schools of the *district attended*" to be ascertained with reference to "the total enrollment in the elementary schools of the district." Clearly, the obligation here is one which arises in favor of one Ohio school district against another; it cannot arise in favor of the managers of a private institution nor in favor of the public authorities of another state or one of its subdivisions.

The high school sections are as follows:

"Sec. 7747. The tuition of pupils who are eligible for admission to high school who reside in village or rural districts, in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal residence, such tuition to be computed by the month. * * * No more shall be charged per capita than the amount ascertained by dividing the total expenses of conducting the high school *of the district attended*, which may include charges not exceeding five per cent. per annum and depreciation charges not exceeding five per cent. per annum, based upon the actual value of all property used in conducting said high school by the average monthly enrollment in *the high school of the district.* * * *"

Sec. 7748. A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years and a first grade high school for one year. Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four years; * * * Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. * * *"

Sec. 7752. No *board of education* shall be entitled to collect tuition under this chapter unless it is maintaining a regularly organized high school with a course of study extending over not less than two years and consisting

mainly of branches higher than those in which the pupil is examined. The standing or grade of all public high schools in the state shall be determined by the superintendent of public instruction and his finding in reference thereto shall be final."

While the language of these sections is not quite so conclusive as that of the sections previously examined, yet it is impossible to draw from them any inferences productive of a contrary result. In the first place, section 7747 fixes the method of computing with reference to the "expenses of conducting the high school of the district attended" to be ascertained by the use of "the average monthly enrollment in the high school of the district." These phrases refer to school districts of the state of Ohio.

It is true that section 7748 standing by itself uses no term more definitive than "first grade high school," "second grade high school," etc.; so that by reference to this section alone some one might argue that any educational institution offering courses of study substantially the equivalent of those afforded by a high school of the proper grade might be entitled to resceive tuition. However, section 7747 must be read in connection with section 7748 because it fixes the basis of computing the tuition payable under section 7748, as well as that payable under section 7747, where the obligor district maintains no high school at all. Otherwise, there would be no way of arriving at the amount chargeable against a school district under section 7748, no contract being contemplated. Therefore, the inferences previously drawn from section 7747 apply to section 7748 as well.

In the same connection section 7752 surely contemplates that the obligee shall in all cases be a "board of education," by which, of course, is meant a board of education of the state of Ohio.

The sections examined cover the whole field of authority to pay tuition or liability to pay such tuition. In this connection see the opinion of the Attorney-General under date of May 16, 1918, No. 1213. It is apparent, therefore, that the first question submitted must be answered in the negative and that from such answer a like answer to the second question necessarily follows.

Respectfully,
JOHN G. PRICE,
Attorney-General.

283.

APPROVAL OF BOND ISSUE OF NEW CONCORD VILLAGE SCHOOL DISTRICT IN THE SUM OF $25,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 10, 1919.

284.

APPROVAL OF BOND ISSUE OF OTTAWA COUNTY IN THE SUM OF $49,700.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 10, 1919.

285.

APPROVAL OF BOND ISSUE OF OTTAWA COUNTY IN THE SUM OF $173,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 10, 1919.

286.

ARTICLES OF INCORPORATION OF HOME INSURANCE ASSOCIATION OF FREMONT, OHIO, APPROVED.

COLUMBUS, OHIO, May 10, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication of May 9, 1919, with which you transmitted to me for examination and approval the articles of incorporation of Home Insurance Association of Fremont, Ohio, was duly received.

It is proposed to organize this company under sections 9593 et seq. G. C. (107 O. L. 696), and on examination I find the articles to be in conformity with the law governing the organization of such companies.

I am returning the articles to you with my certificate of approval endorsed thereon.

Respectfully,

JOHN G. PRICE,

Attorney-General.

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MUNICIPAL CORPORATION—HOW ASSESSMENT TO BE MADE OF STRIP OF LAND OWNED BY RAILWAY COMPANY WHICH ABUTS AND RUNS PARALLEL TO STREET.

1. *Where a strip of land owned in fee by a railway company and used by it as a right of way, abuts upon and runs parallel to a municipal street, such strip is "land" within the meaning of sections* 3812 *G. C. et seq., providing for assessment by municipalities.*

2. *For the purpose of such assessment, if the foot front plan is used, said strip must be taken as the "abutting land," to the exclusion of lots and lands adjoining it and separated by it from such street.*

COLUMBUS, OHIO, May 12, 1919.

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

GENTLEMEN:—Under date April 7, 1919, you made request of this department for an opinion upon the following statement of facts and inquiries submitted by Hon. David Armstrong Jr., city solicitor, St. Marys, Ohio:

"STATEMENT OF FACTS.

The city of St. Marys, Ohio, intends within the near future to make an improvement on a portion of East Spring street in said city, said portion being a part of Main Market Road No. 11, and also being a part of Inter-County Highway No. 165, by paving, curbing, sewering, and otherwise improving the street, in accordance with G. C. sections No. 6950, 6951, 6952, 6953 and 6954. Said portion to be paved lies wholly within the corporate limits of the city, and is an extension of the Wapakoneta-St. Marys road.

The Western Ohio Railway Company, owns for railway purposes a strip of land adjoining said street to be improved, which said strip runs easterly and westerly. The street runs in the same directions. Said strip of railway land lies immediately south of said street and is adjacent to said street. Said strip used for railway purposes separates the street to be improved and the lots and lands of property owners lying south of said street and right-of-way. The north boundary line of said right-of-way coincides with the south boundary line of said street, while the south boundary line of said right-of-way coincides with the north boundary line of the property owners' lots and lands. The deed granting said right-of-way to said railway company is a clear warranty deed, containing, however, this provision, viz.: That should said company ever fail to operate a railway on said strip, that then, said strip should revert to the property owners from whom the strip was purchased or of course to their successors, vendees or assigns. Assessment to pay the cost of said improvement is to be made upon the foot frontage plan at the proper time.

The improvement in question was initiated by the county commissioners of this, Auglaize county. The improvement will be made under and in accordance with plan or method No. three (3) of section No. 6919, and not under section 6921. The width of the right of way in question is 36 feet. The railroad in question is an interurban railroad. The railroad connects the two cities of St. Marys and Wapakoneta, and extends on to Lima to the east and to Celina to the west of St. Marys. It runs through the center of streets in the several cities, but I take it that it would be classed as an interurban railroad, since it connects up several cities in this vicinity.

1. In your opinion, who is the abutting property owner on the south side of said street—the railway company or the owners of lands and lots lying south of said right-of-way?

2. Should the railway company pay the entire assessment, they being in one sense the abutting property owner, or should the property owners having lots and lands south of said right-of-way pay the entire assessment, or should the assessment for the south side of said street be prorated between the two?

3. In your opinion, can the railway company be assessed for any portion of the cost of said improvement, or is it exempt from assessment in this matter?

4. If in your opinion, the assessment should be pro-rated between the railway company and the property owners having lands and lots south of said right-of-way, upon what basis should said assessment be pro-rated?"

It may be noted that while in said statement, reference is made to section 6954 the same is found to have been repealed. It therefore appears that the statutes in point are sections 6949 to 6953, which in turn refer specifically to certain other statutes, among them section 6919, mentioned in the statement.

Said sections 6949 to 6953, are the concluding sections of a series of statutes sections 6906 to 6953, providing for road improvement under the supervision of county commissioners. Such concluding sections provide for the contingency of road improvement into, within, or through a municipality.

Section 6949 provides in substance that the municipality may assume such share of the cost of that part of the improvement lying within the municipality as may be agreed upon between the council and the board of county commisssioners, and that if no part of the cost is assumed by the municipality, then no action on its part is necessary, other than the giving of consent by its council to the improvement,—all other proceedings in such event being conducted by the county commissioners as though the improvements were wholly outside of a municipality.

Section 6950 first provides for certain steps to be taken by the council in the event that the municipality assumes any part of the cost of the improvement,—such as approving plans, agreeing on a proportion of cost to be assumed, publishing notices in newspapers, etc., and then continues:

"* * * claims for compensation and damages on account of the proposed improvement shall be filed with the council. Said notice shall be published at least one week before said time fixed for the filing of such claims. Claims for compensation and damages shall be in writing, and shall be filed with council not later than the time fixed in said notice, and all claims not so filed shall be barred, except as to minors and other persons under disability. If any claims for compensation or damages are filed and the council is not able to agree upon the amount of the same with the persons filing such claims, they shall order proceedings to be instituted in a court of competent jurisdiction to inquire into such claims for compensation and damages in the manner provided for the assessment of damages in the case of street improvements wholly under the control and jurisdiction of the municipality. All compensation and damages on account of said improvement shall be paid by the municipality. For the purpose of providing by taxation a fund for the payment of the proportion of the cost and expense of said improvement to be paid by the municipality and also the compensation and damages incident thereto, said municipality is authorized to levy taxes upon all the taxable property of such municipality under the same conditions and restrictions imposed by law in the case of taxes levied, for the purpose of provid-

ing funds for the payment of the municipality's share of the cost of street improvements under the exclusive jurisdiction and control of the council of a municipality. The council of said municipality may assess against abutting property owners all or any part of the proportion of the cost and expense of said improvement and the compensation and damages to be paid by it. Said assessments shall be made in one of the methods provided for in the case of street improvements wholly within the municpality, and under the exclusive control of the council."

Section 6951 reads:

"The municipality shall pay to the county treasurer its estimated proportion of the cost and expense of said improvement as fixed in said agreement between the council and the county commissioners, out of any funds available therefor, and in anticipation of the collection of assessments to be made against abutting property as hereinbefore provided, and in anticipation of the collection of taxes levied for the purpose of providing for the payment of the municipality's share of the cost and expense of such improvement, said municipality is authorized to sell its bonds under the same conditions and restrictions imposed by law in the sale of bonds for street improvements under the exclusive jurisdiction and control of the council of a municipality."

Section 6951-1 reads:

"The board of county commissioners may provide for an improvement within a municipality by levying against the property benefited in the same manner as is herein provided for in sections 6919, 6920, 6922, 6923 and 6925 of this act and as provided in section 6924 of the General Code. In such proceedings, however, the municipality shall pay all damages and compensation for land affected or taken by reason of such improvement. The municipality shall pay to the county treasurer its estimated portion of the cost and expense of such an improvement to be borne by the municipality as a whole as fixed in the agreement between the council and the county commissioners, out of any funds available, and may issue such bonds therefor and under such conditions as provided for in sections 6951."

Section 6952 provides for letting of contract by the county commissioners and the payment of the cost of the work on their allowance.

It would appear to have been the intent of the legislature that in case the municipality assumes a portion of the cost with the intention of assessing against abutting real estate, all or a part of the portion so assumed, sections 3812, et seq providing for assessments within municipalities are to be followed insofar as concerns the making of such assessment, easpecially as it is to be noted that by the provisions of section 6951, bonds for the assessment share, as well as the municipality's share of the cost, may be sold "under the same conditions and restrictions" as are imposed by law in the sale of bonds for street improvements under the exclusive jurisdiction and control of the council of a municipality. Therefore the proposed assessment referred to in the above quoted inquiries is doubtless intended to be made as provided in sections 3812 et seq.

That a railroad right-of-way such as is described in the statement of facts above set out, is to be treated for assessment purposes as land abutting the proposed improvement, seems to have been held by our supreme court in two reported cases, the first of which is Railroad Co. vs. Connelly, 10 O. S. 159. In that case, the syllabi read:

"1. Section 116 of the act for the organization of cities, etc. (Swan's R. Stat. 985), authorizing the city council to assess the expense of improving a street upon the lots or lands abutting thereon in proportion to the feet front of said lots or lands, is not unconstitutional.

2. The assessment, whether by the front feet or upon the value assessed for taxation must be uniform, operating alike upon all the lots or lands so abutting; and the fact that one or more of the tracts may not have been benefited by the improvement, will not render such assessment invalid.

3. Lands appropriated by a railroad company for its track through a city, and crossing the improved street at right angles, and upon which the track was constructed after the work had been completed, is liable to such assessment.

4. As between the railroad company and the person performing the work (whatever may be the rights of bona fide mortgagees of said railroad), the lands so appropriated may be sold to pay such assessment.

5. The land appropriated for a railroad track within a city, and occupied exclusively for that purpose, is land within the meaning of section 116 of said act for the organization of cities, etc."

The second case is that of Railroad Co. vs. Commissioners, 19 O. S. 589, a memorandum decision reading as follows:

"By the Court—Held: That land appropriated by a railroad company for a railroad track and depot purposes is, in the possession of such company, 'land' for purposes of assessment under the provisions of the act of March 29, 1867, 'To authorize the county commissioners to construct roads, on petition of a majority of resident land owners along and adjacent to the line of said road, and to repeal an act therein named' (64 O. L. 80). and the act of April 5, 1866 (63 O. L. 114), thereby repealed.

The Northern Indiana R. R. Co. vs. Connelly 10 Ohio St. 159 followed and approved."

See also Dillon, Municipal Corporations (5th Ed.) section 1451; Page & Jones on Assessments, section 595.

The holding in these cases and the text of these writers must be read in the light of the subsequent case of Railway Co. vs. Cincinnati 62 O. S., 465, which holds that section 19 of article I of the Ohio constitution is a limitation upon section 6 of article XIII as to power of assessments (first syllabus) and further holds that this limitation extends to the amount of the assessment "which cannot exceed benefits." (Opinion p. 475.) This matter of limitation is now definitely provided for by statute, the opening words of section 3819 being:

"The council shall limit all assessments to the special benefits conferred upon the property assessed * * *."

The railway company by reason of the location of its right of way as described in the above statement of facts, having thus been seen to be the owner of real estate which is "land" within the meaning of municipal assessment statutes the answer to the first inquiry submitted is that the "abutting land" subject to assessment on the foot frontage plan is that of the railway company, and not that lying south of the railway company's land no statute having been found which authorizes land to be treated for municipal street assessment on the foot frontage plan as abutting land when in fact it does not abut on the improvement.

The foregoing observations bearing on the first inquiry submitted constitute a sufficient answer to all of the questions embraced in the second inquiry excepting the question "Should the railway company pay the entire assessment?" It is assumed. of course that this question has reference only to that portion of the entire assessment that is intended to be laid against the land abutting the improvement on the south, the land abutting on the north not having been made the subject of inquiry. Keeping in mind that it is proposed to make the assessment on the foot frontage plan, we may readily see that a categorical answer may not be given to the question whether the whole assessment applicable to land abutting on the south is to be laid against the railway company's land. The amount that may be assessed is not determinable merely by reference to the abstract proposition that the right of way is to be treated as "land" for assessment purposes, practical considerations must also play their part.

It has already been noted that by express statutory restriction based upon fundamental constitutional rights the amount of the assessment must not exceed special benefits conferred upon the property assessed. The same section of the statutes (3819 G. C.) which sets forth this restriction, contains the further limitation that,

> "in no case shall there be levied upon any lot * * * any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent. of the actual value thereof after improvement is made."

Furthermore, in the present instance, the right of way of the railway company is probably not shown upon the county tax duplicate n whole or in part as having been assessed locally for taxation, but is valued in accordance with statutes relating to public utilities, thus making necessary resort to section 3813 G. C. providing for the fixing of a value by council.

And as by he express terms of section 3813, the fixing of values by the council is "for the purpose of such assessments," it goes without saying that council must act in good faith and fix the value on a proper and not on an arbitrary basis. (Chamberlain vs. Cleveland, 34 O. S., 551; Walsh vs. Baron, 61 O. S., 15; Walsh vs. Sims 65 O. S., 211).

Another limitation on special assessments is provided in section 3822, in substance that where one special assessment for street improvement has been paid, the property assessed shall not be again assessed for more than one-half the cost of repaving or repairs, etc.

For these reasons, the question "should the railway company pay the entire assessment," may be answered by the statement that only to the extent that the sum total of the assessment does not exceed the special benefits accruing to the railway company's land, or the thirty-three and one-third per cent. limitation as defined in section 3819, or the limitation of section 3822, may it be levied against such land.

The answers thus given as to the first and second inquiries make unnecessary the answering of the third and fourth inquiries.

The views above expressed have relation to the fact that it is proposed to make the assessment on the foot frontage plan.

Respectfully,
JOHN G. PRICE,
Attorney-General.

288.

NON-RESIDENT PAUPER DIES IN STATE BENEVOLENT INSTITUTION —EXPENSES OF BURIAL—HOW PAID.

Where a non-resident pauper dies in a state benevolent institution, the county commissioners of the county from which he was sent are required to reimburse the board of administration for the expenses incurred in his burial, except when the body is delivered in accordance with the provisions of section 9984 G. C. See section 3496 *G. C.*

COLUMBUS, OHIO, May 12, 1919.

HON. WAYNE STILWELL, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Your letter of April 24, 1919, requesting my opinion as to whether or not the commissioners of Holmes county should pay the expenses of the burial of John Tracy, a pauper, who died at the Massillon State Hospital on February 26, 1919, was duly received.

The facts and circumstances surrounding this case are stated in your letter, which reads as follows:

> "I am enclosing a letter from the superintendent of the Massillon State Hospital to Hon. Charles A. Estill, probate judge, concerning a bill for the funeral expenses of John Tracy who died in the hospital February 26, 1919, in which he says that the hospital has no burial fund and that he feels the commissioners of Holmes county should pay the bill. The amount involved is not large but the board has held it up pending a ruling.
>
> This man, who was a non-resident of the county and state, was only in the county a day or two when he was picked up as a vagrant. An examination clearly showed a diseased body and mind. Sometimes he would say he was from Michigan and sometimes from Canada. It has since developed that he was from near London, Ontario.
>
> The probate judge, complying with section 1950 G. C. notified the state board of administration and, by their order, Tracy was committed to the state hospital.
>
> So far I have been unable to find a statute or ruling directly deciding whether the county or state would have to pay in a case of this kind. Section 1820 G. C., however, provides that when the domicile of a non-resident insane person is known, he may be transported thereto at the expense of the state.
>
> I would be pleased to receive your opinion as to whether the commissioners should allow this bill."

When application is made to the probate court for the commitment of a person to a state hospital for the insane, it is provided by section 1819 that:

> "If the judge or superintendent finds that the person whose commitment or admission is requested has not a legal residence in this state, or his legal residence is in doubt or unknown, and is of the opinion that such person should be committed or admitted to such institution, he shall notify without delay the Ohio board of administration, giving his reasons for requesting commitment or admission."

It is then provided by section 1820 G. C. that:

> "The Ohio board of administration by a committee, its secretary, or such

agent as it designates, shall investigate the legal residence of such person, and may send for persons and papers and administer oaths or affirmations in conducting such investigation. At any time after investigation is made, and before or after the admission, or commitment to such institution, a non-resident person whose legal residence has been established may be transported thereto at the expense of this state."

The management and government of the Massillon State Hospital is imposed upon the Ohio board of administration by section 1835 G. C.

By the provisions of section 3496 G. C. the duty and obligation of paying the expenses of the burial of a pauper is, in the first instance, placed upon the board of administration (except when the body is delivered in accordance with the provisions of section 9984 G. C., which is not applicable to the present inquiry), which board in turn is required to send an itemized bill of the expense for payment to the county commissioners of the county from which the pauper was sent to the institution, and upon receipt of such bill the commissioners are required to immediately pay the same. Section 3496 G. C. reads as follows:

"In a county in which is located a state benevolent institution, the board in control of said institution shall pay all expenses of the burial of a pauper that dies in such institution, except when the body is delivered in accordance with the provisions of section 9984 of the General Code, and send an itemized bill of the expenses thereof to the county commissioners of the county from which the pauper was sent to the institution. Such county commissioners shall immediately pay the bill to such board in control."

Respectfully,
JOHN G. PRICE,
Attorney-General.

289.

TOWNSHIP POOR RELIEF FUND—NO AUTHORITY FOR TOWNSHIP TRUSTEES TO APPOINT TRUSTEE OF ADJOINING TOWNSHIP TO ADMINISTER SAID FUND.

There is no authority in law for township trustees to appoint or employ a trustee of an adjoining township to perform services in connection with the disbursement of township poor relief funds.

COLUMBUS, OHIO, May 12, 1919.

HON CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter dated April 25, 1919, as follows:

"A part of the city of Warren is in Howland township, and therefore under the jurisdiction of the Howland trustees. Heretofore the trustees of Warren township have been taking jurisdiction of all cases requiring public relief or support in the city of Warren. However, this matter has been corrected, and the Howland trustees are now looking after the cases in their township.

"There is one member of the Warren township board who has looked after the cases and has had experience which makes him very competent to serve in such matters, and the Howland board would like to employ him to look after those cases in their township, within the city of Warren.

It seems to me that the trustees are attempting to delegate authority where they have no right to do so. I therefore would like your opinion as to the power of the trustees to appoint a trustee of the adjoining township to serve in cases such as those in question, it being understood that a compensation would be paid for such services."

The question involved in your inquiry is that of the power and authority of township trustees to delegate their authority under the poor relief laws of the state, for it is assumed that by the words "all cases requiring public relief or support" you mean township poor relief cases.

Section 5, article X, of the constitution of Ohio, and section 3294 G. C., are pertinent.

Section 5 in part is:

"No money shall be drawn from any * * * township treasury, except by authority of law."

Section 3294 G. C., as amended in 107 O. L., 698, in part provides:

"Each trustee shall be entitled to * * * two dollars and fifty cents for each day of service in the business of the township, to be paid from the township treasury. The compensation of any trustee * * * shall not exceed two hundred and fifty dollars in any year, including services in connection with the poor."

It is to be observed that the compensation of the trustees so fixed is for their services in the business of the township and further examination of the laws relative to the duties and powers of such trustees does not disclose any authority to delegate this power to any other officer or person, in the absence of which, such authority, as required by the constitutional provision above quoted, would be lacking.

You are therefore advised that there is no authority in law for the delegation by township trustees of their authority as to the disbursement of poor relief, and the appointment or employment of a trustee of an adjoining township for such purpose is not authorized by law.

Respectfully,
JOHN G. PRICE,
Attorney-General.

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MUNICIPAL CORPORATIONS—ORDINANCE NO 30897 OF CITY OF COLUMBUS, OHIO, UNCONSTITUTIONAL—SALE OF INTOXICATING LIQUORS BETWEEN HOURS OF TEN O'CLOCK P. M. AND SIX O'CLOCK A. M.

Ordinance No. 30897 of the city of Columbus, Ohio, makes it a misdemeanor to keep open any saloon or place where any intoxicating liquor is sold, kept or exposed for sale within the limits of said city, between the hours of ten o'clock P. M. and six o'clock A. M.

of the day following, without any exceptions as to drug stores or sales of intoxicating liquors therein for known pharmaceutical purposes.

HELD Because of the absence of such exception, said ordinance, being in conflict with general laws, is invalid.

COLUMBUS, OHIO, May 12, 1919.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of your letter dated February 25, 1919, in which you inquire if the facts as stated therein constitute a violation of ordinance No. 30897 of the city of Columbus.

Said ordinance, a copy of which you enclose with your letter, prohibits the keeping open of "any saloon or place where any intoxicating liquor is sold, kept or exposed for sale" between the hours of ten o'clock p. m. and 6 o'clock a. m. of the day following.

Section 1 of said ordinance, from which the above quotation is taken, makes such keeping open a misdemeanor and provides that upon conviction thereof the sentence shall be not less than $100.00 nor more than $250.00 for the first offense and an increased penalty for a second offense.

Section 2, having reference to hotels, boarding houses and restaurants, defines the acts and conditions which will amount to a compliance with the ordinance on the part of the proprietors of such places.

Section 3 repeals old sections 319 and 320 of the codified ordinances of the city of Columbus and, as provided therein, "all other ordinances or parts of ordinances in conflict herewith."

Section 4 of the ordinance relates to the time that it shall be in force and take effect.

The facts as stated in your letter and supplemented by other facts stated in personal conferences with you, are that a certain hotel company, which has a saloon license effective in the building wherein it conducts a hotel business, with a bar room or saloon in connection, permits the drinking of intoxicating liquors in what may be termed its grill room after ten o'clock p. m. The further fact is noted that, as stated in your letter, "the liquor is said to be sold and delivered to the guests before ten p. m. and the guests are permitted to remain in the _____ room until the liquor is consumed."

While your letter does not directly inquire if ordinance 30897 is valid, its validity is fundamentally involved in the question which you have submitted. Therefore it is deemed proper to first consider the validity of the ordinance in order that the opinion of this department may be responsive to the need of your board.

Preliminary to consideration of this ordinance and the decisions of the courts relative to such matters, it may be observed that this is a penal ordinance and must be strictly construed.

We may approach the question of the validity of this city ordinance by a consideration of the power of a municipality in such matters.

Article XVIII, section 3, and section 6065 G. C. are pertinent.

Article XVIII, section 3, of the constitution, adopted in 1912, is:

> "Municipalities shall have power * * * to adopt and enforce * * * such local police * * * regulations as are not in conflict with general laws."

Section 6065 of the saloon license law of 1913, 103 O. L., 241, in part is:

> "The phrase 'trafficking in intoxicating liquor' as used in this chapter, and in the *penal statutes of this state*, means the buying or procuring and selling of intoxicating liquor otherwise than upon a prescription * * * or for exclusively known * * * pharmaceutical purposes."

Section 3661 G. C., in the enumeration of the powers of municipal corporations authorizes them "to regulate ale, beer, porter houses and shops, and the sale of intoxicating liquors as a beverage."

Sections 6103 and 6137 are also pertinent. Section 6103 in part is:

> "No provision of this chapter or the penal laws relating thereto, *shall prevent* the sale of intoxicating liquor at retail by a regular druggist for exclusively known medicinal, * * * pharmaceutical * * * purposes."

Section 6137 provides:

> "Every municipal corporation shall have full power to regulate the selling, furnishing or giving away of intoxicating liquor as a beverage, and the places where such intoxicating liquor is sold, furnished or given away as a beverage, *except as provided for in this chapter.*"

It is to be observed that the authority of the municipal corporation, under section 3661 G. C., is to regulate the class of houses therein referred to and which may now be included in the general term "saloon" which will include the place referred to in your letter, and the sale of intoxicating liquors as a beverage; and also that the grant of power to municipalities in section 3, article XVIII, to enact local police regulations, is limited to such regulations as are not in conflict with general laws.

Because of the exceptions of drug stores from the operation of the laws as to liquor licenses, and the penal laws with reference to the traffic in intoxicating liquors, it is clear that such places are neither regarded as saloons nor are druggists regarded as being engaged in the sale of intoxicating liquors for beverage purposes, and in those laws they are specifically exempted from their provisions.

From the foregoing considerations it is equally clear that neither section 3661 G. C., nor section 3, article 18, of the General Code, authorizes the regulation of such places in the respect involved in the matter under consideration.

In the very early case, Canton vs. Nist, 9 O. S., 442, it was held:

> "In ignoring the statutory exceptions to which we have referred and in assuming to punish acts which the statute, by clear inference, authorizes, the ordinance becomes inconsistent with the laws and policy of the state and must, as to this section, be declared void."

At this point it is proper to point out that ordinance No. 30897 makes no exception as to drug stores and in its comprehensive term, in describing the places which must be closed, would include drug stores.

In Ackerman vs. Lima, 8 O. D., 430, it was held that an ordinance regulating the time of opening of places for sale of intoxicating liquors must include the statutory exceptions as to druggists, and that an ordinance not including such statutory exemptions is invalid.

In consideration of that case, the court used the following language:

> "But our supreme court, in Canton vs. Nist, 9 O. S., 439, held directly upon the proposition that a section of the ordinance, pursuing the statutory authority—the statute containing certain exceptions, the ordinance must contain the exceptions, and under the law of the state, giving authority to prohibit common labor upon Sunday, except in the case of persons who habitually and conscientiously observe the seventh day of the week—that an ordinance which in general terms seeks to prevent all common labor on Sunday, without the exception, is void. This case is commented upon and approved, although

distinguished in Burckholter vs. McConnellsville, 20 O. S., 308, but especially at page 315; and the supreme court again in Daggett vs. Hudson, 43 O. S., 548, but particularly at pages 566 and 567, lay down the proposition that an ordinance under an authority of this kind, containing an exception, must itself contain the exception, and if it does not it is void. And in Canton vs. Nist, supra, it was held that the invalidity of an ordinance did not depend upon the defendant in a particular case coming within the exception, and the fact that Nist, in that particular case, was not able to say that he was not one of those who observes the seventh day of the week, it was not necessary for him to raise the question as to the validity of the ordinance, and such appears to be the well settled, and, it may be said, the undoubted, law now in the state of Ohio."

To the same effect was the holding in Columbus vs. Schaerre, 5 Low D., 101, 33 O. L. J., 113.

In the case of Emery vs. Elyria, 11 O. D., 316, an ordinance which by its terms could only apply to saloons was held to be valid without referring to or excepting drug stores from its operations. The ordinance in that case is quoted by the court, at page 318:

"The ordinance in question prohibits the keeping open of any house, shop, room or other place, where ale, porter or beer is habitually sold or furnished to be drank, or keep open in any manner any place or notorious or habitual resort for tippling or intemperance."

The court concluded that that ordinance could not be construed to have any application to a drug store, as follows:

"I am of the opinion that by no fair interpretation of this ordinance can it have any application to a drug store, and when the ordinance prohibits the keeping open of that kind of a place on the first day of the week, commonly called Sunday, it does not infringe upon any rights granted by the legislature under Sec. 11 of the Dow law.

"It will be observed that this ordinance does not aim or attempt to aid at places where intoxicating liquors are sold on prescription; but only aims to close places on Sunday where intoxicating liquors are sold to be drank, and that it has no reference to a drug store where intoxicating liquors are sold upon prescription or for exclusively known mechanical, pharmaceutical or sacramental purposes."

In the case of Landman vs. Columbus, (City) 17 O. D., N. P., 61, an ordinance passed by the city of Columbus to compel "mid-night closing" was considered and held to be valid because it exempted drug stores from its operation. The exempting clause is quoted by Judge Dillon to have been:

"Nothing in the provisions of any section of this ordinance shall be construed to prevent regular druggists from filling prescriptions by regular practicing physicians."

The question in that case was as to the necessity of the exemption clause being strictly in as full or as broad terms as the exemptions in the statute. The court held that the exempting feature of the ordinance was in compliance with the statute, as stated on page 63 of the opinion, as follows:

> "But it seems to me that a careful consideration of section 319 of the codified ordinance must satisfy one that the ordinance not only specifically omits and excludes any reference to druggists whatsoever, but on the contrary its constant reference is simply to saloons and places where beer, ale, spirituous or other intoxicating liquors are sold."

And, the reason for holding the ordinance valid is clearly indicated on the same page to be:

> "In view of the fact, therefore, that the exemption clause applies only to sales by druggists, and in view of the fact that this ordinance has not attempted to regulate any such sales but only sales by saloons, or kindred places, I hold the ordinance to be valid."

Had that ordinance been so drawn as to apply to druggists, the decision undoubtedly would have been against its validity as on the same page Judge Dillon asks and answers this question:

> "Does this ordinance in question apply to druggists? If so, it would probably fail for the reasons above stated, in that it does not contain the exemption provided for by the statute."

Both of these decisions are consistent with the Lima case, supra.

Sections 6137 and 6103 G. C. were formerly sections 4364-20 and 4364-20c R. S. respectively and were construed in Bramley vs. Euclid, 15 O. D. 155, where the direct question of the limitation of municipalities to regulate the sale of intoxicating liquors by regular druggists for known medicinal and pharmaceutical purposes was raised and decided. On page 157 of the opinion in Bramley vs. Euclid, supra, the court holds:

> "The authority of the village to pass an ordinance of this character (Sunday closing of saloons) is granted by section 4364-20 Rev. Stat. (6137 G. C.) the grant of power being substantially in these words:
>
> 'Any municipal corporation shall have the full power to regulate the selling, furnishing or giving away of intoxicating liquors as a beverage and places where intoxicating liquors are sold, furnished or given away as a "beverage," except as provided for in Sec. 4364-20c of this act.'
>
> And the exception as contained in that further Sec. 4364-20c Rev. Stat. is, substantially, that municipalities shall not have power 'to regulate or prevent the selling of intoxicating liquors at retail by a regular druggist for exclusively known medicinal, pharmaceutical, mechanical or sacramental purposes.' Those sections state substantially the power, and the restriction upon that power."

Consideration of these statutes, in the light of judicial construction placed upon them in the foregoing cases and of the limitations of section 3, article 18, supra, compel the conclusion that the ordinance under discussion is in conflict with general law and therefore is invalid.

Respectfully,
JOHN G. PRICE,
Attorney-General.

291.

APPROPRIATION BILL—MERE ITEM IN SUCH BILL NOT SUFFICIENT AUTHORITY FOR PAYMENT OF GREATER AMOUNT OF SALARY THAN THAT AUTHORIZED BY PERMANENT LAW.

A mere item in a bill appropriating money is not sufficient authority for the payment to an officer or employe of a greater amount of salary than that authorized by permanent law.

COLUMBUS, OHIO, May 12, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have requested the opinion of this department on the following question:

> "May the legislature legally increase a salary or per diem fixed by statute in the appropriation bill simply by appropriating a greater amount than is authorized by statute?"

An appropriation within its proper sphere is, of course, a "law." (See article II, section 22 of the constitution.) Its natural scope, however, does not go beyond authorizing the withdrawal of money from the treasury for the specfic purposes mentioned in it. It is true that in many instances its effect is larger than this, as where an item in an appropriation law authorizes the withdrawal of money from the treasury for the payment of the salary of a clerk or other employe in a department the head of which is not authorized by permanent law to employ such clerk or other assistant. By long usage such an appropriation is regarded as including, by necessary implication, the authority to make the employment, though logically it might well be questioned whether it has that effect. Of course, such implied authority could not last longer than the appropriation itself, viz.: for the period of two years.

But the doctrine of implied power does not exist where express power is granted. In the case submitted by you power to make the employment or appointment of the employe or officer, the amount of whose compensation is in question, is expressly conferred by statute. Hence, we cannot go to the appropriation to find such power by implication only.

Not only is the power to appoint or employ conferred expressly by statute, but there is a limitation therein upon the compensation to be paid to such appointee or employe. This limitation inheres in the office itself, if it be an appointment, or in the contract of employment, if the position be of that character. The head of the department is without authority to alter such terms; he cannot look to an ordinary item in an appropriation law for such authority.

It has been assumed in the foregoing discussion that all there is in the appropriation law is an item for personal service greater in amount or rate as to a given position than the salary or other compensation fixed by law. The discussion has been as to the possibility of drawing from such an item an implication strong enough to override the express limitations of the permanent law. As stated, an appropriation act is a law of equal dignity during its existence with all other laws of the state, and it is not intended in this opinion to hold that a permanent law may not be temporarily suspended by an appropriation act. Such things can be done, with respect, for example, tc the suspension of the state building code in the expenditure of certain appropriations. No reason is perceived why salary limits may not be similarly suspended if the intention to produce such a result is clearly expressed in the appropriation act. The general assembly has power to suspend laws (Constitution. article

I, section 18.) Indeed, the whole doctrine of implied repeals, so-called, rests upon this power as a foundation. As heretofore intimated, an appropriation law would seem to be just as efficacious as a suspension of other laws as any other legislative act could be.

But upon the assumption which has been made in discussing the question submitted, we are not dealing with the extent of the *power* which the legislature may exercise through an appropriation law, but rather with the interpretation of an ordinary item appropriating money, which does not expressly suspend existing laws. We must determine what effect such an item may have by implication. Here the principle employed in dealing with questions of so-called implied repeal is controlling. That principle is that implied repeals—and because fundamentally all implied repeals are suspensions, an implied suspension for the definite period of the life of an appropriation law—are presumed against. All laws, whatever the date of their respective enactments may be, are to be construed together and effect given to each, if possible. A later law is not potent to repeal, modify or suspend an earlier law unless the provisions of the later law are irreconcilably inconsistent with those of the former. In the case supposed there is no irreconcilable inconsistency; for the appropriation law expends its primary force in setting aside money in the treasury and making it subject to withdrawal; whereas the permanent law relates to a logically distinct subject matter, namely, the power to appoint or employ and the limitation on that power with respect to the payment of compensation. It is only by drawing from the item in the appropriation law an inference which takes its operation beyond the natural scope of the law that we are able to educe an intent to suspend the permanent law. To permit such effect to be given to the appropriation law by inference would be violative of the principle which must be applied in such cases. But where the intended effect of the appropriation law upon the permanent law is not left to conjecture, but is expressly stated in the appropriation law, the principle referred to can have no application.

See—Attorney-General's Report 1908, p. 176.

Respectfully,
JOHN G. PRICE,
Attorney-General.

292.

BOARD OF EDUCATION—MAY FUND UNPAID PAYROLLS OF TEACHERS AND OTHER EMPLOYES BY BORROWING MONEY OR ISSUING BONDS UNDER SECTION 5656 G. C.

Board of education may fund unpaid payrolls of teachers and other employes by borrowing money or issuing bonds under section 5656 G. C.

COLUMBUS, OHIO, May 12, 1919.

HON. GEORGE WAITE, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—Replying to your letter of May 1st I beg to advise that the question submitted by you has been repeatedly passed upon in this department and the following ruling made:

A contract for the employment of teachers or other school employes is by virtue of section 5661 G. C. valid without a previous appropriation of money sufficient to discharge the contract on the part of the school district, or the issuance of a certificate of the clerk of the board of education that the money necessary for such purpose is in the treasury or in process of collection and not appropriated for any other purpose.

Therefore, when services are rendered under such contract and, by its terms, money is due from the school district to the employe, a valid, legal and binding obligation of the district for the payment of money exists within the meaning of section 5668 G. C., and the indebtedness so created may be extended by borrowing money on notes or funded by the issuance of bonds under section 5656 G. C.

See—Reports of Attorney-General
1912, volume II, page 2027;
1914, volume II, page 1394;
Opinions of Attorney-General
1915, volume I, page 477;
1915, volume II, page 1246;
1915, volume I, page 328;
1917, volume I, page 353.

Respectfully,
JOHN G. PRICE,
Attorney-General.

293.

DISAPPROVAL OF BOND ISSUE OF VILLAGE OF MT. STERLING—AMOUNT OF ISSUE IN EXCESS OF AMOUNT WHICH COUNCIL, WITHOUT VOTE OF ELECTROS, IS AUTHORIZED TO ISSUE FOR PURPOSE PROPOSED.

COLUMBUS, OHIO, May 13, 1919.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

IN RE: Bonds of the village of Mt. Sterling, in the amount of $10,000.00, for the purpose of extending, enlarging and equipping the Mt. Sterling water and light plant, being 20 bonds of $500.00 each.

I have examined the transcript of the proceedings of council and other officers of the village of Mt. Sterling, relating to the above bond issue, and herewith decline to approve the validity of said bonds for the reason that the amount of the issue is in excess of the amount which the council of the village of Mt. Sterling, without a vote of the electors, is authorized to issue for the purpose indicated in said bond ordinance.

The bonds in question are issued under authority of section 3939 of the General Code. Section 3940 of the General Code, as amended in 107 O. L., p. 578, which provides a limitation upon the amount of bonds which the council of a municipality may issue in any fiscal year, under the provisions of section 3939 G. C., is as follows:

"Section 3940: Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation under the authority conferred in the preceding section, shall not exceed one-half of one per cent. of the total value of the property in such municipal corporation as listed and assessed for taxation."

The financial statement contained in the transcript states that the total valuation of the property in the village of Mt. Sterling, as assessed for taxation, is $1,600,000.00

One-half of one per cent. of this valuation amounts to only $8,000.00, whereas the council of the village is attempting to issue $10,000.00, or $2,000.00 in excess of the limitation fixed by law.

The bond issue in question is therefore clearly in excess of the limitation fixed by law, and I advise you not to accept the same.

Respectfully,
JOHN G. PRICE,
Attorney-General.

294.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF KINSTON IN THE SUM OF $5,302.25.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 13, 1919.

295.

APPROVAL OF BOND ISSUE OF MORROW COUNTY IN THE SUM OF $78,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 13, 1919.

296.

APPROVAL OF BOND ISSUE OF HUBBARD VILLAGE SCHOOL DISTRICT IN THE SUM OF $200,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 13, 1919.

297.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY IN THE SUM OF $14,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 13, 1919.

298.

APPROVAL OF BOND ISSUE OF HARLEM TOWNSHIP RURAL SCHOOL DISTRICT, DELAWARE COUNTY, IN THE SUM OF $2,400.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 13, 1919.

299.

APPROVAL OF BOND ISSUE OF THE CITY OF NORWOOD IN THE SUM OF $50,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 14, 1919.

300.

APPROVAL OF BOND ISSUE OF THE CITY OF NORWOOD IN THE SUM OF $65,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 14, 1919.

301.

APPROVAL OF BOND ISSUE OF THE CITY OF NORWOOD IN THE SUM OF $10,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 14, 1919.

302.

APPROVAL OF BOND ISSUE OF LICKING COUNTY IN THE SUM OF $18,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 14, 1919.

303.

APPROVAL OF BOND ISSUE OF THE CITY OF LAKEWOOD IN THE SUM OF $84,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 14, 1919.

304.

APPROVAL OF BOND ISSUE OF AUGLAIZE COUNTY IN THE SUM OF $12,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 14, 1919.

305

APPROVAL OF BOND ISSUE OF AUGLAIZE COUNTY IN THE SUM OF $142,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 14, 1919.

306.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN MONROE AND FAIRFIELD COUNTIES.

HON.. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, May 15, 1919.

307.

APPROVAL OF BOND ISSUE OF EUCLID VILLAGE SCHOOL DISTRICT IN THE SUM OF $260,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 16, 1919.

308.

OHIO STATE UNIVERSITY—WOMEN'S BUILDING—APPROPRIATION FOR NEW BUILDING IS NOT "FOR CURRENT EXPENSES OF STATE GOVERNMENT AND STATE INSTITUTIONS"—SUBJECT TO REFERENDUM.

An appropriation for a new building is not one "for the current expenses of the state government and state institutions," it is therefore subject to the referendum and does not go into effect until after ninety days after the law making it is filed in the office of the secretary of state.

COLUMBUS, OHIO, May 16, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of May 14th requesting the opinion of this department upon the following question:

> "Attention is called to house bill No. 452, (107 O. L. 51), an act entitled, to provide for the erection of a Women's building at Ohio State University.
>
> Request is hereby made as to when the appropriation contained in this act began and when it lapses."

The act referred to is in full as follows:

> "AN ACT
>
> To provide for the erection of a women's building at the Ohio State University.
>
> Be it enacted by the general assembly of the state of Ohio:
>
> Section 1. That for the purpose of providing for the women students of the Ohio State University a place where the required physical education can be given, where proper rooms may be provided for study, for reading, for rest and recreation, where the student activities of the young women may be centered with proper direction and supervision with provision for restaurant and dining room facilities, where provision for proper social and educational development may be provided; there be and hereby is appropriated out of any money in the state treasury to the credit of the general revenue fund, not otherwise appropriated, the sum of one hundred and fifty thousand dollars.
>
> Section 2. The board of trustees of the Ohio State University is hereby authorized and directed to contract for and superintend the erection of such women's building at the Ohio State University under plans and specifications approved by the governor, and said trustees are hereby authorized to do all things necessary to carry out the intent and purpose of this act.'

While the first section of this act does not expressly mention the erection of a building for the purposes therein referred to, the second section together with the title shows that it was the intent of the general assembly not only to authorize, but to "direct" (section 2) or to "provide for the erection of" (title) a building for the use of women students of the Ohio State University.

This act was approved March 24, 1917, and if the appropriation therein made is one "for the current expenses of the state government and state institutions" it

went into immediate effect by virtue of Article II, section 1-d of the constitution; but if the appropriation is not such a current expense appropriation it did not go into effect on that day, but its effectiveness was suspended for the period of ninety days from and after the day when the act was filed in the office of the secretary of state by virtue of article II, section 1-c of the constitution.

The question thus raised does not require a comprehensive definition of the phrase "current expenses" as used in article II, section 1-d, which has been cited. It is only necessary to inquire whether or not the expenditure of money for the erection of a new building to cost one hundred and fifty thousand dollars is a "current expense" within the meaning of the constitution. This department is clearly of the opinion that it is not. Whatever the term "current expenses" may mean as applied to various items of expense, it is clear that its meaning excludes expenditures in the way of permanent investments. A number of decisions of the courts of other states under statutes using this term so hold.

State vs. Marion county, 21 Kas., 419;
Sheldon vs. Purdy, 17 Wash., 135;
Helena Water Works Co. vs. Helena, 31 Mont., 243;

In Babcock vs. Goodrich, 47 Cal., 488, 510, the phrase was otherwise construed and the expense of constructing a new building was held to be within its scope, for the reason that any other construction would leave the subdivision concerned without means to provide new buildings. The court admitted that the construction placed upon the statute was not the natural one. Indeed, the phrase was read as if it had been "expenses of the current year" in order to supply what would otherwise have been a defect of the legislation.

But in the case under consideration no such necessity exists. Ample authority is vested in the general assembly to make appropriations for all the expenses of the state and its institutions. The requirement is simply that appropriations for expenses which are not current shall be subject to the referendum, and for that purpose laws providing for them shall not go into effect until after the expiration of the ninety day period.

For these reasons you are advised that the appropriation in question became effective ninety days after the law making it was filed in the office of the secretary of state. Such filing took place on March 24, 1917, and the appropriation therefore took effect on June 24, 1917, the day after the expiration of the ninety day period.

You also ask when this appropriation lapses. Article II, section 22 of the constitution provides in negative terms that—

"no appropriation shall be made for a longer period than two years."

No other provision having been made in the law providing for the appropriation, it is presumed that the intention of the general assembly was that it should last for the full constitutional period. Accordingly, the appropriation will lapse on June 24, 1919.

Respectfully,
JOHN G. PRICE,
Attorney-General.

309.

WHEN A FOREIGN CORPORATION MUST COMPLY WITH SECTION 183, GENERAL CODE.

A foreign corporation having a "principal place of business" in this state; at which, however, is transacted no other part of the corporate business than the collection of accounts, is liable to compliance with section 183 of the General Code and to the payment of at least the minimum fee under that and succeeding sections.

COLUMBUS, OHIO, May 16, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have requested the opinion of this department upon the following question:

> "The Federal Oil Company, a foreign corporation, has established a business office in this state which is designated as its principal place of business. The company is engaged in the business of boring and drilling for petroleum; all of its fields are located outside the state of Ohio and the production activities of the company are conducted in other states.
>
> The company does not market its product, but by a standing arrangement, apparently made before the company located an office in Ohio, all of its product is sold to another company, which is also a foreign corporation and which has no office in the state of Ohio.
>
> The company states that the function of the Ohio office consists of receiving checks mailed to it from time to time by the company to which it sells its entire product and banking the same in Cleveland where the office is located. Though the company's letter does not so state, it is assumed that such books of account as the company would have to keep are kept at the Cleveland office.
>
> The question is as to whether or not this company is required to comply with the provisions of section 183 of the General Code."

That section exacts compliance with its provisions from a foreign corporation "owning or using a part or all of its capital or plant in this state, before doing business in this state."

It may be assumed at the outset that some, doubtless very small, part of the capital of the company is located in Ohio, though this may consist only of office fixtures. It is certain also that in some senses the company is transacting business in Ohio. The activities of its Cleveland office are business activities. But the question is as to whether or not it is "doing business" within the meaning of section 183 G. C. The report required to be filed by that section leads to a determination by the secretary of state of "the proportion of the capital stock of the corporation represented by its property and business in this state."

This language is, as the commission is aware, essentially similar to that of section 5502 G. C. The commission is familiar with the rule established under these sections, to the effect that the volume of business done in the state must be measured and separated out, so to speak, from the total business of the company, so that it may be given equal weight with the factor of property in the determination of the proportion of the authorized capital stock upon which the initial fee (under the one section) and the annual fee (under the other) are to be based. Previous opinions of this department have laid down the rules whereby the amount of business represented by the production activities of a company may be measured; while the manne of

arriving at the volume of business represented by the selling activities of the company is, of course, very familiar. But there are some business activities of a company of this kind which do not lend themselves to measurement. For example: at one end of the line of a manufacturing process comes the activity of buying raw material, machinery and the like. At the other end of the line comes the collection of book accounts growing out of the business. That is, the mining or manufacturing company has completed its peculiar activities of mining and manufacture to the point of disposing of the product, and none of its activities on that behalf is conducted within the state; but it maintains an office where its books are kept and where the moneys due to it from those to whom it has sold its product are collected and deposited. It is manifest that it is not practicable to arrive at any such exact measurement of the extent of such activities in this state as is possible with respect to the extent of the other activities mentioned

It would be different with a section like section 178 G. C., for example, which requires a foreign corporation before it "transacts business in this state" to procure a certificate of compliance from the secretary of state and to pay a fee based upon its authorized capital stock, without regard to the amount of business done in the state or the property owned therein as compared with the total business and property. Undoubtedly the facts stated with respect to the Federal Oil Company are sufficient to render it amenable to such a statute.

Now the language of section 183 G. C. is not distinguishable in purport from that of section 178. What we have to decide is whether or not the fact that there is or may be difficulty in fixing the amount of the initial fee under section 183 G. C. or the annual tax under sections 5502 et seq. G. C. in a given case is sufficient to take that case out of the operation of these sections entirely. It is the opinion of this department that such is not the case and that the company mentioned is liable to compliance with section 183.

In this connection attention is called to the fact that the secretary of state under section 184 G. C. and the tax commission under the similar provisions of the annual franchise tax law are authorized to have recourse to "any other facts coming to his knowledge" (section 184); also, that these sections impose a minimum fee, which is ten dollars as to the initial fee (section 184) and the same as to the annual fee (section 5583).

By virtue of these provisions it follows, in the opinion of this department, that a foreign corporation which actually does business in this state, though that business is of such character and amount, as compared to the total volume of business done by the company elsewhere, as to be almost incapable of measurement and therefore infinitesimal, is liable to compliance with sections 183 et seq. of the General Code, and to annual franchise taxation under sections 5502 et seq. of the General Code, and in connection therewith must pay at least the minimum fees under these sections.

Very respectfully,
JOHN G. PRICE,
Attorney-General.

310.

ROADS AND HIGHWAYS—STATE AID GRANTED ON APPLICATION OF COUNTY COMMISSIONERS—TOWNSHIP LIABLE TO COUNTY FOR TOWNSHIP'S SHARE BY ACT OF 103 O. L. 449.

Where a highway improvement has been made with state aid granted on application of county commissioners, in accordance with highway laws as amended, 103 *O. L.* 449,

et seq., the township is under a liability to the county for the township's share as defined in section 1208 *G. C.* (103 *O. L.* 456), *unless such share has been waived and assumed by the county upon resolution adopted by the county commissioners as provided in section* 1210-1 *G. C.* (103 *O. L.* 457).

COLUMBUS, OHIO, May 16, 1919.

HON. HUGO, N. SCHLESINGER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—The receipt is acknowledged of letter of May 6, 1919, from your office and signed by your assistant Mr. Summers, reading as follows:

> "On December 17, 1913, the commissioners of Franklin county, Ohio, filed a petition with the state highway commissioner for the improvement of the Columbus and Washington C. H. I. C. H. No. 50, extending from the corporate limits of the city of Columbus southwardly to the boundary line between Franklin and Pickaway counties. The highway commissioner granted the improvement and the bonds of the county for fifty per cent. of the improvement covering the share of Franklin county, three townships within said county, and the abutting property owners were sold on the 1st of August, 1914, and the contract for said work was executed on the 31st day of August, 1913 (1914) by the state highway commissioner, the same being approved by the county commissioners. So far as the records show, no notice of the improvement was given officially to the trustees of Franklin, Jackson and Pleasant townships of this county, through which the road passes and in which the road was improved as per petition and contract. The work was completed some time in the latter part of 1915 or the early part of 1916, but the cost thereof was not certified as required by the statute to the auditor of Franklin county until the 30th day of January, 1918.
>
> The trustees of each of the three townships above mentioned have been notified of the certification of the cost and requested by the county commissioners that they pay the three-fifths of the twenty-five per cent. as provided by statute and assess the cost of two-fifths of the twenty-five per cent. against the abutting property owners. Pursuant to this notice, the trustees in each of these townships have promised to assess the proper proportion against the abutting property owners and Franklin township did so last fall. However, the trustees of Jackson and Pleasant townships refuse to pay the three-fifths of the twenty-five per cent provided for in section 1208 G. C. as amended in 103 O. L. page 456 on the advice of an employed attorney who states that section 1210-1 G. C., 103 O. L., page 457, by inference indicates that, unless the trustees agreed to pay a part of the cost of the road improvement, they are not bound for any part of the cost. They do, however, admit that they will have to assess the two-fifths of twenty-five per cent. against the abutting property owners.
>
> I, therefore, desire your opinion whether the trustees are bound for the payment of their share as provided in section 1208 G. C. and whether the county has a right of action under the above circumstances for that share."

Said sections 1208 and 1210-1 G. C., as amended by act of April 18, 1913, and hence as they are applicable to the situation stated by you, read as follows (103 O. L 456-457):

> "Sec. 1208. Except as otherwise provided, one-fourth of the cost and expense of such improvement, except the cost and expense of bridges and culverts, shall be apportioned to the township or townships in which such road is located. Of the amount so apportioned, three-fifths shall be a charge

upon the whole township or townships and two-fifths shall be a charge upon the property abutting on the improvement. The township trustees shall apportion the amount to be paid by the owners of the abutting property according to the benefits accruing to the owners of land so located. At least ten days' notice of the time and place of making such apportionment shall be given to the persons affected thereby, and an opportunity given them to be heard in the manner provided by law for the assessment of the cost and expense of establishing township ditches. If the improvement lies in two or more townships, the amount to be paid by each shall be apportioned according to the number of lineal feet of the improvement lying in each township.

Sec. 1210-1. The county commissioners of a county in which a highway is constructed under the provisions of this act may, by resolution, waive any part or all of the apportionment of the cost and expense of such highway as herein provided to be paid by the township or townships or abutting property owners, and assume any part or all of the cost and expense of such highway improvement in excess of the amount received from the state up to the entire cost and expense of such highway improvement without any assessment whatsoever upon any township or townships of the property abutting on such highway. The township trustees of any township in which a highway is constructed under the provisions of this chapter may, by resolution, waive any part or all of the apportionment of the cost and expense of such highway as herein provided to be paid by the county or abutting property owners and assume any part or all of the cost and expense of such highway improvement in excess of the amount received from the state up to the entire cost and expense of such highway improvement without an assessment upon the county or owners of abutting property upon such highway."

It is worthy of note that the trustees and their attorney are basing their claim upon inference from these sections, rather than upon the express terms thereof. It is believed that a short examination into the history and context of these sections will demonstrate that there is no ground for such an inference.

Sections 1206 to 1210 became effective as a part of the original General Code upon its enactment in February, 1910, and in their form at that time read as follows (General Code 1910 as issued by commissioners of public printing):

"Section 1206. One-half of the cost and expenses of the construction of the improvement shall be paid by the treasurer of state upon the warrant of the auditor of state issued upon the requisition of the state highway commissioner, from a specific appropriation made to carry out the provisions of this chapter.

Section 1207. One-half of the cost and expenses of such improvement shall be paid by the treasurer of the county in which the highway is located upon the order of the county commissioners, issued upon the requisition of the state highway commissioner, from any funds in the county treasury for the construction of improved highways under the provisions of this chapter. One-half of the amount so paid by the county shall be apportioned by the county commissioners to the township or townships and the abutting property as provided in the next section.

Section 1208. One-fourth of the costs and expenses of such improvement shall be apportioned to the township in which such road is located. Of the amount so apportioned to the township, three-fifths shall be charged upon the whole township and two-fifths shall be a charge upon the property

abutting on the improvement. The township trustees shall apportion the amount to be paid by the abutting property according to the benefits accruing to the owners of lands so located. At least ten days' notice of the time and place of making such apportionment shall be given to persons affected thereby, and an opportunity given them to be heard in the manner provided by law for the assessment of the costs of establishing county roads.

Section 1209. If a railway corporation owns in fee a strip of land along the side of the highway upon which it operates a steam or electric railway, the land back of such strip shall be regarded and treated as abutting upon such highway for all purposes of abutting ownership, and both such strip and land back thereof shall be assessed as provided in the preceding section.

Section 1210. The township trustees shall certify the assessment to the county auditor, who shall place it upon the tax duplicate against the property benefited. The county treasurer shall collect such assessment in the same manner as other taxes are collected, and in such payments as may be approved by the county auditor. The township trustees shall pay the portion of the costs and expenses assessed to the township in the same manner as other claims are paid."

As they thus read, said sections were adapted from sections 8, 16 and 17 of the highway act of 1908, appearing in 99 Ohio Laws 314.

Said five sections remained in their form as above quoted until certain amendments to them were made by act of May 31, 1911, approved June 9, 1911 (102 O. L. 342, 343). Said amendments, however, do not appear to have changed in the least the percentages which by the mandate of the sections in their earlier forms were to be charged respectively to the township and property owners; nor do said amendments appear to have relaxed the mandatory terms providing that the township and property owners should bear a part of the cost, or to have changed the assessment proceedings which the township trustees are commanded to carry out.

However, by an entirely new supplemental section designated as section 1210-1 (102 O. L. 344), enacted contemporaneously with the making of said amendments, an optional or alternative plan was provided whereby, upon action by the county commissioners or township trustees, the percentages might be changed, said section 1210-1 as then enacted reading as follows:

"The county commissioners of a county in which a road is constructed under the provisions of this act may, by resolution, waive any part or all of the apportionment of the cost and expense of such road as herein provided to be paid by the township or townships or abutting property owners, and assume any part or all of the cost and expense of such road improvement in excess of the amount received from the state up to the entire cost and expense of such road improvement without any assessment whatsoever upon any township or townships or the property abutting on such road. The township trustees of any township in which a road is constructed under the provisions of this chapter may, by resolution, waive any part or all of the apportionment of the cost and expense of such road as herein provided to be paid by the county or abutting property owners and assume any part or all of the cost and expense of such road improvement in excess of the amount received from the state up to the entire cost and expense of such road improvement without an assessment upon the county or owners of abutting property upon such road."

A comparison of said section 1210-1 as just quoted with its amended form as quoted above from 103 O. L., shows that the only change made by the amendment

was the substitution of the word "highway" in the amended form for the word "road" in the earlier form.

It thus clearly appears by sections 1206 to 1210 that a legislative policy had been established prior to the time of the original enactment of section 1210-1, whereby as to certain classes of road improvement the state would contribute a definite portion of the cost, the remaining portion by mandatory provisions being distributed among county, township and property owners. Certainly no question could have been raised prior to the enactment of section 1210-1 G. C., that the township by any means might be relieved of its statutory portion. An inflexible rule had been laid down as to the portions to be borne, and methods had been provided for raising money to pay such shares. That policy was not changed in the least by any amendments made at the time that section 1210-1 was enacted, or by the legislative act of which it is a part. However, to provide for varying local conditions and to permit of the handling of such local conditions by local officials, the legislature enacted as a supplemental section said section 1210-1. Of course this required a slight change in the phraseology of section 1208, so that as amended 102 O. L. 343 it opened with the words "Except as otherwise provided," etc., which words were retained in the amendment of the section in 103 Ohio Laws.

In the light of the foregoing observations, does it not become entirely clear that the official action permitted by section 1210-1 G. C. is an action authorized for the purpose of relieving an obligation already established by statute, and is in no sense an action required to be taken as a step in establishing an obligation? And this being true, how can the township claim to have been relieved of its statutory obligation, unless it can show that the commissioners took action as provided in section 1210-1? You say that as far as the records show, no notice of the improvement was given officially to the trustees of the several townships. It is not perceived how that fact is in point. The statutes did not require any such notice; hence there can be no claim on the township's part of waiver by the county, for as stated by Davis, J., in the case of List vs. Chase, 80 O. S. 42, at p. 49 of the opinion:

> "A waiver is a voluntary relinquishment of a known right. It may be made by express words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform. Mere silence will not amount to waiver where one is not bound to speak."

Furthermore, the legislature, in adopting section 1210-1, made use of language indicating precisely that the action of the county commissioners, if taken at all, should be for the purpose of relieving a burden falling upon the township and property owners, and not for the purpose of creating one. The terms of the statute are that the county commissioners—

> "may, *by resolution, waive* any part or all of the apportionment *as herein provided to be paid* by the township or townships or abutting property owners, and *assume* any part or all of the cost and expense of such highway improvement in excess of the amount received from the state up to the entire cost and expense of such highway improvement without any assessment whatsoever upon any township or townships or the property abutting on such highway."

When we keep in mind the rule, long established in Ohio, that the powers granted county commissioners are to be strictly construed, and that the commissioners represent the county in its financial affairs only so far as authority is given them by statute (State ex rel. vs. Com'rs., 11 O. S. 183; Jones vs. Com'rs., 57 O. S. 189, and many other

cases), we can only conclude from the language above quoted that there is but one way in which the county may be held to have waived and assumed the share of the township or property owners, namely, by affirmative action of the commissioners in strict compliance with section 1210-1 G. C.

While you make no reference to former section 1200, it is thought proper to call attention to it. Said section, as in force at the time of the beginning of the improvement proceedings you mention, read as follows (103 O. L. 455):

> "Section 1200. Before their approval of the proposed highway improvement, the county commissioners may require that the trustees of the township or townships through which it extends by resolution approve the construction of the same and agree to pay twenty-five per cent. of the cost and expense thereof, excepting the cost of construction or improvement of bridges and culverts."

Construed in connection with former sections 1206 to 1210, inc., the seeming purpose of section 1200 was to allow the commissioners, before approving a highway improvement, to require the trustees of an affected township to assume in the first instance the whole twenty-five per cent. which, according to sections 1206 to 1210, inc., was payable three-fifths by the townships and two-fifths by the property owners—in other words, to require the township to guarantee in advance the collection of the property owners' share. But to say the least, said section 1200 affords no ground for a claim that the trustees were to be notified in advance of the intention to proceed with the improvement or an intention to charge the township with a part of the cost; for the matter of securing the approval and agreement was purely optional with the commissioners and in addition is to be treated as a provision for the protection of the county, rather than the township. It will be noted also that the optional character of the provisions of section 1200 is emphasized by reference to the fact that in its original form the section provided in mandatory terms that the commissioners should require the approval and agreement of the trustees (see section 1200 in original 1910 edition of General Code).

For these reasons, the specific answer to your question is that the trustees are bound for the payment of their share as provided in section 1208 G. C. and that the county has a right of action for such share.

Respectfully,
JOHN G. PRICE,
Attorney-General.

311.

ROADS AND HIGHWAYS—ASSESSMENTS MADE PRIOR TO ENACTMENT OF CASS HIGHWAY LAW.

(1.) *With respect to those roads constructed with state aid granted on application of county commissioners, improvement proceedings as to which became pending proceedings during the year* 1911 *and from that time until the first Monday in September,* 1915, *at which time the Cass law became effective, the property owners' share must be assessed and collected, and the township's share must be paid, unless such respective shares have been waived and assumed in accordance with former section* 1210-1 *G. C., the manner of the assessment to be as prescribed by statutes in force when the improvement proceedings became pending.*

(2.) *Assessment for improvements mentioned in next preceding paragraph* (1) *must*

be confined to such realty as immediately abuts the improvement, subject only to the exception created by former section 1209 *as to railroad right of way and land adjoining it.*

(3) *The rule stated in next preceding paragraph* (2) *is applicable to improvements made under Cass law (said former section* 1209, *however, having been broadened and reenacted as section* 1215 *in Cass law).*

(4.) *A road improvement proceeding becomes a pending proceeding at the time the state highway commissioner approves the application of the county commissioners for state aid as to such improvement, and orders the county surveyor to make plans, etc., for such improvements.*

COLUMBUS, OHIO, May 16, 1919.

HON. GEORGE W. SHEPPARD, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Attention has been given your communication of April 12, 1919, addressed to this department, reading as follows:

> "John G. Harper, surveyor of Scioto county, Ohio, has submitted to me the following questions and has asked me to submit them to your department for legal opinion:
>
> 'Can assessment be made on all roads constructed during the years of 1911, 1912, 1913, 1914 and 1915 which is prior to Cass highway law, September 6, 1915, if assessment has not been waived by county commissioners?
>
> How can assessment be made during this time—I mean can assessment be made on abutting property owners one-half mile or one mile from improvements? Can the township be assessed with improvements made during these various years if the county commissioners did not waive their assessment? How shall the assessment be made under the Cass law?
>
> If an improvement was started prior to the Cass law; that is, surveys, plans, etc., all of the preliminary work done, the improvement contracted for and made under the Cass law, can assessment be made on this improvement if not waived by county commissioners?
>
> If the preliminary work is started, under the Cass law (that is, surveys ordered and made, plans prepared, etc.), and the contract is let under the present law, shall the assessment be made under the Cass law or the present law?' "

From the trend of your inquiries and from information coming to this department it is assumed that you have in mind only those road improvements as to which state aid was granted on application of county commissioners; hence the views expressed and conclusions stated herein will have reference only to such improvements. The foregoing statement is made because of the fact that for several years past our statutes have provided for state aid under certain conditions upon application by township trustees; and it is important to bear in mind that the proceedings in connection with such an application are somewhat different from those relating to an application for state aid by the county commissioners.

Your first and third inquiries are as to whether the so-called "assessment share" or "property owners' share" may at this time be lawfully assessed, and whether the so-called "township share" may at this time be lawfully collected as to improvements pending prior to the taking effect of the Cass act on the first Monday in September 1915 if there has been no waiver by the county as to the payment of such shares.

These two inquiries will be considered together for the reason that both of them involve consideration of former sections 1206 to 1210 G. C. as well as of an enactment formerly designated as section 1210-1 G. C.

Sections 1206 to 1210 became effective as a part of the original General Code

upon its enactment in February, 1910, and in their form at that time read as follows (General Code 1910 as issued by commissioners of public printing):

> "Section 1206. One-half of the cost and expenses of the construction of the improvement shall be paid by the treasurer of state upon the warrant of the auditor of state issued upon the requisition of the state highway commissioner, from a specific appropriation made to carry out the provisions of this chapter.
>
> Section 1207. One-half of the cost and expenses of such improvement shall be paid by the treasurer of the county in which the highway is located upon the order of the county commissioners, issued upon the requisition of the state highway commissioner, from any funds in the county treasury for the construction of improved highways under the provisions of this chapter. One-half of the amount so paid by the county shall be apportioned by the county commissioners to the township or townships and the abutting property as provided in the next section.
>
> Section 1208. One-fourth of the costs and expenses of such improvement shall be apportioned to the township in which such road is located. Of the amount so apportioned to the township, three-fifths shall be charged upon the whole township and two-fifths shall be a charge upon the property abutting on the improvement. The township trustees shall apportion the amount to be paid by the abutting property according to the benefits accruing to the owners of lands so located. At least ten days' notice of the time and place of making such apportionment shall be given to persons affected thereby, and an opportunity given them to be heard in the manner provided by law for the assessment of the costs of establishing county roads.
>
> Section 1209. If a railway corporation owns in fee a strip of land along the side of the highway upon which it operates a steam or electric railway, the land back of such strip shall be regarded and treated as abutting upon such highway for all purposes of abutting ownership, and both such strip and land back thereof shall be assessed as provided in the preceding section.
>
> Section 1210. The township trustees shall certify the asessment to the county auditor, who shall place it upon the tax duplicate against the property benefited. The county treasurer shall collect such assessments in the same manner as other taxes are collected, and in such payments as may be approved by the county auditor. The township trustees shall pay the portion of the costs and expenses assessed to the township in the same manner as other claims are paid."

As they thus read said sections were adapted from sections 8, 16 and 17 of the highway act of 1908, appearing in 99 Ohio Laws, 314.

Said five sections remained in their form as above quoted until certain amendments to them were made ay act of May 31, 1911, approved June 9, 1911 (102 O. L. 342, 343). Said amendments, however, do not appear to have changed in the least the percentages which by the mandate of the sections in their earlier forms were to be charged respectively to the township and property owners; nor do said amendments appear to have relaxed the mandatory terms providing that the township and property owners should bear a part of the cost, or to have changed the assessment proceedings which the township trustees are commanded to carry out.

However, by an entirely new supplemental section designated as section 1210-1 (102 O. L. 344), enacted contemporaneously with the making of said amendments, an optional or alterative plan was provided whereby, upon action by the county commissioners or township trustees, the percentages might be changed,—said section 1210-1 as then enacted reading as follows:

"The county commissioners of a county in which a road is constructed under the provisions of this act may, by resolution, waive any part or all of the apportionment of the cost and expense of such road as herein provided to be paid by the township or townships or abutting property owners, and assume any part or all of the cost and expense of such road improvement in excess of the amount received from the state up to the entire cost and expense of such road improvement without any assessment whatsoever upon any township or townships or the property abutting on such road. The township trustees of any township in which a road is constructed under the provisions of this chapter may, by resolution, waive any part or all of the apportionment of the cost and expense of such road as herein provided to be paid by the county or abutting property owners and assume any part or all of the cost and expense of such road improvement in excess of the amount received from the state up to the entire cost and expense of such road improvement without an assessment upon the county or owners of abutting property upon such road."

Sections 1206 and 1208 were subjected to further amendment, and section 1210-1 was also amended by act of April 18, 1913, in these particulars: (103 O. L. 456-457.)

(a) The words "and bridges" were added at the end of section 1206,—the effect of the amendment being to make county bridge funds available for the county's share of road improvement.

(b) The clause "except the cost and expense of bridges and culverts" was inserted in section 1208; and the clause "in the manner provided by law for the assessment of the cost and expenses of establishing township ditches," was substituted in said section 1208 for the clause "in the manner provided by law for the assessment of the cost and expense of establishing county roads"—the effect of such respective insertion and substitution being to except from the total cost the item of bridges and culverts in calculating shares of township and property owners; and to set up as assessment proceedings to be followed by the township trustees, the township ditch assessment proceedings in lieu of assessment proceedings relating to establishment of county roads.

(c) The word "highway" was substituted for the word "roads" in section 1210-1.

As no further changes were made in the series of statutes 1206 to 1210 or in section 1210-1, until the passage of the Cass act, the above references to the history of said sections carry us through the period covered by your first and third inquiries.

Assuredly a mere reading of these statutes is convincing that they place upon affected townships a positive obligation to pay a definite share of the cost of the improvement, and that they also make mandatory the payment of a definite share of such cost by affected property owners,—the making of such assessment being a duty cast upon township trustees to be carried out either in accordance with the plan of township ditch assessment or county road establishment assessment, depending on which plan was enjoined by statute in force at the time the road improvement became a pending proceeding as hereinafter defined.

Of course, as to those road improvements which became pending proceedings after June 9, 1911, and before the first Monday in September, 1915, there was an option in the county commissioners by virtue of said section 1210-1 to assume all or a part of the township's share and all or a part of the property owners' share, and a like option in the township trustees to assume all or a part of the county's share and all or a part of the property owners' share (which option, it may be said in passing, was as of the first Monday in September, 1915, and now is, restricted by section 210 of the Cass act, now section 1217 G. C. to the extent that in all cases the property owners must pay at least ten per cent.) The very terms of said former section 1210-1 indi

cate that affirmative and formal action by the commissioners, namely, the passage of a resolution, is a necessary step to the assumption by the county of any part or all of the township's or property owners' share; for the section says in so many words that the county commissioners "may, by resolution, waive," etc. The use of the word "waive" and the requirement of formal action by resolution serve to emphasize the mandatory character of the other sections referred to, concerning the share to be borne by the township and property owners, if the commissioners have not seen fit to exercise the option of waiver.

Furthermore, in this connection, attention is called to an opinion of this department of date June 28, 1913, Annual Reports of the Attorney General for 1913, page 1279, in which it was held with reference to sections 1206 to 1210 as they stood prior to the enactment of section 1210-1 that no power was lodged in the township trustees to waive the ten per cent. provided by statute to be assessed against property owners, and cause said ten per cent. to be charged to the township. The same rule would apply to county commissioners in the absence of section 1210-1; and as a matter of course, if the commissioners took no action under section 1210-1, no claim can reasonably be made that either the township or property owners have been relieved of their respective shares.

Perhaps some reference should be made to former section 1200, which as incorporated into the original enactment of the General Code in 1910 read as follows:

> "Before their approval of a road improvement, the county commissioners shall require that the township or townships through which it extends shall pay twenty-five per cent. of the costs thereof, and that the trustees, by resolution, approve its construction."

By above mentioned act passed May 31, 1911, said section was amended to read as follows (102 O. L. 341);

> "Before their approval of the proposed road improvement, the county commissioners may require that the trustees of the township or townships through which it extends agree to pay twenty-five per cent. of the cost and expense thereof, and that the trustees by resolution, approve the construction, improvement, maintenance or repair of the same."

Of course, no claim could be made that the section as thus amended and becoming effective as of June 9, 1911, implies that as a condition precedent to charging the township with any part of the cost, the trustees must agree to assume twenty-five per cent. of the cost and by resolution approve the construction of the road, etc., for as amended said section left entirely to the option of the commissioners the matter of requiring agreement and approval of trustees.

On the other hand, the exact purpose of the statute as it stood prior to said amendment is somewhat vague, since co-existing sections 1206 to 1210 sufficiently provided for the shares to be paid by the township and property owners—twenty-five per cent in all. Probably the real intent of the section as it read before the amendment was to make the township liable in the first instance for the whole twenty-five per cent., including township's share and property owners' share as defined in sections 1206 and 1210; just as the county was made liable to the state in the first instance for the whole cost of the improvement over and above the portion assumed by the state. In any event, the several sections must be construed together, and from that standpoint, as well as from the fact that said section 1200 was plainly for the protection of the county as against the township and property owners, the provisions of said section cannot be construed as mandatory in the sense that the township and property owners would be relieved if the commissioners failed to make the requirement, in other words,

the positive statutory obligation laid on the township and property owners by sections 1206 to 1210 is not to be avoided by the failure of the commissioners to perform an act required by another section (1200) of the same series of statutes.

Your second inquiry relates to the point whether as to improvements pending before Cass law became effective, assessments may be made against lands other than those immediately abutting the improvement, or to state your question specifically, whether a one-half mile or one mile assessment zone is permissible. You will find this question to have been answered in an opinion of this department heretofore rendered (Opinions of the Attorney General for 1916, p. 309), to the effect that the assessment may be made only against property abutting the improvement, and not against other property that might be embraced within a one-mile zone. True, the opinion just referred to related to the statutes as amended by the Cass law, but the opinion is equally applicable to the statutes as they existed before the Cass law took effect, the plan of having an assessment zone of one-half mile or greater extent not having made its appearance in the statutes relating to state aid improvements until the passage of the White-Mulcahy act, effective on June 28, 1917.

Your fourth question is: How shall assessment be made under the Cass law? It is assumed that you mean by this to inquire whether the assessment may include other land than that immediately abutting the improvement; hence the opinion last above referred to constitutes an answer to the effect that the immediately abutting land only may be assessed. The assessment procedure to be followed by the township trustees is set forth in section 207, et seq. Cass law (106 O. L. 637), which sections were designated sections 1214 et seq., G. C. It has already been noted that as to Cass law improvements, no option was left in either co nty commissioners or township trustees to waive assessment of, and assume, property owners' share.

The rule stated as to abutting realty is subject to an exception specified in former se tion 1209 (which with certain changes became section 1215 of the Cass law), relating to railroad right of way, etc., and lands adjoining it.

Your fifth and sixth questions relate to the matter of what set of statutes is to be followed in making the assessment. These questions are found to have been fully answered by an opinion of this department, not yet in print, rendered to Hon. Franklin J. Stalter, prosecuting attorney, Upper Sandusky, Ohio, under date of April 29, 1918, copy of which is enclosed. You will find on examination that it constitutes specific answer to your sixth question and an answer upon principle to your fifth question.

Of course, it must be borne in mind as a general principle when making assessments, that no tract of land may be assessed in excess of special benefits conferred (Railway vs. Cincinnati, 62 O. S. 465). This constitutional limitation is recognized in the statutes above referred to, wherein we find the expression, "according to the benefits accruing." It will be found, also, that the Cass act and White-Mulcahy act provide a special limitation of thirty-three per cent. of tax value.

In conformity with the views expressed herein and in the opinions above referred to, specific answer to your questions may be made as follows:

(1) With respect to all roads, improvement proceedings as to which became pending proceedings during the year 1911, and from that time until the first Monday in September, 1915, property owners' share must be assessed and collected, and the township's share must be paid, unless such respective shares have been waived and assumed in accordance with former section 1210-1, the manner of the assessment to be as prescribed by statutes in force when the improvement proceedings became pending.

(2.) Assessments for improvements mentioned in next preceding paragraph (1) must be confined to such reality as immediately abuts the improvement, subject only to the exception created by former section 1209 as to railroad right of way and land adjoining it.

(3.) The rule stated in next preceding paragraph (2) is applicable to improve-

ments made under Cass law (said former section 1209, however, having been broadened and re-enacted as section 1215 in Cass law.)

(4.) A road improvement proceeding becomes a pending proceeding at the time the state highway commissioner approves the application of the county commissioners for state aid as to such improvement, and orders the county surveyor to make plans, etc., for such improvement.

Respectfully,
JOHN G. PRICE,
Attorney-General.

312.

APPROVAL OF THREE LEASES FOR COAL LANDS TO JOSEPH CARPENTER, SHIRLEY E. WALDREN AND GEORGE U. BONE.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

COLUMBUS, OHIO, MAY 19, 1919.

DEAR SIR:—Acknowledgment is made of the receipt of your letter dated May 10, 1919, with which it is noted you submit three leases from the auditor of state to Joseph Carpenter, Shirley E. Waldren and George U. Bone, for the approval of this department.

It is noted that the premises described in these leases are a part of section 16 and that provision is made in section 3209-1, as amended in 105 O. L., page 6, for the auditor of state to lease the coal in and under such lands as provided in said section, "upon such terms and for such time as will be for the best interest of the beneficiaries thereof."

It is noted also from the facts in your letter that the coal sold under these leases is contained in pockets and is of no value except for wagon mining.

It is also noted that a reservation is made in these leases for coal lying below the level of the valley.

A careful examination of these leases, and consideration of the laws applicable to such leases, convince this department that they are executed in conformity with section 3209-1 G. C. and are for the best interests of the beneficiaries of section 16, and for these reasons these leases are therefore approved.

Respectfully,
JOHN G. PRICE,
Attorney-General.

313.

APPROVAL OF BOND ISSUE OF DEFIANCE COUNTY IN THE SUM OF $180,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 20, 1919.

314.

APPROVAL OF BOND ISSUE OF DEFIANCE COUNTY IN THE SUM OF $59,400.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 20, 1919.

315.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY IN THE SUM OF $18,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 20, 1919.

316.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY IN THE SUM OF $21,000.00.

Industrial Commission of Ohio, Columbus Ohio.

COLUMBUS, OHIO, May 20, 1919.

317.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY IN THE SUM OF $20,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 20, 1919.

318.

APPROVAL OF BOND ISSUE OF AUGLAIZE COUNTY IN THE SUM OF $6,600.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 20, 1919.

319.

APPROVAL OF BOND ISSUE OF HURON COUNTY IN THE SUM OF $21,750.00

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 20, 1919.

320.

APPROVAL OF BOND ISSUE OF HURON COUNTY IN THE SUM OF $19,300.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 20, 1919.

321.

INTOXICATING LIQUORS—LAWS OPERATIVE RELATING TO POSSESSION OR STORAGE OF LIQUORS AT TIME PROHIBITION AMENDMENT TO OHIO CONSTITUTION BECAME EFFECTIVE.

Neither the prohibition amendment to the Ohio constitution nor statutes of the state now operative prevent the removal of liquor from the state nor purport to penalize the possession or storage of liquor.

COLUMBUS, OHIO, May 21, 1919.

State Liquor Licensing Board, Columbus, Ohio.

GENTLEMEN:—Under date of May 6, 1919, you requested my opinion as follows:

> "We are in receipt of the following inquiry from an attorney of East Liverpool, Ohio:
>
> 'May liquor remaining in stock after May 27th be stored in this city outside of the place where the business was conducted, if so, may such liquor be legally shipped outside of the state at any time before July 1, 1919?'
>
> Will you kindly furnish this department an opinion on the above question?"

I am presuming that your inquiry relates to the state of the Ohio law upon the subject involved, and in reply to such inquiry I advise that the provisions of the prohibition amendment to become effective May 27th do not in terms provide against the possession or storing of liquor within the state; nor is there statutory law now in operation dealing with that specific phase of the subject.

True, the possession and storage of liquor may well be made the subject of legislation looking to the enforcement of the prohibition amendment, and while such provisions may be embodied in legislation considered or to be considered before the present

session of the general assembly, yet none of such legislation is now in effect, and therefore has not been examined in connection with the consideration of your inquiry.

Likewise the provisions of federal legislation have not been considered, since it was presumed your inquiry relates to laws cognizable by the administrative agencies of the state.

As thus considered, I advise in answer to your inquiry that the possession and storage of liquor in Ohio is not the subject of legislation now in force.

Respectfully,
JOHN G. PRICE,
Attorney-General.

322.

INTOXICATING LIQUORS—DISCUSSION OF STATUTES RELATIVE TO REFUNDERS FOR LIQUOR LICENSE ASSESSMENTS.

The thousand dollar tax provision and the Sunday closing provision of the Ohio statutes are cumulative regulations of the liquor traffic, and among other regulatory measures, are to be construed and applied together. The observance of one creates no immunity from the observance of the other, and no part of the tax assessment is referable to the "closed day."

The last business day of the present tax year is Saturday, May 24, 1919, *and dealers are not entitled to a refunder as of May* 25*th by virtue of the Sunday closing requirement.*

In case of refunders ordered by the common pleas court in pursuance of section 6071-1 *G. C., when the temporary discontinuance of business is upon the order of federal or state authority, the refunder is payable from the state treasury out of moneys appropriated for such purpose, and when the discontinuance of business is in pursuance of an order of county, municipal or township authority, or is the result of fire, flood, earthquake or other public calamity, the refunder is to be paid from the county treasury out of any surplus or unexpended funds of the county in the hands of said treasurer.*

COLUMBUS, OHIO, May 21, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your inquiries relative to questions of refunder of liquor assessments, and will consider the same together in one opinion.

Your first inquiry is as follows:

> "Is a liquor dealer entitled to a refunder as of Sunday, May the 25th, if he has complied with the technical requirements of the statute providing for such refunder?
>
> It has been the practice of this department since the enactment of the original liquor tax law to prepare tables of refunders and we attach one of the same to this request for opinion."

You also submitted the further inquiry, as follows:

> "If a discontinuance of a liquor dealer is had under the provisions of section 6071-1 G. C. (103 O. L. 818), we desire an opinion upon the following questions:
>
> If a discontinuance is had upon the order of a county, municipal or town-

ship authority, is the state required to bear any proportion of such refunder by the court under said section? "

The liquor tax involved in your inquiry is provided for in section 6071 et seq., G. C.

"Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors, there shall be assessed yearly and paid into the county treasury, as provided by sections 6072, and following, of the General Code, by each person, corporation, or co-partnership engaged therein the sum of one thousand dollars."

Section 6072 provides that the assessment with any penalty thereon shall attach as a lien upon the real property on the fourth Monday of May of each year, and shall be paid in equal installments as other taxes are paid in June and December of each year. It further provides:

"Any person who traffics in intoxicating liquors as a beverage at retail shall not be entitled to any rebate or refunder under the liquor tax law without giving a bond in amount equal to twice the amount of such rebate or refunder, with securities acceptable to the county clerk that he will not traffic in intoxicating liquors without paying the liquor taxes provided by law; such bond shall be filed with the county auditor and certified to the state liquor licensing board."

Section 6074 provides:

"When a person, company, corporation or co-partnership, engaged in such business, has been assessed and has paid the full amount of such assessment and afterward discontinued such business, the county auditor, upon being satisfied thereof, shall issue to such person, corporation or co-partnership a refunding order for a proportionate amount of such assessment so paid, but the amount of such assessment so retained shall not be less than two hundred dollars unless such discontinuance of business has been caused by an election under a local option law or a lawful finding of a mayor or judge on a petition filed in a residence district as provided in this chapter, in which case the proportionate amount of such tax shall be refunded in full."

A further provision for refunder is made by section 6071-1 G. C. (103 O. L. 818), which section provides:

"When a person, association, partnership or corporation engaged in the traffic of intoxicating liquors is required by the order of the military or other authority of the United States or of the state, county, municipality or township or by or through fire, flood, earthquake or other calamity to discontinue business temporarily, said person, association, partnership or corporation shall be entitled to a refunder of a proportionate amount of the tax so paid under section 6071 and following of the General Code, based upon the number of days or fraction thereof, of enforced discontinuance. A person, association, partnership or corporation so affected upon written application to the common pleas court of the county shall be entitled to an immediate hearing by said court. The clerk of said court shall notify the county auditor and county prosecutor of the application and the time set for hearing, and the said officer shall represent the county at said hearing.

> The court shall thereupon make a finding as to the fact and the number of days of said enforced discontinuance and shall make an order for a refunder accordingly which order shall not be subject to review. If the discontinuance is upon the order of any state or federal authority for whatever reason said order is made then the auditor of state shall draw a warrant upon the treasurer of state in favor of any such person, association, partnership or corporation for the amount of such refunder found by the court, to be paid out of any sum appropriated by the general assembly therefor; and if the discontinuance is upon the order of any county, municipality or township authority or is the result of fire, flood, earthquake or other public calamity, then the auditor of the county shall draw a warrant upon the treasurer of the county in favor of such person, association, partnership or corporation for the amount of such refunder found by the court, to be paid out of any surplus or unexpended funds in the hands of said treasurer.
>
> The act shall apply to any such discontinuance of business in the assessment year beginning the fourth Monday of May, 1912, and thereafter."

Your first question, as above submitted, is understood to involve the right to a refunder for Sunday, May 25th, arising out of the fact of that day being included within the license year, but the sale of liquor being precluded by the provisions of the Sunday closing law, so-called, which is as follows:

> "Sec. 13050. Whoever, on Sunday, sells intoxicating liquor, whether distilled, malt or vinous, or permits a place, other than a regular drug store, where such intoxicating liquor is sold or exposed for sale on other days to be open or remain open on Sunday, shall be fined not less than twenty-five dollars nor more than one hundred dollars, and for each subsequent offense, shall be fined not more than two hundred dollars or imprisoned in jail or in a city prison not less than ten days nor more than thirty days, or both."

In arriving at the correct answer to your inquiry it is only necessary to recall that the provision for assessing the one thousand dollar liquor tax (Aiken tax so-called) does not constitute a license in any respect, but on the contrary is in the nature of a legislative measure for the regulation of the traffic in intoxicating liquor.

Taxes of this character were originally enacted when the constitution provided:

> "No license to traffic in intoxicating liquors shall hereafter be granted in this state; but the general assembly may, by law, provide against evils resulting therefrom."
>
> Section 7, article XV, constitution.

And the tax provisions have been upheld as an exercise of the police power, as well as a legitimate exercise of the taxing power, and considered as accumulative regulations along with those of a penal character which have been in force from time to time.

Viewed in this light, it is readily apparent that there is no basis for a claim for refunder for Sunday, May 25th, as the payment of tax vested the payor with no rights to engage in the traffic free of such other legal restraints and regulations as were or might be in force, but on the contrary, was but one of the regulatory measures to be observed by those engaging in the liquor traffic, and at the same time in no respect was effective as an immunity from observance of the other regulatory measures, such as the Sunday closing requirement.

Therefore, answering your first question specifically, I advise that liquor dealers

are not entitled to a refunder as of Sunday, May 25th by reason of being required to close under the present provisions of the law.

The question raised by your second inquiry I think is fully answered by a consideration of the language of the statute, section 6071-1 G. C. Said section provides for a refunder in case of a temporary discontinuance of the business necessitated by order of the military or other authority of the United States or the state, county, municipality or township, or by or through fire, flood, earthquake or other public calamity. The refunder under such circumstances is to be determined by the common pleas court upon an application duly filed for said purpose, and shall be based upon the number of days or fraction thereof of enforced discontinuance as found by the court.

It is then provided that

> "if the discontinuance is upon the order of any state or federal authority for whatever reason said order is made then the auditor of state shall draw a warrant upon the treasurer of state in favor of any such person, association, partnership or corporation for the amount of such refunder found by the court, to be paid out of any sum appropriated by the general assembly therefor; and if the discontinuance is upon the order of any county, municipality or township authority or is the result of fire, flood, earthquake or other public calamity, then the auditor of the county shall draw a warrant upon the treasurer of the county in favor of any such person, association, partnership or corporation for the amount of such refunder found by the court, to be paid out of any surplus or unexpended funds in the hands of said treasurer."

This section provides a distinct authority for refunders entirely independent of that provided for in case of discontinuance of the business contemplated in section 6074 supra, and must be administered in accordance with its own specific provisions which provide the complete procedure governing in case of temporary discontinuance by order of the United States or the state and several political subdivisions of the state.

In accordance with the express provisions of the statute, I advise that in case a temporary discontinuance is made necessary by the order of a county, municipal or township authority the entire amount of the refunder determined by the common pleas court is payable from the county treasury, and in such case there is no provision for reimbursement of all or any part thereof from the state treasury.

Respectfully,
JOHN G. PRICE,
Attorney-General.

323.

AGGREGATE SUM TO BE EXPENDED BY COUNTY OFFICERS PROVISION OF SECTION 2980 G. C. AS TO TIME DIRECTORY—OTHER LIMITATIONS.

1. *The provision of section* 2980 *G. C. as to the time within which the county commissioners are to fix the aggregate sum to be expended by the county officers therein referred to, is directory.*

2. *The county commissioners are empowered under sections* 2980 *and* 2980-1 *G. C. to make allowances from time to time from the county fee fund, subject to the limitation*

that the aggregate sum allowed does not exceed an aggregate amount to be ascertained by making the percentage computations therein specified.

COLUMBUS, OHIO, May 21, 1919.

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

GENTLEMEN:—Your letter of March 21, 1919, requesting my opinion as to the validity of the action taken by the board of county commissioners of Franklin county on February 6, 1917, amending its resolution of November 23, 1916, so as to increase the allowance made to the probate judge for clerk hire for the period beginning February 9, 1917, and ending December 31, 1917, was duly received.

The facts, as I gather them from your letter and the other papers transmitted therewith, are as follows:

On November 22, 1916, the probate judge then in office requested the board of county commissioners to make an allowance of $16,500.00 for clerk hire, etc., for the year beginning January 1, 1917.

The earnings of the office for the year ending September 30, 1916 (a percentage of which determines the maximum that may be allowed for clerk hire), amounted to $33,923.53. Of this amount the commissioners could have allowed the probate judge the sum of **$24,135.00.**

On November 23, 1916, the commissioners by resolution granted the request of the probate judge, and stipulated that the judge then in office be allowed to expend $1,763.00 of the amount allowed for the period beginning January 1, 1917, and ending February 8, 1917, the closing day of his term of office.

On February 6, 1917, it became apparent to the commissioners that the allowance made by them on November 23, 1916, (being diminished as it was by the expenditure of the $1,763.00, above mentioned), would be inadequate to meet the necessary expenses of the office for the balance of the year. At the same time the probate judge-elect made a survey of the needs of the office, and found that records had been allowed to fall back; that many accounts of administrators, executors, guardians, trustees and assignees had not been spread upon the complete record; that many proceedings to sell real estate had not been recorded: that many last wills and codicils, though duly admitted to probate, had not been recorded, and that divers and sundry things required by statute to be done, and some within a certain limit of time fixed by statute, had not been done. It was apparent to both the judge-elect and the county commissioners that an additional allowance of money for clerk hire was necessary if the court records were to be brought up and kept up as required by law.

The county commissioners, therefore, in consideration of the premises, by resolution unanimously adopted on February 6, 1917, amended their allowance of November 23, 1916, by increasing the amount to be expended by the probate judge from February 2, to December 31, 1917, to $16,970.00. In other words, an additional allowance of $2,233.00 was made. This sum, plus that allowed the retiring judge for the month of January and part of the month of February, 1917, would amount to $18,733.00 for the entire year 1917, and is $5,402.00 less than the amount the county commissioners could have allowed on November 23, 1916.

The question for decision is whether or not the action taken by the board of county commissioners on February 6, 1917, is valid.

What is commonly called the county fee fund was created under the Act of March 22, 1906 (98 O. L. 89), now sections 2977 G. C. et seq. This fund is raised from fees, costs, percentages, penalties, allowances and other perquisites collected or received as compensation for services by certain county officers, including the probate judge, and under section 2983 G. C. the sum collected and received by each office constitutes a "separate fund," and is credited to the office from which it is received.

To aid the county commissioners in fixing the allowance to the county officers,

section 2980 G. C. provides that each officer shall prepare and file with the commissioners on November 20th a statement of the probable amount necessary to be expended for the year beginning the following January, and it is further provided that not later than five days after the filing of such statement, the commissioners shall fix a reasonable and proper sum to be expended for such period. Section 2980 G. C. reads as follows:

> "On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, bookkeepers, clerks or other employes of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal."

The aggregate amount to be fixed by the county commissioners for each office cannot exceed an amount ascertained by computing 30 per cent. on the first $2,000 or fractional part thereof, 40 per cent. on the next $8,000 or fractional part thereof, and 85 per cent. on all over $10,000 of the fees, costs, percentages, penalties, allowances and other perquisites collected in any such office during the year ending September 20th next preceding. See section 2980-1 G. C. which, omitting the provision hereinafter quoted, reads as follows:

> "The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes, except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office, or office of the clerk of the courts, an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum, * * *.
>
> When the term of an incumbent of any such office shall expire within the year for which such aggregate sum is to be fixed, the county commissioners at the time of fixing the same, shall designate the amount of such aggregate sum which may be expended by the incumbent and the amount of such aggregate sum which may be expended by his successor for the fractional parts of such year."

It will thus be observed that the provisions of the statute so far quoted deal exclusively with a special fund commonly called the county fee fund, which is raised by the collection of fees, costs, etc., and not with the general county fund.

In the event that the amount legally payable from the fee fund is insufficient to carry on the business of a particular office, it is provided that the additional allowance must come from the general county fund. The authority for transferring the

amount of such additional allowance from the general county fund to the fee fund, and the method and machinery by which it is to be transferred, is contained in a proviso found in section 2980-1 G. C., and reading as follows:

> "Provided, however, that if at any time any one of such officers require additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if upon hearing the same said judge shall find that such necessity exists he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required, and thereupon the board of county commissioners shall transfer *from the general county fund to such officers' fee fund,* such sum of money as may be necessary to pay said salary or salaries.
>
> Notice in writing of such application and the time fixed by such judge for the hearing thereof shall be served by the applicant, five days before said hearing upon the board of county commissioners of such county. And said board shall file in said proceedings their approval or disapproval of the allowance asked for and shall have the right to appear at such hearing and be heard thereon; and evidence may be offered. * * *"

It clearly appears that the proviso just quoted only applies when the additional allowance is to come from the general county fund and that the judge of the common pleas court is not vested with any authority or jurisdiction over the fee fund or to make the additional allowance from that fund.

The statutes under consideration vest in the county commissioners the exclusive power to make allowances from the fee fund, and, in my opinion their jurisdiction is not exhausted by a single exercise of such power, but is continuing, and not exhausted until they have exercised to the fullest extent the 30, 40 and 85 per cent. computations provided for in section 2980-1 G. C. It is only after such jurisdiction has been completely exhausted that the jurisdiction of the common pleas court over the general county fund attaches. In other words, the term "additional allowance" in the proviso above quoted, refers to an allowance to be made from the general county fund only.

What has been said disposes of the same question stated in a different form viz.: Whether the county commissioners can *amend* their original order so as to increase the allowance thereby made, when it becomes apparent that the amount allowed is wholly inadequate for the ensuing year? There is no magic in words and it is my opinion that the action of the county commissioners was a proper exercise of their power to fix the allowance of the probate judge for the ensuing year whether it be called an amendment or by some other name so long as the aggregate amount did not exceed the amount arrived at under the percentage computations above mentioned.

There is no provision in the statute that the commissioners may not at any time increase an allowance made from the fee fund, either by way of amending their original order or by making a new order, so long as they keep within the percentages specified. As already stated, the power of the commissioners is continuing until they have reached the aggregate amount authorized in the section.

While it is true that section 2980 G. C. provides that the county officer shall prepare and file with the commissioners on November 20th a statement of the probable amount necessary to be expended for the year beginning January 1st, and that "not later than five days after the filing of such statement the county commissioners shall fix an aggregate sum to be expended for such period * * *, which sum shall be reasonable and proper," it is my opinion that the provision of the statute as to time is directory only, and that the provision with respect to the amount must be

considered in connection with 2980-1 G. C., and, when so considered, refers to the aggregate amount ascertained by applying to the fullest extent the 30, 40 and 85 per cent. computations therein prescribed, and does not have the effect of preventing the commissioners from making further and additional allowances for use during a single ensuing year so long as the aggregate amount so ascertained is not exceeded.

In Weed vs. Tucker, 19 N. Y. 422, the court, in answer to the contention that where power is granted to an officer it is to be construed as limited to a single exercise, unless the statute provides for its exercise on more than a single occasion, said:

> "If such a general rule of construction prevails at all, and I have been unable to find the evidence of it, I am persuaded that it is limited to private grants or to the grants of the public property, or of franchises for the emolument of individuals or private corporations."

The statutes under consideration are not at all of that character. They are rather a part of the legal machinery for carrying on government, and providing for the administration of justice.

It must also not be overlooked that section 2980 G. C. clearly and expressly provides that the aggregate sum to be fixed by the commissioners shall be "reasonable and proper," and this, in my opinion, evinces the legislative intent to confer upon the commissioners continuing authority until a reasonable and proper amount has been allowed, subject only to the express limitation imposed by section 2980-1 G. C. What is a reasonable and proper amount, within the limitation just referred to, must be determined from the facts and circumstances of each particular case.

There is no universal rule by which directory provisions under all circumstances may be distinguished from those which are mandatory, and it is dificult at times to point out just where the line between the two classes is to be drawn. One of the tests frequently applied by the courts is to ascertain, if possible, whether it is the legislative intent that the act should not be performed at all, unless performed within the time fixed, and a factor to be considered in this connection is the effect upon the public interests of permitting or denying the right of the officer to act after the time has gone by.

In State vs. Lean, 9 Wis., 279, the court stated the rule as follows:

> "That when there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before; no presumption that by allowing it to be done it may work an injury or wrong; nothing in the one itself, or in other acts relating to the same subject matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not to be done at all, there the courts assume that intent was, that if not done within the time prescribed, it might be done afterwards."

In the St. Hilaire case, 101 Maine, 522, the court, at page 525, after stating that it is difficult to formulate exact rules for determining when a statutory provision should be construed as mandatory and when as directory, summed up the authorities as follows:

> "When no rights are impaired, provisions concerning the time and manner in which public officers are to perform assigned acts are directory.
>
> When there is no substantial reason why an act may not as well be done after as at or before the time prescribed, such a statute is directory."

In State vs. Covington, 29 O. S., 92, the court at page 117 in distinguishing be-

tween directory and mandatory provisions of the constitution, attached importance to the consideration whether "less injury results to the general public by disregarding than by enforcing the letter of the law."

In my opinion there is nothing in the nature of the duty to be performed by the commissioners under the statutes involved, nor in the manner of its performance, nor in its effect upon public interests or private rights, to indicate that the legislature intended that, if not performed within the time prescribed, it should not be performed at all.

When it is kept in mind (and it certainly must be apparent to any one) that no person can with certainty anticipate the amount of work that probate courts may be called upon to perform during a particular year, by reason of causes over which they and the commissioners have no control, the unsoundness as well as the unfairness of any rule which denies the right of the commissioners to exercise continuing power under these statutes must readily occur. Such a situtation is presented here, for it became obvious to all concerned that the public records of the office could not be brought up and kept up and the other work of the office properly performed during the ensuing year without additional help, and consequently without additional money with which to employ and pay such help.

The effect of a conclusion other than the one at which I have arrived, would in some instances, be to clog the administration of justice, for it is obvious that the manifold duties and uncertain amount of work that the probate judge may find suddenly thrust upon him, and the recording and keeping up of the important public records in his office as contemplated and required by statute, could not be accomplished or performed without the necessary assistants and clerks, who cannot be procured to do the work without compensation. To deny the authority of the county commissioners to meet these situations and emergencies as they arise would, in many cases, of which the one under consideration is a fair sample, result in great public inconvenience and perhaps injustice.

The conclusion at which I have arrived is supported by the unreported decision of the common pleas court of Noble county, afterwards affirmed by the court of appeals, and also by a recent decision of the court of common pleas of Franklin county, Ohio. Opposed to the conclusion reached by myself and the three courts just mentioned, are the opinions of the former Attorneys-General (1913 Annual Reports of Attorney-General Vol. II p. 1322; 1916 Opinions of Attorney-General Vol. II p. 1837).

The questions under consideration have been squarely presented to and decided by three Ohio courts of competent jurisdiction. In the latest case decided by the common pleas court of Franklin county the opinions of the Attorneys-General above referred to were disapproved and until such time as some court of higher jurisdiction than the ones mentioned has authoritatively decided the contrary I can only advise that the provision of section 2980 G. C. as to the time within which the commissioners shall fix the aggregate sum to be expended by the officers therein referred to is directory and that under section 2980-1 G. C. the commissioners are authorized to make allowances from time to time from the county fee fund subject to the limitation that the aggregate sum allowed does not exceed an amount to be ascertained by computing 30 per cent. on the first $2,000 or fractional part thereof 40 per cent. on the next $8,000 or fractional part thereof and 85 per cent. on all over $10,000 of the fees etc. of the particular office involved and collected for the use of the county for official services during the year ending September 30th next preceding, etc.

Respectfully,
JOHN G. PRICE
Attorney-General.

324.

TAX COMMISSION—ASSESSMENT OF SLEEPING CAR, FREIGHT LINE AND EQUIPMENT COMPANIES—MAY USE TRACK MILEAGE BASIS OR VALUE OF DAILY AVERAGE NUMBER OF CARS IN STATE DURING YEAR.

In the assessment of sleeping car, freight line and equipment companies the tax commission is not obliged to use the method of apportioning the value of the whole number of cars owned by such companies to Ohio on the track mileage basis if it has information as to the value of the daily average number of cars in the state during the year, as that is the object of the assessment.

COLUMBUS, OHIO, May 21, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—At the verbal request of Mr. Peckinpaugh of your commission, I desire to amplify the opinion of recent date relating to the assessment of sleeping car, freight line and equipment companies. In that opinion it was intimated that under the decision of the supreme court of the United States in Union Tank Line Co. vs. Wright U. S. Supreme Court Advance Opinions 1919, No. 11, page 320, the full extent of the taxing power of the state of Ohio with respect to such property is limited to such portion of the value of the daily average number of cars operated in Ohio as is represented by the ratio which the miles of track in Ohio bear to the total miles of track in Ohio and elsewhere. This intimation is somewhat misleading, and to that extent the former opinion must be modified.

As a portion of the decision of the supreme court quoted in the former opinion clearly states, the taxing power of a state extends to the taxation of the full value of the daily average number of cars operated in that state; and any reasonable means which the state may adopt to exert its power to that extent will be sustained and an assessment made by such means will be upheld. The vice of the Georgia assessment was found in the fact that the track mileage basis of apportionment of the entire value of all the cars owned by such company was the exclusive method of arriving at the value which was subject to the taxing power of the state and taxable by the state under its laws; whereas, on the admitted facts, the use of such a ratio of apportionment produced a result as to the Union Tank Line Company in the state of Georgia greatly in excess of the whole value of the daily average number of cars actually in Georgia during the year.

In the former opinion the view was expressed that no other result was possible under the Georgia statute, which therefore would have to be held unconstitutional in every case in which a showing of facts like that made by the Union Tank Line Company could be made but that the Ohio statute is more elastic than the Georgia statute and therefore could not be held unconstitutional.

I now call the attention of the commission to section 5465 of the General Code, which provides that the commission shall ascertain "the amount and value of the proportion of the capital stock of sleeping car, freight line and equipment companies, representing capital and property of such companies owned and used in this state." This is the thing to be determined. The section goes on to provide that in making this determination the commission "shall be guided in each case by the proportion of the capital stock of the company representing rolling stock, which the miles of railroad over which such company runs cars, or its cars are run in this state, bear to the entire number of miles in this state and elsewhere over which such company runs cars, or its cars are run." In other words, in order to arrive at the thing to be determined it is the duty of the commission under this language to give due and proper weight, where other factors are lacking, to such an apportionment of the value of the whole number of cars owned by the company.

Stated in another way: this mathematical calculation which is to be applied to the value of the whole number of cars is one way of arriving at the result, and indeed, as was declared in the former opinion, the only legal way in which the result can be arrived at by an apportionment of the value of the whole number of cars. So that where the value of the whole number of cars is taken as the starting point, and Ohio's taxable share thereof is to be arrived at on the basis of an apportionment, the track mileage basis must be followed.

But the section does not stop here; it goes on to provide that the commission shall also be guided by "such other rules and evidence as will enable the commission to determine, fairly and equitably, the amount and value of the capital stock of such company representing capital and property owned and used in this state." In other words, if the commission has before it other evidence bearing upon the value of the capital owned and used in this state it may be guided by that evidence; and may make other rules than the one which the statute sets up in order fairly and equitably to arrive at the appraisement which the statute commands.

The section is like section 5452 of the General Code, which provides that in determining the value of the property of express, telegraph and telephone companies in this state, "the commission shall be guided by the value of the property as determined by the value of the entire capital stock of the companies," and then goes on to provide further that the commission shall also be guided by "such other evidence and rules as will enable such commission to arrive at the true value, in money, of the entire property of such companies within this state, in the proportion which such property bears to the entire property of the companies, as determined by the value of the capital stock thereof, and such other evidence and rules." Under this section it was held in State ex rel. vs. Jones, Auditor, 51 O. S. 492, that the taxing authorities are not limited to the capital stock method in determining the whole value of the property of an express company in the state.

It seems to me that the case is different from that of a section like section 5424 of the General Code, which provides, as to utilities other than express, telegraph and telephone companies, that—

> "In determining the value of the property of each such public utility to be assessed and taxed within the state, the commission shall be guided by the value of the property as determined by the information contained in the sworn statements made by the public utility to the commission and such other evidence and rules as will enable it to arrive at the true value in money of the entire property of such public utility within this state, in the proportion which the value of such property bears to the value of the entire property of such public utility."

Here the commission is to arrive at the value of the entire property of the public utility within this state, in the proportion which that property bears to the value of the entire property of the utility; and that proportion is further indicated by section 5445 General Code, which provides as follows:

> "When a street, suburban or interurban railroad or railroad company has part of its road in this state and part thereof in another state or states, the commission shall take the entire value of such property, moneys and credits of such public utility so found and determined, in accordance with the provisions of this act, and divide it in the proportion the length of the road in this state bears to the whole length thereof, and determine the principal sum for the value of the road in this state accordingly, equalizing the relative value thereof in this state."

The difference between section 5465 and sections 5424 et seq., respectively, lies

in the fact that under the former the thing to be determined is the value of the property of sleeping car, freight line and equipment companies in this state, and the apportionment is simply a means to that end; whereas, in the other sections the very thing to be determined is the value of a certain arbitrarily defined proportion, and the mileage basis is set up in the statute to define the proportion and is therefore binding upon the commission.

For these reasons, then, the commission is advised that it is not limited under section 5465 to the mileage rule as a means of determining, fairly and equitably, the value of the capital stock of sleeping car, freight line and equipment companies representing property owned and used in this state; unless the value of the property so owned and used in this state is ascertained or arrived at by working backward, so to speak, from the value of the whole property. When that is the case, and Ohio's share is arrived at by a process of apportionment, the track mileage basis is, as declared in the former opinion, binding upon the commission. But if information is furnished responsive to paragraph 11 of section 5463 of the General Code, referred to in the former opinion, whereby the commission can arrive at the actual average value of the company's property in the state, the commission may lawfully make its assessment on that basis, ignoring the artificial, roundabout, and possibly invalid—in a given case, as in Union Tank Line Co. vs. Wright—method of apportionment of the whole value in order to arrive at the same result.

Conceivably, there may be cases in which the commission cannot acquire the necessary information to make what might be termed a direct valuation of the cars actually in Ohio. Where such information is not available the statute steps in and requires the method of apportionment to be used as the means to an end. But where the information which enables the commission to make a direct appraisement of the property actually in Ohio during the year is available, that information should be used as the basis of the commission's assessment.

By following these rules the Ohio statutes can be complied with and the constitutional objections raised in Union Tank Line Co. vs. Wright obviated.

Respectfully,
JOHN G. PRICE,
Attorney-General.

325.

BOARD OF EDUCATION—NO HIGH SCHOOL MAINTAINED—MUST PAY TUITION—HOW PAID—WHEN DISTRICT IS ENTITLED TO STATE AID—WHEN COUNTY BOARD OF EDUCATION HAS AUTHORITY TO PAY OBLIGATIONS OF DISTRICT BOARD AND CHARGE SAME TO DISTRICT BOARD.

1. *A board of education not maintaining a high school must pay the tuition of high school pupils resident in such district.*

2. *Such tuition can be paid from the tuition or the contingent fund and if either or both are insufficient, a tax levy can be made as provided in section 7751 G. C. but limited by section 5649-2 G. C.*

3. *When a tuition fund, levied as provided in section 7595 G. C. is so exhausted that teachers can not be paid, such school district is entitled to state aid.*

4. *Where a district board neglects to pay its proper obligations, the county board*

of education upon investigation shall make such payments as necessary, same to be a charge against the district board.

COLUMBUS, OHIO, May 21, 1919.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request of April 17, 1919, asking for an opinion on the following:

> "This situation has been presented to me. A pupil goes from one shool district, which has no high school, to a high school in an adjoining school district. The board of education of the latter district is desirous of charging the tuition against the board of education of the district wherein the pupil lives. The debtor board of education claims to have reached its maximum levy and that all funds are necessary for the support of its own schools. Question: Can the tuition be collected?
>
> Under section 7748 G. C. there is an exception which protects a district having either a second or third grade school, when the maximum levy has been reached and all funds raised thereunder are necessary for the support of the schools of such district. Can this exception be applied to a debtor board of education in which there is not a high school?"

Attention is invited to section 7747 G. C., which says in part:

> "The tuition of pupils who are eligible for admission to high school and who reside in village or rural districts *in which no high school is maintained, shall be paid* by the board of education of the school district in which they have legal school residence, such tuition to be computed by the month.
> * * *"

The above section refers to school districts which maintain *no high school* and is the law governing your inquiry, making it mandatory upon boards of education in such districts to pay tuition of eligible pupils.

Section 7748 G. C. says:

> "A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years, or at any second grade high school for three years and a first grade high school for one year. Such board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years, except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of

the pupils living more than four miles from the said high school, maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transporation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a rural district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a resident pupil of such district."

This section was passed in the same act with section 7747 G. C., supra, and is a saving clause for those districts *which maintain a high school* of some kind or grade, and a board of education having no high school can not avail itself of the language in such section, which says that, "when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district," such board is not required to pay such tuition, for such exception applies only to a district which maintains a second or third grade high school and is making an effort to comply with the clear intent of the law, that each child shall have an opportunity for a high school education.

Under section 7747 G. C., supra, there is no escape for a district maintaining no high school from paying tuition of its pupils eligible to high school, in their attendance at a high school in a neighboring district. The board can not plead that no avenue is open to them in the matter, for the board has recourse in its application to the superintendent of public instruction of the state for "state aid," if it is a week school district.

Bearing upon the matter of payment of tuition as affecting "state aid," the Attorney-General said in opinion rendered on July 22, 1913 (Vol. I, Ann. Rep. Atty.-Gen., 1913, p. 309):

"The payment of tuition of high school pupils (section 7751, General Code) * * * is chargeable either upon the tuition or the contingent fund * * * but if the contingent fund has not money sufficient therein with which to pay, and the tuition fund has, the payment would have to be made from the tuition fund.

* * * if three-fourths of the amount raised by taxation for *all* local school purposes went into the tuition fund and a deficit should occur, the school district would be entitled to aid from the state." (This fraction was changed to two-thirds in 106 O. L., 430.)

However, a board of education requiring funds for the payment of tuition due another district should first be governed by section 7751 G. C. (to be read in conjunction with the Smith one per cent. law, a later enactment) if it has no contingent or tuition funds sufficient to care for such obligations, such section reading as follows:

"Sec. 7751. Such tuition shall be paid from either the tuition or contingent funds and when the board of education deems it necessary it may levy a tax of not to exceed two mills on each dollar of taxable property in the district in excess of that allowed by law for school purposes. The proceeds of such levy shall be kept in a separate fund and applied only to the payment of such tuition."

Section 7595 G. C. reads in part:

"* * * When a school district has not sufficient money to pay its

teachers such salaries as are provided in section 7595-1 of the General Code, for eight months of the year, after the board of education of such district has made the maximum legal school levy, at least two-thirds of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficit."

Further, section 7596-1 G. C. (107 O. L. 623) provides:

"Whenever a school district receives state aid, as is provided for in section 7595-1 of the General Code the board of education of such school district may refund any tuition indebtedness by issuing bonds, as is provided by section 5656 of the General Code. When such bonds are due, the amount and interest of the bonds shall be a part of the deficit for the current year, and shall be paid as state aid by the auditor of state as is provided by section 7596 of the General Code."

However, should a district board of education neglect to carry out its clear duty in providing funds for tuition payments, the matter should be brought to the attention of the county board of education, for section 7610-1 G. C. (107 O. L. 623) says:

"If the board of education in a district fails to provide sufficient school privileges for *all* the youth of school age in the district, * * * or to pay out any other school money, needed in school administration, * * *. * * * the county board of education of the county to which such district belongs, upon being advised and satisfied thereof, shall perform *any and all* of such duties or acts, in the same manner as the board of education by this title is authorized to perform them. All * * * money so paid by the county board of education * * * shall be a charge against the school district for which the money was paid. The amount so paid shall be retained by the county auditor from the proper funds due to such school district, at the time of making the semi-annual distribution of taxes."

It is therefore the opinion of the Attorney-General that:

(1) A board of education not maintaining a high school must pay the tuition of high school pupils resident in such district who attend a high school in another district.

(2) Such tuition can be paid from the tuition or the contingent fund and if either or both are insufficient, a tax levy can be made as provided in section 7751 G. C.

(3) When a tuition fund, levied as provided in section 7595 G. C., is so exhausted that teachers can not be paid, such school district is entitled to state aid.

(4) Where a district board neglects to pay its proper obligations, the county board of education upon investigation shall make such payments as necessary, same to be a charge against the district board.

Respectfully,
JOHN G. PRICE,
Attorney-General.

326.

OHIO BOARD OF ADMINISTRATION—AUTHORITY TO EMPOWER PROBATE JUDGES TO DEPORT NON-RESIDENT PATIENTS—EXPENSES HOW PAID.

Under section 1819 *G. C., where the probate judge or superintendent finds that a person, whose commitment or admission to the state institutions referred to in section* 1835 *G. C., is requested, has not a legal residence in this state or his legal residence is in doubt or unknown, and such probate judge or superintendent is of the opinion that such person should be committed or admitted to such institution, upon notice as to such residence, as provided, in section* 1819, *it becomes the duty of the Ohio Board of Administration to investigate the legal residence of such person and that board may transport such person to the place of his residence at the expense of the state, and such expense is not payable from county funds.*

COLUMBUS, OHIO, May 21, 1919.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your letter dated April 29, 1919, as follows:

> "We are sending you herewith communication received by this department from the Ohio Board of Administration concerning a legal procedure to be observed under sections 1817 to 1820, inclusive, of the General Code, and we would request your written opinion in regard to same, and especially ask you to outline a legal method of procedure thereunder, as it is our purpose to circularize your opinion to probate courts throughout Ohio in order that there may be uniform action in these matters."

From the communication attached to your letter, and from supplemental personal conference, it is observed that the particular question with reference to the sections quoted in your letter is as to the authority of the Ohio Board of Administration to empower probate judges to deport non-resident patients direct from their courts. It is also noted in that communication that difficulty and confusion have arisen as to the payments of the expenditures caused by such deportation.

It is also observed that you request this department to outline a legal method of procedure under said sections.

Sections 1817, 1818, 1819, 1820, 1835, 1838 and 1841-8 G. C. are pertinent to your inquiry.

Section 1835, relative to the powers and duties of the Ohio Board of Administration, provides that said board

> "shall have full power to manage and govern the following institutions: * * * The Ohio hospital for epileptics, * * * The Columbus state hospital * * * The institution for feeble-minded * * *."

Section 1838 provides:

> "The board, in addition to the powers expressly conferred, shall have all power and authority necessary for the full and efficient exercise of the executive administration and fiscal supervision over all said institutions."

Section 1841-8, as amended in 103 O. L., 681, confers authority on such board to act as a commission of lunacy, with power

"to examine into * * * the question of the sanity or condition of any person committed to or confined in any * * * hospital or asylum * * or restrained of his liberty by reason of alleged insanity at any place within this state."

Section 1817 provides that a person not a legal resident of this state shall not be admitted to a benevolent institution except as therein provided.

Section 1818 defines the requisites of an application for admission to the institutions referred to in section 1835, supra.

Section 1819 in part is:

"If the judge or superintendent finds that the person whose commitment or admission is requested has not a legal residence in this state, or his legal residence is in doubt or unknown, and is of the opinion that such person should be committed or admitted to such institution, he shall notify without delay the Ohio Board of Administration, giving his reasons for requesting commitment or admission."

Section 1820 provides that said board

"by a committee, its secretary, or such agent as it designates, *shall investigate the legal residence of such person,* * * *. At any time after investigation is made, * * * a non-resident person whose legal residence has been established, may be transported thereto *at the expense of this state.*"

It is to be observed that when the probate judge or superintendent finds the facts as to residence, as stated in section 1819, he is obliged to notify the Ohio Board of Administration (which will be hereinafter referred to as the board) at once, and there is no further provision in these sections for the judge to perform other subsequent duties or exercise any authority after such notice, and it is suggested that from the time of such notice the probate judge or superintendent, to include both of whom the term judge will be hereinafter used, have nothing further to do with the case unless called upon to testify or furnish information in the investigation by the board, under section 1820, which provides that such board shall investigate the legal residence of such person.

Consideration of these sections leads to the conclusion that when the fact of the person's residence is certified to the board under section 1819, it becomes the exclusive function of the board to decide the legal residence of such person and the further question of transporting such person thereto at the expense of the state.

It is a pertinent question whether such board may delegate its power in such matters to another officer or person.

In support of the affirmative of this question, the first part of section 1820 might be cited. It provides:

"The Ohio Board of Administration by a committee, its secretary, *or such agent as it designates,* shall investigate the legal residence of such person, and may send for persons and papers and administer oaths or affirmations in conducting such investigation."

It is to be observed here, however, that the thing which the board is directed to investigate is "the legal residence of such person," and it is concluded that for the purposes of investigation of such residence the board may properly designate

the probate judge or any other person and delegate to such official or other person the same powers possessed by the board.

It follows, however, that the agent of such board shall report the result of his investigation to his principal, the board which appointed him. There is no authority in this section for delegating the power and discretion of deciding as to the transportation which is contained in the latter part of section 1820.

A general rule of law as to the delegation of official authority may be profitable at this time.

The rule is succintly stated in Knauss vs. Columbus, 13 O. D., N. P., 200, where it is stated in the second branch of the syllabus:

> "Where a particular public agent or official is charged with the performance of certain duties, these duties cannot be voluntarily assumed by any other person nor delegated to any other person by him who is charged with the discharge of the duty."

It is to be borne in mind that the expense of such transportation is to be paid by the state, and it certainly was the legislative policy that such state funds should be expended upon the order of this state board of administration and not upon the order of a probate judge of the county or the superintendent referred to in section 1819.

From the foregoing considerations it is concluded that such board cannot delegate the duty of finally deciding as to the legal residence of such person and his transportation to his residence.

It is also noted that you request that this department outline a legal procedure for such transportation in conformity with the laws relative thereto.

In compliance with this request, and starting with section 1819, where the judge or superintendent finds the facts as to residence therein defined, this department suggests the following procedure:

1. Notice from such judge or superintendent to the board "without delay," with reasons for request of commitment.
2. Investigation by such board as to the legal residence of such person. Such investigation may be made by the probate judge or superintendent as the designated agent of the board, as desired.
3. After the completion of such investigation, the board shall make and enter on its records a formal finding as to the legal residence of such person, and if it decides to transport such person, an order to that effect should also be made and recorded.
4. The board in its order should designate the person into whose custody such transported person shall be placed and direct him to carry out the order of the board.
5. After the transportation of such person, pursuant to the order of the board, upon proper presentation of an account of the expense thereof, such account should be paid from the state treasury.

Trusting that this suggestion may be of service to you and the Ohio Board of Administration in the discharge of their duties under these sections, I am

Respectfully,
JOHN G. PRICE,
Attorney-General.

327.

PUBLIC UTILITIES COMMISSION — EMPLOYEE WHO TRAVELS AROUND STATE REQUIRED TO REMAIN IN COLUMBUS BY ORDER OF COMMISSION DUE TO EMERGENCY—ENTITLED TO EXPENSES—J. B. DUGAN, CHIEF RAILROAD INSPECTOR.

Where the duties of an employe of the Public Utilities Commission require him to travel around the state and the rules and orders of the commission do not otherwise specify, his headquarters from which he is entitled to traveling expenses and when away from which he is entitled to hotel bills, etc., is his home.

When in case of emergency such employe is detailed for service at the office of the commission for a limited and temporary period his official headquarters is not thereby changed and he is entitled to his expenses while at Columbus.

COLUMBUS, OHIO, May 21, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have requested the opinion of this department in the matter of the allowance and payment of certain expenses incurred by Mr. J. B. Dugan, chief railroad inspector of the Public Utilities Commission. The following quotations from letters which have passed between the Public Utilities Commission and yourself will suffice as a statement of facts:

"The auditor of the Public Utilities Commission presented to you for payment the expense account of Mr. J. B. Dugan, chief railroad inspector of this department, * * * the same or most of it being for expenses incurred while located in Columbus, which account was returned to this department by you with a request that we 'show cause for paying Mr. Dugan's expenses when permanently located in Columbus.'

In reply to your request * * * wish to say that Mr. Dugan is not permanently located in Columbus, but has been ordered to remain at our offices only until such time as the present congested transportation condition, together with the coal and food situation clears up.

* * * * * * * * * * *

This commission is of the belief that in view of the urgent need of Mr. Dugan's services in Columbus for the present that his expenses should be paid and I am therefore returning same to you for further action."

(Letter of the chairman of the Public Utilities Commission to the auditor of state under date of December 5, 1917).

"In reply to your favor of December 6 with relation to the expense account of Mr. J. B. Dugan * * beg to say that I took this matter up with the governor and took over the certificate of appointment filed with me by the governor, which certificate states that J. B. Dugan was appointed under section 498 G. C., as chief railroad inspector, at a salary of $3,000.00 per year, and no mention is made of traveling expenses. I also directed the governor's attention to your letter and he read the same. He said he would make no further approval to the certificate already on file and asked me to do that which I believed to be my duty.

I have considered this question carefully and it is my opinion that we will allow no further expense accounts for Mr. Dugan while engaged in the office at Columbus. Of course any expenses incurred by him while traveling for the department will be paid promptly. I do not do this arbi-

trarily, simply because we have to define a policy that will accord the same treatment to all departments."

(Letter of the auditor of state to the chairman of the Public Utilities Commission under date of December 8, 1917.)

My opinion has been requested as to the authority of the Public Utilities Commission to present the vouchers referred to and as to the duty of the auditor of state to honor them by the issuance of a warrant.

The two statements above set forth present but one issue of fact, if indeed any issue of fact is presented; and that is the character of Mr. Dugan's presence in Columbus during the period covered by the vouchers. From the statement of the chairman of the commission it appears that his presence is not permanent, but that Mr. Dugan was detailed at Columbus for special service during an emergency. The last letter of the auditor of state does not disclose any assertion to the contrary, and I feel justified in assuming for present purposes that this statement is correct. We have it, then, that Mr. Dugan was appointed in the first instance as an inspector under section 498 of the General Code. This section provides that

> "The (public utilities) commission shall have power to employ, during its pleasure, such * * * inspectors * * * as it may deem necessary to carry out the provisions of this chapter or to perform the duties and exercise the powers conferred by law upon the commission. All * * * inspectors * * * shall receive such salaries and compensation as may be fixed by the commission, with the approval of the governor; said salaries and compensation to said officers and employes to be paid out of the state treasury upon the warrant of the auditor, upon presentation of vouchers signed by the chairman and secretary of the commission."

The duties of an inspector of the kind referred to in this section are not prescribed by law and therefore are such as are prescribed by the commission, either by express order or by the custom of the service. I assume, however, that it may be taken for granted that the ordinary duties of an inspector are of a peripatetic character requiring him to travel from place to place; so that the special service upon which Mr. Dugan was detailed, as outlined in the letter of the chairman of the Public Utilities Commission, is not within the line of his ordinary duties. Nevertheless, there can be no question as to the authority of the commission to make such a detail, for the reason that it has complete and plenary power to order his duties, so long at least as he is not permanently deprived of his character as an inspector.

In the letter of the auditor of state it seems to be assumed that authority to pay traveling or other expenses must be found in the certificate of appointment approved by the governor; that is to say, that the governor's approval is necessary to authorize the payment of traveling expenses, or at least the payment of expenses other than traveling expenses. If this is the assumption I beg to advise that, in my opinion, it is erroneous.

Section 499 of the General Code provides as follows:

> "* * * the actual and necessary traveling *and other* expenses and disbursements of the commission, their officers and employes, incurred while on the business of the commission, shall be paid from funds appropriated for the use of the commission after being approved by the commission. An itemized statement of traveling expenses shall be sworn to by the person incurring same before payment is made."

The authority, therefore, of the commission to expend money for the reimbursement of expenses incurred by its employes is not derived from the governor's approval of its certificate of appointment, but directly from the provisions of section 499 above quoted. Said section authorizes the commission to draw on appropriations made for the use of the commission in reimbursement of any traveling or other expenses and disbursements incurred by its employes "while on the business of the commission." All that is required in order that this authority may be properly exercised is a showing that the expense was so incurred and that it was "actual and necessary." This requirement excludes the payment of expenses of a personal nature not referable to the business of the commission and not necessarily incurred while on such business. Ordinarily an employe of the public is engaged in the public business only during what may be termed "working hours." Therefore, his necessary personal expenses incurred outside of working hours are not such as pertain to the public business. His meals, his lodging and his transportation to and from the place where he must be to discharge his duties on ordinary occasions fall within this category.

But when a public employe is required by the order of his superior to leave his home or his official headquarters and travel about the state the custom of the service, as well as the dictates of common sense, allow him to be reimbursed not only for the transportation charges incurred by him, but also for lodging and meals while so absent from his headquarters. These practices and principles are familiar enough to require no further comment.

It sometimes happens that an official appointment or employment would be made to perform services or discharge duties requiring the permanent presence of an employe at a stated headquarters other than his own home. For example, a clerk in the office of the auditor of state is appointed from Cuyahoga county; in order to accept the appointment it is understood without express stipulation that the employe will have to be ready to present himself daily at the office of the auditor of state in Columbus during working hours; that is his headquarters; he is at liberty to do as he pleases with respect to the establishment of his home during his incumbency of the position; he may retain his family residence in Cuyahoga county and stay at a hotel while in Columbus, or he may remove his family to Columbus, as he pleases; in neither event is he entitled to traveling expenses going to and from his actual home to the office of the auditor of state nor to any allowance or reimbursement on account of food and lodging.

On the other hand, however, the character of the duties of an employe may be such that he is not required to maintain as a regular or permanent thing his headquarters at any given place. Such is true of an inspector or other traveling representative of a department. Ordinarily such an inspector is entitled to his expenses when away from his home under a statute like section 499 of the General Code. True, the head of the department may designate a particular headquarters from which expenses shall be allowed; or, without explicitly so stating, his definition of his duties may be such as to lead to the legal result that his traveling expenses are chargeable to and from a given place other than his home. I point out in this connection, however, that the authority to determine such matters resides, in the absence of statute, in the head of the department, in the first instance at least.

On this branch of the question, then, I am of the opinion that it is within the power of the Public Utilities Commission to take such action as shall determine what the headquarters of Mr. Dugan are in the sense which has been discussed—that is, to determine by its action whether a particular place is the one at which hotel bills and meals shall not be allowed and from which traveling expenses shall be allowed.

It is quite certain from all the correspondence that Mr. Dugan's regular employment is a traveling one and that if he were engaged in his regular service of inspection he would be entitled to hotel bills that he might incur while in the city of Columbus on his official journeys, though that naturally is, of course, the headquarters of the Public Utilities Commission, as such. This being true, I am led to inquire whether the detail of Mr. Dugan to service at Columbus temporarily has the effect of reversing the result. In my opinion, it does not have such effect in and of itself. If all the circumstances before me should indicate that a permanent change had been made in the character of Mr. Dugan's duties, so that his position had become what might be termed a headquarters position instead of an outside position, then I would be satisfied without more that such a change in his status had taken place as to make it illegal for him to receive reimbursement for lodging and meals while in Columbus. The situation in such event would be exactly the same as that of the clerk in the office of the auditor of state to whom I have referred. But it does not appear that such a permanent change in the character of Mr. Dugan's duties has taken place. His detail is but temporary, and though perhaps it is indefinite in duration yet it has been made with a specific intent on the part of the commission that it shall be terminated as soon as the extraordinary conditions that give rise to it shall have ceased. I am unable on the facts before me to draw a line between the situation which is here presented and one which would be presented if Mr. Dugan had happened to remain in Columbus under orders of the commission for a week at any other time in his official career.

I have not, however, thus far considered the question save from the point of view of the Public Utilities Commission. The correspondence before me shows quite obviously a conflict of opinion between that commission and the auditor of state. I have already stated that, in the first instance, the commission has some authority to act in determining official headquarters. I should supplement that statement by saying that the commission is again called upon to act when it approves of an expense voucher under section 499 G. C. Then it has the opportunity to determine the effect of its own previous orders and to decide whether or not in its judgment the expenses incurred have been necessary in the business of the commission within the principles which I have laid down. Undoubtedly the decision of the Public Utilities Commission in this respect is entitled to some weight.

I pass now, however, to the question as viewed from the standpoint of the auditor of state. It is his duty under section 243 of the General Code to "examine each invoice presented to him * * * and if he finds it to be a valid claim against the state and legally due, and that there is money in the state treasury duly appropriated to pay it" to "issue thereon a warrant on the treasurer of state for the amount found due * * *." The section further provides that: "He shall draw no warrant on the treasurer of state for any claim unless he finds it legal, and that there is money in the treasury which has been duly appropriated to pay it."

The first inquiry of the auditor of state must be directed under this section to the legality of the claim presented to him for payment. A claim of the character under consideration is "legal," in my opinion, if it represents "actual and necessary * * * expenses and disbursements * * * incurred while on the business of the commission." I do not understand that there is any dispute as to the actuality or necessity of any of the items of Mr. Dugan's expense account; that they were actually incurred seems to be admitted; that they were necessary in the same sense in which they would be necessary if they had been incurred outside of Columbus seems to be acknowledged by the statement of the auditor of state to the effect that "Of course, any expenses incurred by him while traveling for the

department will be paid promptly." The only inquiry remaining is as to whether they were incurred while on the business of the commission. The commission by its order has made it necessary for Mr. Dugan to remain temporarily in Columbus for an indefinite period. He lives elsewhere, and the temporary character of his detail in Columbus is such as not, in my judgment, to place upon him the burden of adjusting his personal affairs to the situation. That is to say, where the service is but temporary it certainly is not contemplated that the person shall locate his family and home with reference to such temporary condition. Therefore I am of the opinion that it is legal for the commission to regard the expenses in question as having been incurred while on its business and not as having been incurred in the ordinary course of Mr. Dugan's family or home life.

The second thing which the auditor of state has to determine is that there is money duly appropriated to pay the claim. I find an appropriation in 107 Ohio Laws, page 250, for "transportation" for the use of the Public Utilities Commission. This term is not defined. I take it, however, that it has been interpreted in all instances to cover hotel bills and meals as well as actual railroad fare—in other words, to cover all the kinds of expenses which have been considered in this opinion. If this is true generally speaking then, in my opinion, this appropriation is available to pay the claim in question.

I find nothing in the general sections of the appropriation bill granting to the auditor of state in the disbursement of the appropriations therein made any authority greater than that vested in him by section 243 of the General Code. He may lawfully decline to honor a voucher only when in his opinion the claim represented thereby is not legal or there is no money appropriated to pay it. I have already stated that I find nothing in the facts disclosed by the correspondence which tends to show that the claim in question is illegal. To be sure, if the Public Utilities Commission had, as I have previously suggested, made an order so changing the character of Mr. Dugan's duties as to make him practically a headquarters employe, then it would be illegal for the commission itself to expend its appropriation in reimbursement of his expenses while at Columbus; and it would then accordingly be the duty of the auditor of state to refuse to honor a voucher in payment of such expenses. But inasmuch as Mr. Dugan's detail at Columbus was temporary merely and not of a character that ought to require of him a readjustment of his personal affairs, I do not think that the order in this instance has such effect, and conclude therefore that when the Public Utilities Commission approved the vouchers they thereby became legal claims.

I have made no inquiry into facts not disclosed by the correspondence itself. It will be understood, therefore, that the conclusion which I have reached is based entirely upon the letters which I have seen. On such basis, however, I am clearly of the opinion that it was the duty of the auditor of state to honor the vouchers in question.

Respectfully,
JOHN G. PRICE,
Attorney-General.

328.

APPROVAL OF BOND ISSUE OF LAKE COUNTY IN THE SUM OF $42,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 21, 1919.

329.

APPROVAL OF LEASE FOR CANAL LANDS AT AKRON, OHIO.

COLUMBUS, OHIO, May 21, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Receipt is hereby acknowledged of your communication of May 21, 1919, enclosing for my approval leave (in triplicate) for canal lands, as follows:

Valuation.

Being a small tract of Ohio canal lands, Akron, Ohio----------$250.00

I have carefully examined said lease and find it correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

330.

ROADS AND HIGHWAYS—FAILURE OF COUNTY COMMISSIONERS UNDER CASS HIGHWAY ACT TO ISSUE SUFFICIENT BONDS TO PAY TOWNSHIP'S SHARE OF IMPROVEMENT—TOWNSHIP HAS REACHED TAX LIMITATIONS—COMMISSIONERS MAY LEVY ON ALL TAXABLE PROPERTY OF COUNTY TO PAY DEFICIENCY FOR TOWNSHIP—WHAT STATUTES GOVERN.

Where county commissioners, in undertaking an improvement under the provisions of the so-called Cass Highway Act (106 *O. L.* 574), *have issued a set of bonds under authority of section* 1223 *G. C., without having waived and assumed, on behalf of the county, in accordance with section* 1217 *G. C., the share of an affected township as specified in section* 1214 *G. C., and have subsequently found that the amount of bonds so issued is insufficient for the purpose contemplated, and that such township may not, because of tax limitations, bear any share of the additional amount necessary for the improvement, said commissioners are authorized to waive and assume such township's statutory share as to an additional issue of bonds proposed to be made under the same statutes as governed the first issue, and to levy a tax on all the taxable property of the county to meet its portion of such bond issue as augmented by assuming the township's share—provided that the total amount of bonds and levy of taxes be within the legal limitations.*

COLUMBUS, OHIO, May 21, 1919.

HON. CHARLES R. SARGENT, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—You have submitted for opinion of this department the following statement of facts and inquiry:

"In December, 1915, the commissioners of Ashtabula county applied for state aid in the construction of a portion of an inter-county highway lying in Monroe township in this county. At said time, they proceeded

without any agreement between the county commissioners and the township trustees as to any proportion of the improvement leaving the proportion of the cost of the improvement to be assessed to the township of Monroe and the abutting property owners the fifteen and ten per cent respectively as provided by the Cass law where there is no agreement. The total estimated cost of the improvement at this time was approximately $113,000.00, of which state aid was given to the extent of $10,000.00.

In anticipation of the collection of taxes, etc., and for the payment of the county, township and abutting property owner's share for the remaining $103,000.00 of the cost of the construction of the improvement, bonds of the county of Ashtabula were issued, and the bond resolution in its recitals shows that the commissioners were following the statutory proportion without agreement with the township trustees. That is to say, the recited proportions in the bond resolution of the township and abutting property owners' respective shares, were fifteen per cent and ten per cent of the total cost of the improvement. The road was advertised, but at the letting there were no bids received to construct the road within the estimate. Subsequently, the estimate was amended at least once, and the present estimate is approximately $30,000.00 in excess of the original estimate. The tax duplicate of Monroe township is not, and at the time of this bond resolution was not large enough so that the two mill levy would raise sufficient money by taxation within the five year period, to provide a sinking fund for the retirement of the bonds and the payment of the interest thereon as they became due. As a matter of fact, a mistake was made in figuring ten year bonds instead of five year bonds, and as a result of this mistake the resolution was carried and the bonds were actually sold and marketed. All of the two mills authorized by the Cass law to be levied for the payment of the township's share of the cost of the improvement has already been levied and is now on the tax duplicate. As stated above, the bonds have been sold and the total of $103,000.00 is now in the county treasury, but the state, of course, has not let the contract as the balance of approximately $30,000.00 has not been raised or provision made therefor.

After the commissioners have proceeded and issued bonds, as above stated, on the basis of the county commissioners paying all of the cost of the improvement above the $10,000.00 received as state aid, and the fifteen per cent assessed to the township, and the ten per cent to the property owners, can they *now* waive, under section 210 above referred to, any amount to be paid by the township of this $30,000.00 required to be raised to cover the increased cost of the improvement under the new estimate? It being impossible to issue any bonds for the township's share inasmuch as the two mill limit for taxation as to said township's share has been reached, can the county commissioners issue bonds for this $30,000.00 and under section 215 of the Cass law levy a tax upon the taxable property of the county for the purpose of meeting the county's proportion of such bond issue—that is, all of said $30,000.00 and interest except the ten per cent to be levied against the abutting property owners? Having once proceeded without a waiver of the township's share, can the commissioners subsequently waive any part thereof—that is, after bonds have been issued as to the $103,000.00 on the basis of the township paying fifteen per cent, can they eliminate the township share of the $30,000.00?"

Section 1223 G. C., as it stood in the Cass highway act, read in part as follows (106 O. L. 641):

"The county commissioners, in anticipation of the collection of such taxes or assessments, and whenever in their judgment it is advisable, are hereby authorized to sell the bonds of any such county in which such construction, improvement or repair is to be made to an amount necessary to pay the respective shares of the county, township or townships, and the lands assessed for such improvement, but the aggregate amount of such bonds issued shall not be in excess of one per cent of the tax duplicate of such county. Such bonds shall state for what purpose issued and bear interest at a rate not to exceed five per cent per annum, payable semi-annually, and in such amounts as to mature in not more than five years after their issue, as the county commissioners shall determine. Prior to the issuance of such bonds the county commissioners shall provide for levying and collecting annually a tax upon all taxable property of the county to provide a sum sufficient to pay the interest on such bonds and to create a sinking fund for their retirement at maturity. The proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the construction, improvement or repair of the highway for which the bonds are issued. * * *."

The taxes referred to in said section are those accruing from levies authorized by section 1222 G. C., which, as it appeared in the Cass act, authorized the county commissioners to levy a tax of one mill on all the taxable property of the county, and the township trustees to levy a tax of two mills on all the taxable property of the township; while the assessments referred to are those authorized by section 1214, to be made against abutting property owners. The respective shares of the county, township and property owners, as referred to in section 1223 G. C., were those fixed by section 1214 G. C. (106 O. L. 637), namely, county, twenty-five per cent; township and property owners, fifteen per cent and ten per cent, respectively, excepting therefrom cost of bridges and culverts. However, by favor of section 1217 G. C. the county commissioners might relieve the township of all or a part of its share, said section 1217 reading in part as follows:

"The county commissioners of a county in which a highway is constructed or improved, under the provisions of this act, may, by resolution, waive a part or all of the apportionment of the cost and expense of such highway as herein provided to be paid by the township or townships, and assume a part or all of the cost and expense of such highway improvement, in excess of the amount received from the state, up to the entire cost and expense of such improvement without any assessment or charge whatever upon the township or townships. * * *.

* * * In no case shall the property owners abutting upon said improvement be relieved by the state, county or township, from the payment of ten per cent of the cost and expense of such improvement, excepting therefrom the cost and expense of bridges and culverts, provided the total amount assessed against any abutting property does not exceed thirty-three per cent of the valuation of such abutting property for the purposes of taxation."

The authority thus conferred is given the county commissioners in unambiguous terms, unaccompanied by any express mandate or direction in said section 1217 or elsewhere in the Cass act, as to the time at which the commissioners are to take action. Hence, if there are any limitations imposed in the matter of time, they are to be found, if at all, in the practical application of the highway im-

provement statutes. A brief examination into these statutes, as they appeared in the Cass act, is therefore pertinent.

Sections 1191 to 1193, relating to application for state aid, place no restrictions on the county commissioners in the way of preliminary proceedings—the filing of the application, accompanied by a certified copy of resolution that the public interest demands the improvement, and an agreement to pay one-half of the cost of surveys, etc., being the first step required of the commissioners.

Section 1204, which requires county commissioners to grant petitions of abutting property owners for state aid improvement, if the commissioners find the improvement to be in the public interest, contains the further provision that:

> "The county commissioners may, without the presentation of any petition, make application to the state highway commissioner for aid in the construction of inter-county highways or main market roads under the provisions of this chapter and nothing herein shall in any way restrict their right to make such application."

Section 1218 G. C. is to the effect that the state highway commissioner shall not let a contract where county commissioners are to contribute to the cost, unless such county commissioners shall first have made a written agreement to assume in the first instance that part of the cost of the improvement over and above the share to be paid by the state.

The foregoing brief references sufficiently indicate the comparatively simple procedure involved in arranging for a state aid improvement and also the legislative intent that when the application is made by the county commissioners, the dealings of the state shall be with the county only. It quite clearly appears that the state is not concerned in the question whether at any stage of the proceedings the county shall assume a part or all of the township's share. It is equally clear that the matter of time at which action may be taken by the commissioners under section 1217 is of no legal importance to the affected township or landowners; for on the one hand the commissioners may bring about the improvement without the consent of the township and landowners, and on the other hand such commissioners, if they do bring about the improvement, may take no action to increase the respective statutory obligations of the township and landowners with respect thereto. Nor is there anything in the statutes which, expressly or by implication, indicates that, so far as the improvement proceedings proper are concerned, the commissioners must take action at any particular time in order to bind the county.

Turning next to the matter of issuing bonds for the improvement, as provided in above quoted section 1223:

It may doubtless be urged with considerable force that if the commissioners are to relieve the township of a part or all of its share, they should take action to that end before the bonds are issued, for the reason that if the action were deferred until after the bonds had been issued, the commissioners would in effect be casting away a vested right of the county, namely, the fixed obligation of the township to pay a given sum into the fund for the redemption of such bonds. How potent such an argument may be, as against the fact that the statutes contain no express provision in the matter of time, and the further fact that at all events there is no question as to the power of the commissioners to waive the county's statutory rights in the first instance, need not be here decided; for the claim certainly falls of its own weight when applied to the particular situation stated by you.

In other words, if the time for action by the commissioners as to waiver is determinable by reference to the time at which they pass a resolution authorizing

a bond issue, it is so determinable only as to that particular issue, and not as to a subsequent issue arising from the fact that the first issue has fallen short of its purpose. The county commissioners, of course, have the option of abandoning the improvement. If they do not see fit to avail themselves of that option, but find that the public interests require that the improvement be made, they will certainly have complied with the spirit of the statutes if before authorizing the second bond issue they adopt a resolution waiving the township's share, or part thereof, and assuming it on behalf of the county, thus definitely fixing the extent of the county's obligation at the time the second set of bonds is issued. To state the matter in another form, the fact that the commissioners may have bound the county upon a given financial basis, as to one set of bonds, does not estop them from binding it upon a different basis as to a subsequent issue made for the same purpose as the original issue, it being kept in mind that the second bond issue is proposed to be made under authority of the identical series of statutes applicable to the first bond issue.

You are therefore advised, in answer to your inquiry, that under the facts as stated by you, the commissioners are authorized, as to the proposed issue of thirty thousand dollars bonds, to waive the township's share and assume the same on behalf of the county, and are further authorized to levy a tax upon all the taxable property of the county for the purpose of meeting the county's proportion of such bond issue as thus augmented by its having assumed the township's share. In the event that the county commissioners conclude to take such action, it is recommended that, as a matter of careful procedure, their resolution be so drawn as to show in a preamble the facts on which your inquiry is based. Of course, it will be understood that the total amount of bonds and the levy of taxes must be within the legal limitations.

While your communication contains certain other inquiries, it is assumed that you desired the opinion of this department regarding them only in the event of a negative answer to the inquiries above considered.

Respectfully,
JOHN G. PRICE,
Attorney-General.

331.

SCHOOLS—SEVENTY-FIVE PER CENT OF ELECTORS PETITION FOR TRANSFER—MANDATORY UPON COUNTY BOARD OF EDUCATION TO MAKE IT.

Where seventy-five per cent of the electors, located in territory which it is desired to transfer to an exempted village school district or a city school district or another county school district, petition for such transfer, it is mandatory upon the county board of education to make such transfer.

COLUMBUS, OHIO, May 22, 1919.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter in which you request the opinion of this department upon the following statement of facts:

> "I write to ask if my construction of section 4696 of the General Code is correct as I have given it to the officer making the inquiry. I have

instructed him that the provision found in said section reading as follows:

'Provided, however, that if at least seventy-five per cent of the electors of the territory petition for such transfer the county board of education shall make such transfer'

is mandatory on the county board and that they have no discretion concerning the matter and that the last clause of the section, which provides for certain things being done prior to the transfer being effective, does not change this condition even though some discretion may be necessary as to the division of funds or indebtedness but that these matters can be controlled by a mandamus proceedings should the county board fail to act. Am I correct in this ruling?"

In reply to such inquiry it is advised that it is the opinion of the Attorney-General that the language used in section 4696 G. C., stating that a county board of education shall transfer territory upon petition of seventy-five per cent of the electors of the territory in question from one school district to another, is mandatory.

Attention is invited to the fact, however, that considerable care must be exercised in making transfers of territory from one school district to another for the reason that section 4696, about which you inquire, covers only specific cases which are the transfer of territory from a school district of a county school district to (1) an adjoining exempted village school district, (2) a city school district, (3) *another county* school district and all other transfers of school territory from one district to another come within section 4692 G. C.

In order that a transfer be made under section 4696 G. C., the districts to which the territory is transferred must be one of the above named three exceptions and an adjoining exempted village school district must be one as is described in section 4688 G. C., and thus supervision districts which fall within section 4740 G. C. are not exempted village school districts.

The latter part of section 4696 G. C., which specifies when such transfer shall be in effect, does not govern in the matter of the first steps for such transfer and while the power to make such transfer is discretionary with the county board of education, when at least fifty per cent of the electors of the territory to be transferred petition for such transfer, should this number be increased to seventy-five per cent of the electors, then the county board of education has no other avenue than to make such transfer, provided that such transfer is made to an adjoining exempted village school district or a city school district, or to another county school district; for if the territory in question is not transferred to either one of these three mentioned, then the transfer falls under section 4692 of the General Code. Under the latter section attention is directed to the fact that no petition of any kind is authorized, that all transfers are voluntary with the county board of education and the only instrument that can be submitted by the electors in the territory in question is a remonstrance against, and not a petition for, such action.

It is therefore the opinion of the Attorney-General that where seventy-five per cent of the electors, located in territory which it is desired to transfer to an exempted village school district or a city school district or another county school district, petition for such transfer, it is mandatory upon the county board of education to make such transfer.

Respectfully,
JOHN G. PRICE,
Attorney-General.

332.

SCHOOLS—TUITION—WHAT NOTICE REQUIRED UNDER SECTION 7735 G. C. IS SUFFICIENT WHERE CHILDREN RESIDING MORE THAN ONE MILE AND A HALF FROM SCHOOL TO WHICH THEY ARE ASSIGNED ATTEND SCHOOL IN ANOTHER DISTRICT.

1. *The notice required by section 7735, which permits children residing more than one mile and a half from the school to which they are assigned to attend a nearer school in another district, is a notice from the board of education of the district in which the children are attending to the board of the district in which they reside that a claim will be made for their tuition, the purpose of such notice being to give the debtor broad opportunity to settle the claim before the expense of suit is incurred.*

2. *Knowledge of the board of the district in which the children reside of the fact that they are attending school in an adjoining district and acquiescence therein is sufficient to satisfy the requirement as to notice.*

COLUMBUS, OHIO, May 22, 1919.

HON. WALTER S. RUFF, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following statement of facts:

"A dispute has arisen between two rural boards of education with reference to the payment of tuition of pupils as provided under section 7735. In the school year 1917-1918 certain schools in Osnaburg township, Mapleton district, were closed because of a controversy which had arisen in the district about the consolidation of schools. When Mapleton district consolidated it provided means of transportation for pupils, but the parents of certain pupils refused to send them to the consolidated schools and sometime later in the year the pupils whose parents refused to permit them to attend the consolidated schools in Osnaburg township, attended school in Paris township, which schools, by the way, were the nearest schools open.

The Mapleton district board hired men to provide transportation for the pupils to the consolidated school and while the transportation van passed the homes of the pupils who afterward attended the Paris township schools, these pupils refused to be transported. Because of their refusal the Mapleton board stopped the transportation van after about thirty days and shortly thereafter these pupils began to attend the Paris township schools.

The Mapleton district consolidation was in the courts at that time and the court finally held that the consolidation was illegal and that the board had no right to provide a transportation van for these pupils and this was the position that the parents of the pupils took who did not permit their children to make use of the van. As a matter of fact no money has as yet been paid to the men who transported pupils to the consolidated school.

The board of education of Paris township has sent a bill for the tuition of these pupils to the Mapleton district board and the Mapleton district board refuses to pay the tuition, claiming that they had no notification as provided by section 7735. The Paris township board did not notify the Mapleton board that it intended to collect tuition of said pupils

until December, 1918, at least six months after the close of the school year. The Mapleton board still refuses to pay and the Paris board is insisting upon payment.

On September 3, 1917, the district superintendent who had charge of the Mapleton district sent a letter to the clerk of the board of education of Paris township, a copy of which is hereto attached and while it is admitted that the children of the families whose names are in the letter did not attend the schools of Paris township, other children of the same district did attend the schools of Paris township and the board of Paris township takes the position that because of this letter they were not required to notify the Mapleton board before they would have the right to collect the tuition.

Both boards have agreed to abide by the opinion of the Attorney-General relative to their rights in this matter."

In your letter you further say:

"Under the statement of facts enclosed herewith what is your opinion with reference to the right of the Paris board of education to collect from the Mapleton district board of Osnaburg township the tuition of pupils who attended the Paris township schools during the school year of 1917-1918?

It is my opinion that the Paris board of education has no legal right to collect the tuition from the Mapleton district board because the Paris board of education did not give notice to the Mapleton board until December, 1918, which was more than six months after the school year of 1917-1918 had closed. It seems to me that the provision that 'a board of education shall not collect tuition for such attendance until after notice has been given to the board of education of the district where the pupils resided' means that no tuition can be collected until after notice is given and only such tuition as accrues after notice is given. The members of the Paris township board seem to think that they could give the notice at any time and that the Mapleton board would be required to pay the tuition.

I do not believe that the facts which I have enclosed add anything to the controversy although the Paris township board claims that it was their understanding that the letter from the district superintendent obligated the Mapleton board to pay the tuition of all pupils who attended.

The school situation in this county has been very bad and this is only one of the many controversies which have arisen. I endeavored to have these boards settle this matter among themselves, but was unable to get them to reach any compromise that would be satisfactory so they have agreed to abide by your opinion in the matter. The opinion will necessarily mean a construction of section 7735 as that seems to be the only section which deals with pupils attending other districts."

A study of the above statement of facts indicates that the proposed consolidation did not take place due to a court decision rendering the same invalid and therefore the question we have before us is a proper construction of the word "notice" as appears in section 7735 G. C., which reads as follows:

"When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside, they may attend a nearer school in the same district, or if there be none nearer

therein, then the nearest school in another school district, in all grades below the high school. In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect. But a board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside, to such attendance."

This question as to what constitutes "notice" and when the same should be given, has been thoroughly discussed in the case of the board of education of Thorn township vs. Board of Education of Licking township, Licking county, which was decided by Judge Fulton in 1916 and reported in 20 O. N. P. (n. s.) 193. The case in question was one in which pupils in Licking township attended school in Thorn township and the board of education of Thorn township attempted to collect tuition from the board of education of Licking township for instruction rendered to the pupils in question.

The case is practically similar to the one before us, as the claim was made by the defendant board of education that proper notice had not been given. The decision in this case, as stated in the syllabus, reads:

"1. The notice required by section 7735, which permits children residing more than one mile and a half from the schools to which they are assigned to attend a nearer school in another district, is a notice from the board of education of the district in which the children are attending to the board of the district in which they reside that a claim will be made for their tuition, the purpose of such notice being to give the debtor broad opportunity to settle the claim before the expense of suit is incurred.

2. Kowledge of the board of the district in which the children reside of the fact that they are attending school in an adjoining district and acquiescence therein is sufficient to satisfy the requirement as to notice."

Commenting further in discussing the case, the court said:

"* * * this school was below the grade of a high school, and so it comes within the provisions of this section (7735), which reads:

'In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect.'

Now, if there wasn't anything more in the statute, there would be no question about it, and that would be the end of it. They must pay it without any agreement. There wasn't any agreement made about the schooling of the children at all. The statute says that they must pay for the schooling of the children although without any agreement so to do. The statute says:

'But a board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside to such attendance.'

Now this matter all turns upon this one clause in this section:

'But the board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside.'

On the trial of the case before the jury the court permitted evidence to be given of all the notices that were given—whether they were given before or after, or when they were given against the objection of counsel for defendant; and counsel for the defendant seems to express great surprise at the holding of the court in reference to the meaning of this section.

The court held that this section meant that before they could bring a suit to collect this bill, notice must be given the other board, and that without that notice they could not bring the action at all.

Now there was no question but what notice had been given, just before the suit was brought, that a suit was about to be brought, or would be brought, unless this matter was settled before suit, and other notices are mentioned and described that were given to the board of education of Licking township.

* * * I cannot get any other construction out of these words 'but the board of education shall not collect tuition for such attendance until after notice thereof has been given,' than that they imply the bill has already been made, and they have a right to have notice before they *are sued,* before the expense of a lawsuit is incurred, and to settle without a suit if they so desire, and they can not be sued until this notice has been given; and I think that is as far as this section goes; and as far as this section is concerned, the court holds that notice was given—not only a notice before the suit was brought, but a notice was given * * * before * * *."

In the case in question the court further said, as regards the question of where centralization was attempted:

"Counsel rely considerably upon section 7737, which reads:

'When the schools of a district are centralized or transportation of pupils provided, the provisions of the next two preceding sections shall not apply.'

One of the next preceding sections is 7735 which I have just read and quoted. So that if the schools of the district had been centralized, there is no question but what section 7735 would not be invoked and would not apply in this case. But the schools of this district had not been centralized. * * * If the schools had been centralized in the township, then section 7735 could not be invoked."

In the case which you have submitted there was a proposed consolidation or centralization about which there was more or less controversy and which later was pronounced as null and void by the court. Hence the matter of centralization does not really bear upon the question at hand, the entire question being upon whether notice was required before the children were sent to school or whether notice was required before the tuition could be collected. The court, above quoted, has decided that the notice mentioned in section 7735 is only such notice as is required to be given prior to the beginning of a suit and not before the pupils start to school, but any time after such tuition service has been rendered, but before a suit is attempted. This decision of the common pleas court of Licking county was later affirmed by the court of appeals in the following memorandum opinion by Judge Shields, and in which the judges concurred:

"In this case a recovery was sought by the plaintiff for an amount

claimed to be due from the defendant below for tuition for certain children residing in Licking county, Ohio, attending at said plaintiff's school in Perry county, Ohio.

Without here reciting the respective claims of the plaintiff and defendant below set out in the pleadings, it will be sufficient to state that we have read the same in connection with the evidence embraced in the bill of exceptions herein and we have also read and examined the opinion of the trial judge in said case, submitted with the papers herein, treating as it does of the several issues raised by said pleadings and argued by counsel, and without attempting to add to or enlarge upon the views therein expressed, and approving the conclusion therein reached as to the liability of the plaintiff in error to the defendant in error for said tuition, we adopt the opinion and judgment of the court of common pleas as the opinion and judgment of this court, and it follows that the judgment of said court of common pleas will be affirmed."

Since the matter has been decided by the courts that notice contemplated under section 7735 G. C. is a notice before suit is brought, then the board of education of Paris township, Stark county, can collect the tuition in question from the Mapleton district, Stark county, by giving notice any time prior to the time that suit might be brought, and such notice could really be given at this time and still be valid under the decision herein quoted.

It is therefore the opinion of the Attorney-General that (1) the notice required by section 7735, which permits children residing more than one mile and a half from the school to which they are assigned to attend a nearer school in another district, is a notice from the board of education of the district in which the children are attending to the board of the district in which they reside that a claim will be made for their tuition, the purpose of such notice being to give the debtor broad opportunity to settle the claim before the expense of suit is incurred; (2) that knowledge of the board of the district in which the children reside of the fact that they are attending school in an adjoining district and acquiescence therein is sufficient to satisfy the requirement as to notice.

Respectfully,
JOHN G. PRICE,
Attorney-General.

333.

BOARD OF EDUCATION—TEACHERS' CERTIFICATES FOR ELEMENTARY OR HIGH SCHOOLS—WHAT PROFESSIONAL TRAINING REQUIRED — TEMPORARY AND EMERGENCY CERTIFICATES GRANTED, WHEN.

1. *Applicants for teachers' elementary certificates at a regular teachers' examination must have to their credit not less than twenty-four weeks of professional training in a recognized school for training teachers, and after January* 1, 1920, *such training shall be thirty weeks and after January* 1, 1921, *it shall be one year.*

2. *Applicants for teachers' high school or special certificate at a regular examination must have the professional training defined in section* 7823 *G. C.*

3. *County boards of school examiners at their discretion can issue between*

examinations temporary certificates valid to the next regular teachers' examination to applicants without the professional training defined in sections 7822-7823 G. C.

4. *Where there is a shortage of teachers a county board of examiners, upon the approval of the state superintendent of instruction, can issue a teacher's emergency certificate valid for one year to applicants who have had one year's experience as a teacher.*

COLUMBUS, OHIO, May 22, 1919.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter reading as follows:

"Will you very kindly render us an opinion in answer to the following question?

Section 7826 of the General Code provides as follows:

'Section 7826. Between regular examinations county boards of school examiners at their discretion may issue temporary certificates which shall be valid only until the next regular examination held by such boards after the issue of such certificate, and at any regular examination such board upon proper application being made, subject to the same rules and regulations as applied to the granting of regular certificates shall issue temporary certificates which shall be valid from the date of issue until the first day of September following.'

In order that a person may be granted a temporary certificate under the provisions of the above section, is it necessary that such person shall have the same amount of professional training as is provided for the granting of regular certificates in accordance with the provisions of sections 7822 and 7823 of the General Code? If such certificate can be granted to a person without the required professional training, the same to be valid until the next examination, can this act be repeated by the county board of school examiners at the time of the next examination and so on at each succeeding examination throughout the year, thereby qualifying the person to teach the entire year without any professional training as provided by sections 7822 and 7823 of the General Code?"

Section 7822 G. C. as amended in Ohio Laws 107, page 626, reads in part:

"Applicants for a one year or a three year elementary certificate shall possess an amount of professional training consisting of class room instruction in a recognized institution for the training of teachers, not less than the following: * * * after January 1, 1919, not less than twenty-four weeks of such instruction; after January 1, 1920, not less than thirty weeks of such instruction; after January 1, 1921, not less than one year of such class room instruction in a recognized school for the training of teachers."

The effect of the above section, which has been the law since July 2, 1917, is that at the present time no person can be granted even a one year elementary regular certificate to teach school unless such person shall have had twenty-four weeks of class room instruction in a recognized school for the training of teachers.

Regular certificates referred to in the law are those that are not temporary but have been issued in compliance with the rules and regulations one of which is the required training mentioned in section 7822 G. C. for elementary certificates and in section 7823 for high school and special certificates.

Section 7826 G. C., quoted in your letter, provides for two kinds of temporary certificates, viz.:

1. A board of school examiners can issue at their discretion, and *between examinations* by the board, a temporary certificate that is valid only till the next regular examination day, when the intent of the law is that such person shall submit to the regular examination for teachers.
2. At any regular examination by the board, it can issue a temporary certificate dating from that day and running until the first day of September following, or covering the current school year, but section 7826 G. C. provides that proper application shall be made and the 'same rules and regulations as * * * to the granting of regular certificates' shall apply.

It will thus be seen that it is discretionary with the board to grant the first named temporary certificate between examinations, but upon granting the second temporary certificate at the next regular examination the board must be governed by the same rules and regulations as are in force for regular certificates, that is to say, such applicant during 1919 must have had twenty-four weeks of class room instruction in a recognized teachers' training school. But there is nothing in section 7826 G. C. which prevents a board of examiners from giving a person who has failed in the examination, a short temporary certificate that runs only to the next examination but such short temporary certificates can only be granted "between regular examinations" and "at their discretion." One who is certificated at a regular examination for the remainder of the school year, to September first following, must have the training required for the granting of regular certificates which are issued as of the September first following the examination.

As to high school or special certificates the professional training required is stated in section 7823 G. C., which reads in part:

"5. On and after January 1, 1919, not less than thirty weeks of class room instruction in a recognized school for teachers .
6. On and after January 1, 1920, and thereafter not less than one year of class room instruction in a recognized school for the training of teachers." (104 O. L. 100)

Section 7823-1 G. C. also provides:

"On and after January 1, 1915, all applicants for a one-year of (or) a three-year high school or special certificate shall have had at least two years' training in an approved high school or its equivalent, and on and after January 1, 1920, all applicants for high school and special certificates shall have certificates of graduation from a first grade high school or its equivalent."

The "training" herein mentioned means two years attendance at an approved high school by applicants up to the end of the year 1919; on and after January 1, 1920, such applicants shall have graduated from a first grade high school, or its equivalent.

It is interesting to note the changes that have recently occurred in section 7822 G. C. which governs the requirements on professional training for applicants for their *first certificate*. Thus in 104 Ohio Laws (page 104) professional training in a teachers' college was required after January 1, 1915, the minimum being six

weeks attendance, and the applicant without such training was eliminated; the next General Assembly in 105-106 Ohio Laws (page 340) provided that such professional training for the first elementary certificate was *not* necessary; the following General Assembly in 107 Ohio Laws (page 626) amended section 7822 G. C. *as it now reads,* and providing that no applicant can be granted a certificate following a regular examination unless such applicant in 1919, has not less than twenty-four weeks training in a recognized school for the training of teachers, to his or her credit.

Attention is invited to the fact that the following sections of the General Code have never been repealed or amended in the legislative acts which have changed section 7822 G. C. on professional training requirements, and they are still law, and it is for the state superintendent of public instruction to say if the high schools and normal schools indicated in sections 7832-1 G. C. and 7832-2 G. C. are "recognized schools for the training of teachers" as required in section 7822 G. C. (107 Ohio Laws, 626). Such sections read:

> "Sec. 7832-2.—The county board of school examiners may at their discretion grant one-year certificates to teachers who have completed a one year normal course in any high school or normal school which has been approved by the superintendent of public instruction. Such certificates shall be valid in any village or rural school district in the county in which it is granted and may be renewed for one or three years without examination."
>
> "Sec. 7832-3.—The county board of school examiners shall grant one-year certificates to graduates of first grade high schools who have completed in addition to the high school a one-year professional course in any high school or normal school which has been approved by the superintendent of public instruction."

But *where there is a shortage* of teachers in a district the law has wisely provided for another kind of certificate, for section 7832-1 G. C. reads:

> "A 'teacher's emergency certificate' which shall be valid for one year in any village or rural school district in the county may be granted by the county board of school examiners with the approval of the superintendent of public instruction to applicants who have had one year's experience teaching in the public schools whenever for any reason there is a shortage of teachers in such district."

Under the provisions of this section for emergency use where a shortage exists, a person who has taught one year or more in the past, can be certificated by the county board of examiners *with the approval of the state superintendent of public instruction* and such certificate is valid for one year. Such section does not conflict with section 7822 because that section refers to regular certificates and not to "emergency" certificate (7832-1 G. C.) To grant an emergency certificate there must be *a shortage of teachers* while a temporary certificate might be needed at any time to bridge over an occasion where a teacher died or resigned and a *certain teacher's* services were desired to take up the work, the next examination being some time distant, and the person in question not being certificated at that time or in that county.

It is therefore the opinion of the Attorney-General that:

1. Applicants for teachers' elementary certificates at a regular teach-

ers' examination must have to their credit not less than twenty-four weeks of professional training in a recognized school for training teachers, and after January 1, 1920, such training shall be thirty weeks and after January 1, 1921, it shall be one year.

2. Applicants for teachers' high school or special certificate at a regular examination must have the professional training defined in section 7823 G. C.

3. County boards of school examiners at their discretion can issue between examinations temporary certificates valid to the next regular teachers' examination to applicants without the professional training defined in sections 7822-7823 G. C.

4. Where there is a shortage of teachers a county board of examiners, upon the approval of the state superintendent of instruction, can issue a teacher's emergency certificate valid for one year to applicants who have had one year's experience as a teacher.

Respectfully,
JOHN G. PRICE,
Attorney-General.

334.

BOARD OF EDUCATION—OATH PRESCRIBED BY SENATE BILL NO. 134 FOR APPLICANTS DESIRING TEACHERS CERTIFICATES DISCUSSED.

The oath prescribed by senate bill No. 134 will not be substantially changed, or its force or effect destroyed by permitting an applicant for a teacher's certificate, who so desires, to prefix thereto the clause, "Acknowledging the Lord Jesus Christ as the source of all authority."

COLUMBUS, OHIO, May 23, 1919.

HON. H. J. RITTER, *Chairman, Joint Committee on German Propaganda, Ohio Senate, Columbus, Ohio.*

DEAR SIR:—Your letter of May 8, 1919, requesting my opinion as to the effect of permitting applicants for teachers certificates, who so desire, to prefix to the form of oath prescribed by S. B. No. 134, the words "Acknowledging the Lord Jesus Christ as the source of all authority," was duly received.

The oath is in the following form:

> "I solemnly swear or affirm, that I will support the constitution of the United States, the constitution of the state of Ohio, and the laws enacted thereunder, and, that I will teach, by precept and example, respect for the flag, reverence for law and order, and undivided allegiance to the government of one country, the United States of America."

An examination of the bill discloses, and it should be kept in mind that the bill does not attempt to disqualify any applicant on account of his religious belief, or to require that he shall have any particular religious belief. In those respects the bill is silent.

The law on the subject of oaths is discussed in the following authorities:

In 20 Ruling Case Law, page 508, it is stated that statutes prescribing the form

of an oath are not intended to prescribe an inflexible iron formula, admitting of no deviation in words, but are intended rather to direct and point out the essential matters to be embraced in the oath, and that if there is a substantial compliance with the statute the oath is obligatory and binding.

In 21 Am. & Eng. Ency. of Law, 752, the law is stated as follows:

> "Where a statute prescribes the form of an oath or affirmation to be administered upon a particular occasion, and does not expressly provide that the exact words of the prescribed form shall be used, a substantial compliance with such form is sufficient. * * * When the oath or affirmation administered means the same thing as does the oath prescribed, there is a substantial compliance. The substance of an oath or affirmation cannot, however, ever be dispensed with, * * * and the addition of words to a formula prescribed by statute does not invalidate it where the addition of words does not change the meaning of the oath."

The American and English cases on the subject are brought together in a note found in 5 Am. and Eng. Annot. Cases, p. 722, and the result of the decisions is stated as follows:

> "It has generally been held that a substantial compliance with the requirements of a statute prescribing the form of oath to be administered is sufficient, and that merely informal departure does not affect its validity."

The difficulty, however, in all cases is to determine what constitutes a material or fatal departure and in the foregoing note it is said:

> "There is a lack of uniformity in the decisions as to what is a fatal departure from what is the prescribed form."

No useful purpose will be served in reviewing the cases in this opinion, but the general conclusion seems to be that neither omission from nor addition to the prescribed form nor departure therefrom nor change therein, is considered fatal unless of such character as to substantially change or destroy the force and effect of the oath.

The question for decision is whether or not the oath prescribed by S. B. No. 134 will be substantially changed, or its force and effect destroyed, by prefixing at the time it is administered and subscribed the clause, "Acknowledging the Lord Jesus Christ as the source of all authority."

In my opinion the prefix referred to will have no such effect.

The prefix may be intended as a declaration of the applicant's belief that the source of our government and institutions is the Lord Jesus Christ, but whether or not that be his intention or belief, the effect of the prefix is, not that the applicant, in case there be any conflict between the doctrine and teaching of the Lord Jesus Christ, on the one hand, and our government and institutions, on the other, reserves unto himself the right to reject the latter and give his allegiance to the former, but rather that he will support the latter, notwithstanding his belief that the source of all authority may be in the former. In other words, should there be any difference or conflict of opinion as to the source of all authority, and irrespective of the applicant's belief, he nevertheless solemnly swears or affirms to support the federal and state constitution and laws enacted thereunder, and to give his undivided allegiance to the United States of America, etc.

Respectfully,
JOHN G. PRICE,
Attorney-General.

335.

APPROVAL OF BOND ISSUE OF BELLEFONTAINE CITY SCHOOL DISTRICT IN SUM OF $20,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 23, 1919.

336.

APPROVAL OF BOND ISSUE FOR MIDDLEBURGH TOWNSHIP, CUYAHOGA COUNTY, IN SUM OF $23,600.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 23, 1919.

337.

APPROVAL OF O. E. LUCHTENBERG CONTRACT FOR WOMEN'S COMFORT STATION IN CAPITOL BUILDING.

COLUMBUS, OHIO, May 23, 1919.

HON. ROY E. LAYTON, *Adjutant General, Columbus, Ohio.*

RE: O. E. Luchtenberg contract.

DEAR SIR:—Acknowledgment is made of the receipt of your recent letter in this matter, with which it is noted you have transmitted the proposal and bond of O. E. Luchtenberg to this department for its approval.

Section 416 G. C., as amended in 106 O. L., 319, referring to the adjutant general, provides:

> "He shall have the supervision and control of the state house * * * the fixing and placing of all offices, * * * departments and bureaus of the state therein, and full control and supervision of * * * the grounds and appurtenances thereof."

House bill No. 276, making sundry and supplementary appropriations for the remainder of the current fiscal year, carries an appropriation as follows:

"STATE HOUSE AND GROUNDS

G-2—Buildings.
Women's Comfort Station.....$6,500.00"

concerning which it is noted that the purposes of appropriations under "G-2" are for additions and betterments.

The facts obtained by personal conferences with your office and with Mr. Fred W. Elliott, architect, shows that the station referred to in the contract is not to be a new structure, but that it is in fact the repair and remodeling of rooms now used for the same purpose in the Capitol building and that the contemplated work is in fact the repair and remodeling of a present structure. It is in no sense the erection and construction of a new or separate building.

In this very important feature the question of the approval of a contract for this structure under the appropriation referred to is clearly distinguished from the character of the building involved in opinion No. 309, rendered by this department to Hon. Carl E. Steeb, secretary of the board of trustees, Ohio State University, where the appropriation for a new women's building at the University was held to be subject to the referendum. That opinion rests on the principle that such an expenditure as therein referred to would not be a current expense. In the present case, however, considering the character and purpose of the proposed repair and improvement, it is concluded that the expense involved in the enclosed contract is a current expense, and special appropriation being made therefor and said contract and bond being otherwise in conformity to law, the same is therefore approved.

Respectfully,
JOHN G. PRICE,
Attorney-General.

338.

BOARD OF EDUCATION—TEACHERS PAID ONCE FOR SCHOOL DAY—WHERE SCHOOL CLOSED BOARD MAY ASSIGN TEACHERS TO OTHER SCHOOLS WHERE REGULAR TEACHERS OF SAID SCHOOL ILL WITH CONTAGIOUS DISEASE—SUBSTITUTES—PAY.

Teachers who were paid once for a school day are not entitled to a second pay from the board of education, which has purchased their time and can assign them as it seems fit under section 7690. Salaries of teachers ill with contagious disease can not be withheld by a board of education and the board must provide substitutes.

COLUMBUS, OHIO, May 24, 1919.

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

GENTLEMEN:—Acknowledgment is made of your request for an opinion on the following statement of facts:

"We are this day in receipt of the following communication:

'C————, O., March 12, 1919.

At the request of the C———— twp. school board I submit the following question to you for enlightenment as to what action would be proper and legal on the part of the school board.

One of the buildings in our school system was closed on account of an epidemic. The teachers in this building were, of course, entitled to regular pay during the time the building was so closed. School continued in our other buildings but several teachers in these other buildings

were sick so that I had teachers from the closed school substitute for them. One of our school board members insists that these teachers who substituted for other teachers are entitled not only to their regular pay, which they would have received without teaching, but also to additional pay since they were taking the places of some one who would have had to be paid by the school board. As it now stands the board has paid the teachers of the closed building their regular pay, all alike, although some of them did substitute work and others did no service for the board. The pay of the teachers who were sick while their schools were in session was deducted for the time the regular teachers from the closed building substituted for them. The money due them for that time remaining in the school board treasury.

Are the regular teachers who thus substituted for other teachers in the same school system entitled to extra remuneration, and if so, how may it be legally paid them?

Thanking you for any information you may be able to give us, I am,

Very truly yours,

S. S. R.

District Supt. C———— Twp.'

As this is somewhat different from any question we have yet received, we are respectfully requesting your written opinion upon same."

Section 7690 G. C. (107 O. L. 47) reads in part:

"Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. * * *. Each board shall fix the salaries of all teachers, which may be increased, but not diminished during the term for which the appointment is made. Teachers must be paid for *all time lost* when the schools in which they are employed are closed owing to an epidemic. * * *."

Prior opinions of this department have held that the contagion known as influenza was an epidemic and that teachers must be paid for all time lost when the schools in which they are employed are closed on account of the influenza epidemic.

It has been held further by this department that where a teacher was absent from duty because of being ill with a contagious disease, such teacher is entitled to pay even though the schools were in session. So teachers who are deprived from teaching because schools are closed on account of epidemic and those who are ill with contagious disease, when schools are in session, must be given full pay, and it is for the board to provide substitutes in the latter case, as it deems fit.

Under section 7690 G. C. the board has full control of the management of the schools and can assign teachers as it sees fit, unless a special contract would prevent. It can grant reasonable leaves of absence to teachers who are ill with a disease that is not contagious, if it sees fit to do so, but the schools must be kept going, if possible, by other teachers acting in place of those who are ill. Teachers should be encouraged to remain in that profession, for experience should make them better instructors, and they should not be cut in their pay with undue severity when sickness, which they can not prevent, occurs. Illness that frequently results in contagious disease has often been warded off by proper treatment taken before and in time. Boards of education should be as reasonable in dealing with their employes who are ill for short periods as other public officials and private employers are with salaried help.

But when a teacher contracts with a board of education, the teacher sells his or her time to the board and the board can control such time except in case of

illness or unavoidable absence. The time of the teacher, even during the period when schools are closed on account of epidemic, belongs to the board, for it pays for it the same as if schools were in session. Hence, the board can assign any of its teachers, who are being paid, as it sees fit. Section 7690 G. C. says "schools in which employed" and it does not necessarily mean a single room which might be closed, thus releasing that particular teacher from any obligation to the board, when the latter performs its part of the contract in paying the teachers who must hold themselves in readiness for work when directed by the board.

You say that the pay of teachers who were sick was deducted from their salary, their schools being in session, and that other teachers drawing pay from the board substituted for them for the time being. If the teachers who were ill had a contagious disease, they must be paid. If such illness was not contagious, the board can grant such leave as it sees fit, at full pay, such grant being reasonable in time.

While a board of education can increase the pay of a teacher during the term for which appointed, the law does not contemplate that any teacher shall draw *two salaries* when their whole school time is already paid for with one salary. If the board, in its assignment of teachers who were to substitute, did not divide up the extra work equally to all concerned, that is the board's fault.

Under the law the teachers who were paid *once* for their time can not demand a second payment for the same time, though there is nothing to prevent private arrangements that are frequently made between teachers where substituting has been done.

The opinion of the Attorney-General is, therefore, that the teachers who were once paid are not entitled to a second pay from the board of education which has purchased their time and can assign them as it sees fit under section 7690 G. C.; that salaries of teachers ill with contagious disease can not be withheld by a board of education and the board must provide substitutes.

Respectfully,
JOHN G. PRICE,
Attorney-General.

339.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN DEFIANCE, RICHLAND, SANDUSKY, STARK AND WASHINGTON COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, May 26, 1919.

340.

PROHIBITION AMENDMENT—STATE AND COUNTY LIQUOR LICENSING BOARDS CEASE TO EXIST WHEN CONSTITUTIONAL PROHIBITION AMENDMENT BECOMES EFFECTIVE.

1. *The state and county liquor licensing boards created by the act passed April 18, 1913, and approved by the governor and filed in the office of the secretary of state on May 3, 1913, (103 O. L. 216-243), will cease to exist, and all powers and duties of these boards and their inspectors will end, when section 9 of Article XV of the state constitution becomes effective on May 27, 1919.*

COLUMBUS, OHIO, May 26, 1919.

HON. C. C. CRABBE, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—I have your inquiry of recent date requesting my opinion as follows:

> "I looked over your opinion of a few days ago concerning the effect of the constitutional amendment upon the liquor license laws and as your opinion seems to knock out the penal provisions of the liquor license laws and owing to an article which I read today in the Cincinnati Enquirer, I desire to know what, if any, portion of the license machinery will remain in force after May 27 and what, if any, duties the board can perform concerning the enforcement of law.
>
> As I am interested in the passage of legislation which seeks to enforce state-wide prohibition, I am anxious to receive this opinion at an early date."

Your inquiry calls for consideration of the provisions of the liquor license act, 103 O. L., 216, and particularly involves the question as to the effect of the prohibition amendment to the constitution upon the administrative provisions of said law, certain other phases of the law having been considered in a previous opinion of this department rendered to the state liquor licensing board.

Upon consideration of the act in question as a whole it is to be noted that its provisions are devoted essentially to the creation of administrative machinery charged fundamentally with the function of licensing the liquor traffic.

The law is notably void of explicit and comprehensive definition of the functions to be performed by the administrative department of government created by the act, and in seeking out the scope of duties and authority of this administrative department, the provisions are found to be peculiarly limited and adapted to the one phase of regulation of the liquor traffic pertaining to licensing thereof, as distinguished from the function of enforcement of regulatory and penal provisions of liquor laws of the state generally.

It is provided in section 1 of the act that there shall be a board known as the "State Liquor Licensing Board," consisting of three commissioners * * *. By succeeding sections of the act it is provided, among other things, that each of the commissioners and the secretary of the board shall take an oath of office to "* * * carry into effect the letter and spirit of the liquor licensing system of this state."

The state liquor licensing board is authorized by section 5 of the act to provide itself with an office at the seat of government and to employ the necessary clerks, examiners, inspectors, stenographers and other assistants as it may deem

necessary and fix their compensation subject to the approval of the governor, and provide furniture and supplies for the office.

It is provided by section 7 of the act that the state shall be divided into licensing districts, each county constituting a district, and that there shall be a liquor licensing board in each county to be appointed by the state board.

Section 16 of the act provides

> "It shall be the duty of the county liquor licensing boards of the respective counties of the state, and they are hereby authorized to grant, issue, renew and transfer, as provided by law, all licenses to traffic in intoxicating liquors in the county wherein the board is situated; also to suspend or revoke, subject to the conditions and in the manner provided by law, all licenses granted or renewed in said county; and to perform such other duties as may be required by law."

Provisions are then made for the procedure in granting licenses and it is provided that the fees payable to the county board in connection with the granting of licenses shall be transmitted to the state board, and it is further provided by section 38 of the act that there shall be a right of appeal to the state board in certain stated cases pending before the county board.

The fees and other moneys received by the state board are payable into the state treasury daily to the credit of a special fund known as the "State Liquor License Fund" and expenses and salaries of the licensing machinery of both state and county are payable from said fund upon the approval of the state board and warrant of the state auditor, while such balance as may be found unnecessary for the use of the board is to be transferred to the general fund of the state upon the certificate of the state board.

The foregoing constitute substantially all the provisions of the said law defining the duties and functions of the licensing boards.

It is expressly provided in section 56 of the act:

> "Nothing in this section shall be construed to amend, repeal or affect in any manner any law providing for the enforcement of local option laws prohibiting the sale or traffic in intoxicating liquors as a beverage or jurisdiction of any officer in enforcing such laws."

And it is worthy of note that no provision is found in the act under examination directing that the liquor licensing boards of the state or counties shall be charged with enforcement of the liquor laws generally of the state, or shall institute prosecutions for the violation of laws, or even that they shall through the inspection department make investigations to detect violations of the penal statutes of the state, or in fact administer any of the laws of the state other than the provisions relative to licensing. Certain provisions of another and distinct enactment relative to assessment of the Dow-Aiken tax, so-called, will be noted later. But with respect to the liquor license act itself, one is impressed with the unavoidable conclusion that the extensive administrative machinery provided in the act was provided solely for the uses and purposes of the licensing system to the exclusion and disregard of other liquor legislation of the state remaining in force, and this general purport of the law is so outstanding as to readily suggest that the provisions of the liquor license act were thought to be sufficient and complete within themselves and were intended to supersede other provisions of law dealing with the traffic, within the territory of the state wherein the licensing system was to be operative.

Now with this view of the law in mind it is next to be considered what effect the constitutional amendment has upon the licensing system as a whole. The prohibition amendment is as follows:

"ARTICLE XV.

Section 9. The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited. The General Assembly shall enact laws to make this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental, or other non-beverage purposes.

SCHEDULE.

If the proposed amendment be adopted, it shall become section 9 of Article XV of the constitution, and it shall take effect on the 27th day of May of the year following the date of the election at which it is adopted, at which time original sections 9 and 9a of Article XV of the constitution and all statutes inconsistent with the foregoing amendment shall be repealed."

It goes without saying that the amendment is inconsistent with the previous policy of the state to license the traffic in intoxicating liquor as a beverage and it would seem to as clearly follow that the administrative machinery or department of the government, created for the purpose and charged with the functions of carrying into effect the licensing system, would necessarily become defunct by virtue of its inconsistency with the mandate of the prohibition amendment.

It is of first importance to attribute to the solemn act of the electorate of the state as expressed in the amendment to the fundamental law, its full and exact meaning and effect.

Upon consideration of the full import of the amendment it is found to embody not only a mandate that the existing constitutional provision for *license to traffic* in intoxicating liquor and directing the enactment of license laws, shall be repealed, and that the sale and manufacture for sale of intoxicating liquor as a beverage shall be prohibited, which latter provision would in itself have the effect of repealing all laws irreconcilable with the prohibition amendment, but also the further express avowal of the purpose and intent to repeal all statutes inconsistent with the provision of the prohibition amendment, and a direction that the general assembly shall enact laws to make it effective.

The express avowal of the intent to repeal all inconsistent statutes suggests a departure from the rule of construction in case of repeals only by implication, where there is said to be a presumption in favor of sustaining previous laws not *irreconcilably* inconsistent with the later enactment. Here the extent of the inconsistency has not been made the essence of the declaration for repeal, and the provisions of the liquor license act of 1913 essentially devoted to the creation of an agency in the form of state and county licensing boards and an enumeration of duties and functions addressed exclusively to the administration of the licensing system, obviously answer to the description "statutes inconsistent with the foregoing amendment," as employed in the schedule to the prohibition amendment.

It has been noted above that by another and distinct legislative enactment provision has been made for performance of functions in relation to assessment of Dow-Aiken tax by the liquor licensing board and inspectors appointed by it, and it remains to be considered as to what effect the provisions of said independent enactment may have in respect to sustaining the life of the department.

The act in question was passed April 18, 1913, approved May 5 and filed in the

office of the secretary of state May 8, and as later amended in 1914 vests the duty in the inspectors appointed by the state liquor licensing board to "make investigations to secure the names of all persons, firms or corporations liable to such assessments or increased assessment (Dow-Aiken tax so-called), whose names are not already on the duplicate, and report such names to the state liquor licensing board."

It is then provided that the board shall determine from the report and forthwith certify to the auditor of state the names of persons, firms or corporations liable to such assessment and that the auditor shall cause such names to be entered upon the assessment duplicate of the proper county by the auditor thereof, etc.

It may be questioned whether the tax involved in said provisions of the law will still be assessable after the prohibition amendment becomes effective, but in view of the decisions upon the question of the operation of the tax provision in conjunction with local option prohibition laws, it will be assumed the tax will be assessable similarly in conjunction with prohibition operative throughout the state.

It was held in Brannan, Treas., vs. Schartzer, 4 O. App. 356:

> "When the business of trafficking in intoxicating liquors is carried on in the county in which the sale of intoxicating liquor has been prohibited, such business is subject to the assessment provided for in section 6071 G. C."

While it does not appear that this case was reviewed by the Supreme Court, yet it is in accord with the general trend of authorities involving the assessment in territory where the traffic was prohibited under the several county, township and municipal local option laws, and this court follows an unreported decision of the Supreme Court, making the following observation:

> "This question, however, is no longer open to discussion, as the Supreme Court has directly passed upon it in Burrell vs. Holtz, Treas. et al., 84 O. S., 497. We have been furnished with certified copies of the proceedings in the court of common pleas and circuit court and a copy of the journal entry in the Supreme Court. The identical question was raised in that case and the Supreme Court held that such assessment might be imposed upon the business when conducted in so-called dry territory. The Supreme Court decision affirmed, without opinion, the judgment of the circuit court on the authority of Adler vs. Whitbeck, 44 O. S. 539, and of Conwell vs. Sears, 65 O. S. 49."

In the latter case Shauck, J. observed:

> "The historical development of our legislative policy upon the subject and the terms employed in the present statute indicate the sense in which the word 'prohibit' is used in this section. For nearly half a century prior to the enactment of the present statute, a statute had forbidden throughout the state the sale of intoxicating liquors to be drank upon the premises where sold. During this time the forbidden traffic grew much beyond the general growth of the state. It was, therefore, most obvious when the present statute was enacted that to make the traffic unlawful does not necessarily prevent it. A leading object of the present statute was to secure to the state the benefit of its experience."

After observing that a provision *prohibiting* the traffic does not in all cases *prevent* the traffic, the court further said:

> "The natural force of the language employed in this section is not inconsistent with that of the section which requires the traffic to be assessed wherever it may be carried on."

The question is again exhaustively considered in the case of Reider vs. Davis, Treas., 10 O. N. P. n. s. 177, where the syllabus is as follows:

> "The Dow tax is valid and operative in a county which has been voted 'dry' under the Rose county local option law."

The court quotes from the Supreme Court of the United States, 5 Wall., 462, which is expressive of the trend of reasoning upon which the assessment is held applicable in conjunction with prohibition, as follows:

> "There is nothing hostile or contradictory therefore in the acts or Congress to the legislation of the state. What the latter prohibits, the former, if the business is found existing, notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result."

And again it is said by the court:

> "The tax is not imposed as a protection to the liquor interest but to mitigate its pernicious effect upon society and is a step in the direction of prohibition."

Without pursuing this inquiry at greater length but assuming for the purposes of our present consideration that the imposition of the so-called Dow-Aiken liquor tax where the traffic may be found to be carried on, is not in derogation of the spirit of prohibition, yet its provisions imposing particular functions upon the liquor licensing board and its inspectors must necessarily become inoperative.

When a statute creating an office or agency of government has been repealed there remains no authority for the exercise of its functions nor can there be a legal incumbent of an office created by statute when the statute creating it has been repealed.

The license amendment to the constitution of 1912 and the liquor licensing statutes enacted in pursuance thereof which created the office of license commissioners were the basis upon which rested the legislation conferring functions in relation to the assessment of the Dow-Aiken tax on the incumbent thereof. They were the foundation while the latter was the superstructure erected thereon and when the foundation was removed the superstructure fell as a necessary consequence.

Therefore the repeal of the statutes creating the liquor licensing board by necessary implication rendered inoperative those sections of the statute prescribing particular duties to be performed in relation to assessment of the Dow-Aiken tax, for the reason that such implication is in harmony and consistent with the express constitutional mandate.

The state and county liquor licensing boards and their machinery were not created by the Dow-Aiken law, and the particular function relative to the assessment of the Dow-Aiken tax is not the characterizing or essential function of the board and in fact was simply added by separate enactment of the legislature.

To imply from the assumed validity of the Dow-Aiken tax law an intention not to repeal the liquor licensing laws would be to overcome by implication the expressed will of the electors of the state and fly in the face of their declared intent.

By previous legislation the inspection functions now vested in the inspection department under the state liquor licensing board, had been vested in the dairy and food department and this particular duty was simply transferred to the new department.

The assessment of the liquor tax, while substantially crippled by the passing of the liquor licensing department, will still be operative through the agency of the county taxing machinery, but the extent of interference with the operation of the assessment legislation is not considered decisive of the continued operation of the licensing machinery as against the plain mandate of the constitution that all statutes inconsistent therewith shall be repealed.

It may further be worthy of consideration that a vast amount of unfinished business may be pending under the administration of the liquor licensing department of the government, but that appears to be a matter more appropriately addressing itself to the legislature than as determinative of construction of the specific provision and effect of the constitutional amendment.

There is in the liquor licensing act the provision—Section 41—

> "If an election shall have been held in any county whereby the sale of liquor throughout the county is prohibited by law, the office of the county licensing board shall thereby be abolished within one month after the said prohibition shall take effect. The county board shall proceed to wind up its business and close its office. The commissioners, officers, clerks and assistants shall be entitled to one full month's compensation after the date upon which the prohibition in the said county becomes operative therein,"

but by its own plain provisions it is applicable only in the case of county prohibition by virtue of then existing provisions of the law under which the same might be accomplished and in any event the provision itself with other sections of the act becomes repealed with the advent of the constitutional amendment which provides a new system of dealing with the liquor traffic effective on the 27th of May *at which time* all inconsistent statutes shall be repealed, as well as the constitutional provision under which alone the statutes were authorized at the time of their enactment.

It is likewise provided in section 47 that the county boards shall make reports within thirty days after the expiration of the license year and that the state board shall make report to the governor not later than three months after the expiration of the license year, all of which provisions of the license law are no longer significant in view of the observations which have gone before, and we must look solely to the language of the constitutional amendment in determining when its terms become effective and the inconsistent laws become inoperative, and therefore whatever measures for closing the business of the liquor licensing department and rendering essential reports are to be available, must be found in action to be taken before that department becomes defunct by the impending prohibition, or by such appropriate legislation as the circumstances may require.

It is not to be overlooked that prohibition and license respectively import governmental policies which are far removed and fundamentally and essentially repugnant to each other. The prohibition amendment purports to provide a substitute for the whole subject matter of the former constitutional and statutory licensing system and such a general provision declaratory of the policy of the state must necessarily supersede all laws contradictory thereof.

An examination of the provisions of the liquor licensing laws, section by section, discloses that the substantive provisions are addressed substantially to the one object of licensing the liquor traffic and providing the machinery therefor, and it therefore follows that they must be regarded as in conflict with the purport and policy of the prohibition amendment and cease to be operative, in accordance with the provision of the schedule to the amendment, on the 27th of May.

Respectfully,
JOHN G. PRICE,
Attorney-General.

341.

APPROVAL OF BOND ISSUE OF VILLAGE OF EAST PALESTINE, OHIO, IN SUM OF $7,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 28, 1919.

342.

APPROVAL OF BOND ISSUE OF GIRARD VILLAGE SCHOOL DISTRICT OF TRUMBULL COUNTY IN SUM OF $60,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, May 28, 1919.

343.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN MORROW, HURON AND LAKE COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, May 28, 1919.

344.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ASHTABULA, GEAUGA, MONTGOMERY, MORROW AND PORTAGE COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, May 28, 1919.

345.

APPROVAL OF FINAL RESOLUUTIONS FOR ROAD IMPROVEMENT IN FAYETTE AND MONROE COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, May 29, 1919.

346.

APPROVAL OF ABSTRACT OF TITLE FOR REAL ESTATE ACQUIRED FOR EXECUTIVE MANSION—CERTAIN LIENS NOTED.

COLUMBUS, OHIO, May 29, 1919.

HON. JAMES E. CAMPBELL, *Chairman, Executive Mansion Board, Columbus, Ohio.*

DEAR SIR:—Under date of May 6, 1919, you submitted for my examination certain deeds from Charles H. Lindenberg to the state of Ohio and Lincoln G. Kinsell and Denman R. Kinsell to the state of Ohio respectively, together with abstracts of title covering the premises described in said deeds, requesting my opinion as to the sufficiency of said deeds in form and substance as a conveyance of the premises, and also as to the state of the title to such premises as disclosed by the aforesaid abstracts.

You also requested that I prepare a deed of conveyance on the part of the state of Ohio to said Charles H. Lindenberg covering certain premises heretofore acquired by the state of Ohio as a site for an executive mansion, in accordance with negotiations evidenced by a contract of option entered into between said Charles H. Lindenberg and the executive mansion board, and the provisions of the legislative act pursuant to which the negotiations are to be consummated.

In accordance with your request I have examined the proposed deeds for conveyance of premises to the state of Ohio by Charles H. Lindenberg and by Lincoln G. Kinsell and Denman R. Kinsell, and find them to be in proper form for conveyance of title to the premises therein described to the state of Ohio, when duly executed, stamped and delivered.

Upon examination of the abstracts I find that they evidence legal title in Charles H. Lindenberg and Lincoln G. Kinsell and Denman R. Kinsell respectively, to the premises described in the respective proposed deeds of said parties and the corresponding abstracts, subject to the following liens:

The Lindenberg property is shown to stand assessed for taxes for the year 1918 amounting in the aggregate to $1,350.03, which are disclosed by the abstract to be unpaid and therefor a lien upon the premises.

The Kinsell property is shown to stand assessed for taxes for the year 1918 amounting in the aggregate to $300.92, which are disclosed by the abstract to be unpaid and therefore a lien upon the premises.

No other liens are found disclosed by the abstracts, and therefore, subject to said liens just noted, I find the abstracts evidence the title to be free of encumbrance.

I am furnishing you herewith, in pursuance of your request, a deed for con-

veyance of the state's property to Charles H. Lindenberg in exchange for property to be conveyed to the state, which I believe to be in proper form.

Respectfully,
JOHN G. PRICE,
Attorney-General.

347.

GENERAL ASSEMBLY—MILEAGE FOR REGULAR AND SPECIAL SESSIONS—WHEN PAID—NOT ENTITLED TO MILEAGE WHEN IN RECESS—CANNOT BE FIXED BY JOINT RESOLUTION.

1. *The end of the regular or special session of which the mileage of members of the General Assembly is payable means the final adjournment thereof.*

2. *Only two sessions of the General Assembly are provided for in the constitution and laws of Ohio, namely, regular sessions provided for in section 25, Article II of the constitution and section 35 G. C.; and special sessions convened by the governor under section 8, Article III of the constitution.*

3. *Mileage being a part of the "fixed compensation" of legislators, which must be prescribed by law, the same cannot be fixed by a joint resolution, it not being a legislative act.*

4. *Members of the General Assembly are not entitled to mileage for the weeks the assembly is in recess.*

COLUMBUS, OHIO, May 29, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of this date inviting my attention to sections 35 and 50 G. C., and section 31, Article II of the constitution of Ohio, and propounding the following questions:

> "I desire to call your attention to sections 35 and 50 of the General Code, which provide for regular sessions of the General Assembly and compensation as salary and mileage to its members.
>
> I also desire to call your attention to section 31, Art. II of the constitution of Ohio, with relation to compensation.
>
> Section 50 provides that each member of the General Assembly shall receive two cents per mile each way for mileage once a week during the session from and to his place of residence by the most direct route of public travel to and from the seat of government, *to be paid at the end of each regular or special session.*
>
> I desire to have you answer the following questions:
>
> 1. Can the auditor of state pay mileage to members of the General Assembly before the end of a regular or special session?
>
> 2. What constitutes a regular or special session in connection with the meaning of this statute?
>
> 3. Can the General Assembly legally pass a joint resolution authorizing the payment to themselves of three cents a mile, and would it be legal for the auditor of state, under the constitution and laws above quoted, to pay this amount from the public treasury?
>
> 4. In case the General Assembly would recess until December 1919, would they be entitled to mileage each week during the interim?"

Section 50 G. C. has been considered by one of my predecessors, and his opinion thereon is found in Vol. 1, 1916 Opinions of the Attorney-General, page 68, and so far as that opinion treats of the question, the same is followed and approved by me.

Section 31, Article II of the constitution is as follows:

> "Members and officers of the General Assembly shall receive a *fixed compensation,* to be *prescribed by law* * * * and no change in their compensation shall take effect during their term of office."

It is to be noted that mileage, to be paid at all, must be a part of the "fixed compensation," and the provision for mileage in section 50 G. C. was held by the Attorney-General in the opinion, supra, to be a part of the compensation of members of the General Assembly.

Since the compensation is to be prescribed *by law,* you are advised in answer to your third question that the General Assembly cannot legally pass a joint resolution authorizing the payment of three cents a mile; and because "no change in their compensation shall take effect during their term of office," the auditor of state could not legally pay an increased mileage to the present members of the General Assembly, even though they should enact a law which provided for an increase in mileage.

It is held in the case of R. R. Co. vs. State, 85 O. S. 251, that a joint resolution is not a legislative act. On page 294 of the opinion Judge Shauck says:

> "It should not need the citation of authorities to establish the proposition that a joint resolution is not an act of legislation, and that it cannot be effective for any purpose for which an exercise of legislative power is necessary."

As to your second question, what constitutes a regular or special session in connection with the meaning of the statute under consideration, you are advised that by the constitution and laws of this state, but two sessions of the General Assembly are provided for:

(1) Regular sessions commencing on the first Monday in January after the election of the members, and continuing until final adjournment. Section 35 G. C.; section 25, Article II, and sections 11 and 20, Article III of the constitution; and

(2) Special sessions called by the governor, under the authority of section 8, Article III of the constitution.

Section 50 G. C. provides that the mileage to members is "to be paid at the *end* of each regular or special session."

"Session" as used in this connection means the space of time or period between the first meeting and the adjournment. (Webster's Dictionary) And the *end* of such session means the *final adjournment* and not a *recess* or *temporary adjournment.* So that you are advised in answer to your first question that the mileage to members of the present General Assembly cannot be paid until the final adjournment of the present regular session.

Section 50 G. C. also provides:

> "Each member shall receive two cents per mile each way for mileage once a week during the session * * *."

As used in this connection, "session" has a different meaning from that given above, and means "The actual assembly of the members, actually sitting for the

transaction of business," (Webster's Dictionary), and precludes the right to receive mileage during a recess of one week, or more, when there is no actual assembly of the members, and the members are at their homes. And this is the practical construction heretofore placed on this section by the General Assembly itself.

You are therefore advised in answer to your fourth question that in case the General Assembly should recess until December, 1919, the members would not be entitled to mileage each week during the interim.

Respectfully,
JOHN G. PRICE,
Attorney-General.

348.

APPROVAL OF BOND ISSUE OF OTTAWA COUNTY IN SUM OF $2,900.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 2, 1919.

349.

APPROVAL OF BOND ISSUE OF OTTAWA COUNTY IN SUM OF $3,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 2, 1919.

350.

APPROVAL OF BOND ISSUE OF OTTAWA COUNTY IN SUM OF $4,400.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 2, 1919.

351.

APPROVAL OF BOND ISSUE OF OTTAWA COUNTY IN SUM OF $6,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 2, 1919.

352.

APPROVAL OF BOND ISSUE OF OTTAWA COUNTY IN SUM OF $4,400.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 2, 1919.

353.

APPROVAL OF BOND ISSUE OF OTTAWA COUNTY IN SUM OF $10,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 2, 1919.

354.

APPROVAL OF BOND ISSUE OF CITY OF HAMILTON IN SUM OF $80,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 2, 1919.

355.

FOREIGN CORPORATIONS—SECTION 8667 G. C. DOES NOT APPLY TO SUCH CORPORATIONS.

Section 8667 G. C. does not apply to foreign corporations seeking admission to transact business in this state.

COLUMBUS, OHIO, June 3, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of June 2, 1919, inquiring whether section 8667 G. C. applies to foreign corporations desiring to transact business in this state, was duly received.

The statute reads as follows:

> "If a corporation be organized for profit, it must have a capital stock, which may consist of common and preferred, or common only; but at no time shall the amount of preferred stock at par value exceed two-thirds of the actual capital paid in in cash or property."

This statute is one of the sections of our general corporation law governing the incorporation and organization of domestic companies, and does not apply to foreign corporations. The admission of foreign corporations is regulated by sections 178 et seq. G. C., which do not require that the capital stock of such companies be adjusted in conformity to section 8667 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

356.

JUVENILE COURT—CUSTODY OF CHILD UNDER AGE OF EIGHTEEN YEARS BY REASON OF SECTION 1643 G. C.—CONFLICT AS TO JURISDICTION OF TWO JUVENILE COURTS—WHICH PREVAILS.

Under section 1643 G. C., for all necessary purposes of discipline and protection, when a child under the age of eighteen years comes into the custody of a juvenile court, under the provisions of the juvenile court act, such child shall continue a ward of the court and under its continuing jurisdiction until such child attains the age of twenty-one years or is adopted under section 1672 G. C., and such facts being made to appear in a juvenile court of another county in a subsequent proceeding therein, the latter court is without jurisdiction to permanently commit said child under section 1653 et seq. G. C., but pending the final hearing may make necessary orders for the temporary well being of such child.

COLUMBUS, OHIO, June 3, 1919.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter requesting the opinion of this department as follows:

> "In September, 1915, the juvenile court of Putnam county committed to the Mennonite Orphan's Home in Logan county a minor child, nine years of age, with the order that she be 'committed to said children's home to be there received, cared for, educated and kept in custody of trustees of said home until she arrives at age of eighteen years, unless sooner released according to law, by the proper authorities of said institution or by this court.'
>
> The child was later placed by the Mennonite Home with a family in the northern part of the state, where it was alleged she was neglected. The case was brought into the Fulton county juvenile court and the child placed by the judge of the latter court with a relative living in Miami county.
>
> There are two points at issue. Could the Fulton county juvenile court accept for permanent care and placement in a family home in a distant county, a child already a ward of the Putnam county court, pursuant to the provisions of section 1653 G .C.? What is the present status of the Mennonite Home in relation to the child?"

The order of the juvenile court of Putnam county to the Mennonite Orphan's Home in Logan county, it is noted, commits the minor to that home to be "cared

for, educated, kept in custody of the trustees of said home until she arrive at the age of eighteen years unless sooner relieved according to law by the proper authorities of said institution or by this court.

From your letter it does not appear that the Mennonite Orphan's Home is an institution which has been approved by the board of state charities, as required in such cases of commitment under section 1653, infra, but no question being raised on this point in your letter, indicating that it has not been so approved for present purposes, it will be assumed that the board of state charities has approved of that institution.

It is also noted that the child was brought into the Fulton juvenile court on a charge that "she was neglected." In the absence of other specific facts as to her condition in Fulton county, it is assumed that this charge was made under section 1645, which defines a dependent child, and her last status in that county for the purpose of this opinion will be considered as that of a dependent child.

Sections 1653, 1672 and 1643, as amended in 103 O. L., p. 872, et seq., are pertinent.

Section 1653, relating to the commitment to institutions, in part provides:

> "The judge may make an order committing such child to the care of the children's home * * * or he may commit such child * * * to the care * * * of some association willing to receive it, which embraces within its objects the purposes of caring for or obtaining homes for, dependent, neglected or delinquent children or any of them, and which has been approved by the board of state charities, as provided by law."

Section 1643 G. C. is:

> "When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for *all necessary purposes of discipline and protection,* a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attain such age."

Pertinent provisions of section 1672 are:

> "If the court awards a child to the care of an association * * * in accordance with these provisions, unless otherwise ordered, the child shall become a ward, and be subject to the guardianship of such association. * * * Such association * * * may place such child in a family home and shall be made a party to any proceedings for the legal adoption of the child, and * * * upon such order (of adoption) being made, all jurisdiction of the juvenile court over such child, under section 1643 of the General Code, shall cease and determine."

Assuming that the Mennonite Orphan's Home is such an institution to which the court of Putnam county could and did legally commit the child in what appears to have been her first contact with the juvenile court, further information as to procedure by which said home placed the child with the family in the northern part of the state, as stated in your letter, might have thrown some additional light on the question involved, but it is assumed, however, that the child was not adopted by that family.

Section 1643 provides that for all necessary purposes of discipline and protection this child became and remained a ward of the juvenile court of Putnam county.

This appears clear from the unmistakeable provisions of this section, but by section 1672, upon the commitment by that court to the orphan's home, another guardianship resulted, because this section says that if the court awards a child to an association, the child shall become a ward and "be subject to the guardianship of such association," which may place such child in a family home and be made party to any proceedings to its adoption. The apparent conflict in such a double guardianship may be avoided by construing the guardianship of the association to be what might be termed a sub-guardianship, as section 1643, providing for the continuing jurisdiction of the court in such cases, would seem to be more special in its nature for the protection of the child and that the association's rights as a guardian would seem to prevail against other individuals and not to apply when the rights of such guardianship conflicted with the exercise of the juvenile court's continuing jurisdiction over the ward.

Consideration of these sections, however, does not of itself decide the authority of the juvenile court of Fulton county to make permanent the commitment of the child in that county after the child has become a ward of the Putnam county court under section 1643.

This question is not easy of solution and requires consideration of the proper rule of construction in such cases. It must be borne in mind that dependency is not a crime but a status and that the welfare of the child is the paramount consideration in the construction of the juvenile court laws.

As to the proper venue in a proceeding under section 1645, in which dependency is charged to exist, we have "dependent child" defined in that section in such broad terms as would cover most ordinary cases of neglect.

Section 1647 G. C. provides that:

> "Any person having knowledge of a minor under the age of eighteen years who appears to be either a delinquent, neglected or dependent child, may file with such juvenile court a complaint."

The words "such juvenile court" refer undoubtedly to the courts mentioned in section 1639 of the juvenile court act, which provides that courts of common pleas, probate courts, insolvency courts and superior courts, where established shall have and exercise concurrently the powers and jurisdiction conferred in that act. It further provides:

> "The judges of such court in each county * * * shall designate one of their number to transact the business arising under such jurisdiction."

from which it follows that in ordinary cases the court of the county in which the dependent child is alleged to be neglected, has jurisdiction to hear such complaint. Taking section 1643 at full face value, without reference to other sections of that act, and without special consideration of its whole purpose, would lead to the result that by reason of this child having become a ward of the juvenile court of Putnam county, it would be beyond the jurisdiction and control of the juvenile court of Fulton county, while it resided therein, regardless of what deplorable, dependent or delinquent condition to which it may be subjected. On the other hand, unless the prior guardianship of the Putnam county court is to be considered in the subsequent hearing in Fulton county, section 1643 is nearly meaningless, and to hold that the court in which the later proceeding is held may make a final disposition of the child, in the face of the continuing jurisdiction of the formerly acquired guardianship, is to practically nullify section 1643.

The undesirable results that may follow either of these extreme holdings may be avoided by reconciliation of the apparent conflicting provisions of this act.

In the case of In Re Angeline e. Crist, 89 O. S., 33, the former opinions of the Supreme Court of Ohio are considered and followed to the effect that where the common pleas court, in an action for divorce, awards the custody and control of the children of the marriage, such become the wards of that court and its jurisdiction over their custody and control is continuing and its order therein cannot be affected by a proceeding in the probate court or by a proceeding in habeas corpus.

In Children's Home vs. Fetter, 90 O. S., 110, the second branch of the syllabus is:

> "The probate courts of this state, acting as juvenile courts, under the provisions of section 1639 et seq. G. C., are courts of record and their judgments, where jurisdiction of the person and subject matter has been acquired and no fraud has intervened, are conclusive and can be assailed in no other court in an independent proceeding."

In the Fetter case the alleged conflict of jurisdiction was between the common pleas court of Erie county and the juvenile court of Marion county, and the minor was first brought under the jurisdiction of the juvenile court, and, as stated in the opinion, at page 125,

> "In the case at bar, under the provisions of section 1643 G. C. * * the power of that court over him was continuing until he attained the age of twenty-one years. An independent proceeding in another court, *even of higher jurisdiction,* cannot be maintained to affect this order of a court of record and competent jurisdiction,"

and as to later interference with the order of the juvenile court, in that case Judge Newman held:

> "There is no authority for any court to interfere in an independent proceeding with the custody of the child thus entrusted by law to the jurisdiction of the juvenile court."

Without quoting further from these and other decisions, it may be stated that there effect is that after the child in this case came in contact with the Putnam county court, for the purposes stated in section 1643, it must remain a ward of that court, which shall have a continuing jurisdiction until the child reaches the age of twenty-one years or is adopted under section 1672, supra. But considering the other provisions of the juvenile court act, and its controlling purpose to safeguard the child, it is also quite clear that the juvenile court of the county of its actual residence is not without certain duties and powers under certain circumstances, and considering the urgent necessities which may arise in the county of the child's actual residence, in connection with the provisions of section 1647, above referred to, it is concluded that the court of the county in which such child actually resides has jurisdiction to hear complaints as to the child's condition at that time, and to make any necessary temporary order for its well-being, and if no facts come to the court's knowledge of the prior adjudication in another county, and in the absence of a direct attack upon the court's proceedings, such court may also commit such child as provided in the juvenile court act.

However, it being made to appear to the court that the alleged dependent or delinquent child is a ward of another juvenile court of the state, by reason of the

facts as above stated, a citation must issue to the juvenile court exercising the guardianship over such ward, or preferably to the Mennonite Orphans' Home, which on the Putnam's county court's commitment also stands charged with its guardianship.

Consistent with this construction of this act, it is concluded that if the guardianship of the court first exercising the jurisdiction of the juvenile act be established, that beyond making such temporary order as the welfare of the child requires, the later acting juvenile court is without authority to permanently commit the child under sections 1653 G. C. et seq.

Respectfully,
JOHN G. PRICE,
Attorney-General.

357

CHATTEL LOAN BUREAU—COLLECTION OF INTEREST AND CHARGES IN ADVANCE NOT AUTHORIZED—SECTION 6343-5 G. C. APPLICABLE WHERE LOAN IS FOR INDEFINITE TERM AT RATE OF 1½ PER CENT PER MONTH, RETAINING 2 PER CENT OF LOAN IN ADVANCE.

The inhibition against collection of interest and charges in advance as provided in section 6343-5 G. C. is applicable to the case of a licensee who loans on invoices for an indefinite time at a rate of 1½ per cent per month, retaining 2 per cent of the loan in advance, and adjusting by rebate, in event the amount retained exceeds the stipulated interest and charges at time of settlement, and such method of doing business is in violation of the section.

COLUMBUS, OHIO, June 3, 1919.

Department of Securities, Chattel Loan Bureau, Columbus, Ohio.

GENTLEMEN:—Under date of April 10, 1919, you requested my written opinion as follows:

> "The Chattel Loan Bureau of the department of securities has always ruled, under section 6346-5 G. C. that no part of the 3 per cent per month allowed for charges, including interest, might be collected in advance. This has seemed to be the only construction which could be placed on this phase of said section.
>
> One of our licensees now questions this ruling, basing his contention on the following facts: This company lends on invoices, for an indefinite time, at 6 per cent per annum, plus 1-30 of 1 per cent per day, which is, of course, equivalent to 1½ per cent per month. The company retains from the borrower 2 per cent of the loan, which is admitted by the company as collecting in advance, and also, admittedly, done for the benefit to be derived from relending this 2 per cent. The company rebates to the borrower, when the loan is paid, any surplus there may be, after deducting interest at 1-30 per cent per day, plus 6 per cent per annum, from the 2 per cent.
>
> With this basis of facts, the company avers that the statute reading as follows:

'Said three per cent per month shall not be paid in advance,'
does not apply to their case, as they do not charge three per cent per month."

From your statement it is observed that the question arises as to the authority to require payment in advance of all or a part of the charges authorized by law, by licensees engaged in the chattel loan business.

Apparently the question raised in the specific case you mention is as to whether the restriction against the advance charges is applicable where the maximum rate of the total charge is less than the maximum 3 per cent per month allowed by law.

The provisions of the law governing your inquiry will be found in section 6346-5 G. C. which section is as follows:

"No such licensee or licensees shall make a loan or purchase or furnish guaranty, or security, as hereinbefore provided at a greater total charge, including interest, than three per cent per month; except that on loans that do not exceed fifty dollars in amount, in whatever manner made payable, an inspection fee of not to exceed one dollar may be collected at the time the loan is made, when such loan is made for a period of not less than four months; and such inspection fee shall not be imposed upon the same borrower for any new or additional loan made within four months after such charge has been imposed. Said three per cent per month shall not be paid in advance and shall be computed on unpaid monthly balances, without compounding interest or charges. No bonus, fees, expenses, or demands of any nature whatsoever, other than said inspection fee and said total charge of three per cent per month (which shall include interest) as hereinbefore provided, shall be made, paid, or received, directly or indirectly, for such loans, purchases or furnishing guaranty or security, wage assignments or advancements except court costs upon the actual foreclosure of the security or upon the entry of judgment. Nothing in this act shall apply to pawn brokers who obtain a municipal license as provided in sections 6337 to 6346, inclusive, of the General Code or to national banks or to state banks or any person, partnership, association or corporation whose business now comes under the supervision of the superintendent of banks. No charge or fee shall be made unless the loan is actually made. A copy of this section shall be furnished each borrower at the time the loan is made."

Operative provisions of this section pertinent to the inquiry presented are slightly separated by intervening clauses relating to an exception in case of loans not exceding $50, and for a period of not less than four months, but when brought together the meaning is, we think, fairly free from difficulty.

The language used in the section we think is of the same import as though it read "no licensee or licensees shall make a loan or purchase or furnish guaranty, as hereinbefore provided at a greater total charge, including interest, than 3 per cent per month, which charge shall not be paid in advance, and shall be computed on unpaid monthly balances without compounding interest or charges.

In other words, the phrase "said three per cent per month," is simply a form of expression used to denote the legalized charges under said section which had been limited to a maximum of three per cent per month; that charges may not exceed three per cent per month, but obviously may be less than that amount, at the discretion of the parties to the transaction, and subject to the terms of the contract. And the phrase so mentioned is not to be construed as fixing a universal rate to be charged, nor as relegating the limitations and regulations pro-

vided in the remainder of the sentence to the one particular case of the maximum charge.

The maximum charge of three per cent per month is one of the regulations imposed, while in addition it is provided that the charges shall not be paid in advance, and further, shall be computed on unpaid monthly balances without compounding interest or charges, and I hold that the several provisions are cumulative regulations applicable to the case of any transaction coming within the terms of the introductory language of the section.

The opposing contention suggested by your letter is tantamount to a holding that while a licensee charging the maximum three per cent per month may not require payments in advance, yet licensees charging a slight fraction under the maximum or any other rate below the maximum would not be subject to any of the regulations applicable in case of the maximum charge, which is so obviously a strained and unreasonable interpretation of the language that its mere statement is its own direct refutation.

I interpret the section as providing that not only shall the total charges not exceed three per cent per month subject to the exception provided in the statute, but further, that the interest and charges shall not be payable in advance, but shall be computed on the unpaid monthly balances, and therefore that the method of collection by the company referred to in your letter is at variance with the provisions of the statute and constitutes a collection in advance in violation of the mandate of the statute.

The restriction against collection in advance is held to be applicable to all licensees without regard to the rate of the total charges, with the additional restriction that such total charges may not exceed three per cent per month.

Respectfully,
JOHN G. PRICE,
Attorney-General.

358.

PROSECUTING ATTORNEY—NOT AUTHORIZED TO INCUR EXPENSE FOR STENOGRAPHER UNDER SECTION 3004 G. C.—SECTION 2914 G. C. APPLICABLE—BOND REQUIRED BY SECTION 3004 G. C. ADDITIONAL TO THAT REQUIRED BY SECTION 2911 G. C.

1. *Under section* 3004 *G. C. the prosecuting attorney is not authorized to incur expense for a stenographer, such expense being provided for in section* 2914.

2. *The bond required by section* 3004 *G. C. is an additional bond to that required by section* 2911.

COLUMBUS, OHIO, June 3, 1919.

HON. WALTER B. MOORE, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent communication with reference to your former communication requesting the opinion of this department at that time, as follows:

> "Last January, as provided by law, our common pleas judge failed to make any allowance for a stenographer for the prosecuting attorney of this county.

On the 26th day of April, this year, he fixed the allowance at the rate of $5.00 per month or $60.00 per year, and ordered the clerk to enter the same upon the journal under date prior to the first Monday in January, 1919.

The writer assumed the duties of his office on the first Monday in January this year, and on that day talked with the judge about this allowance. The judge stated to him that he would make an allowance necessary to pay for the actual work done, but, after the stenographer had done the work from that date up to April 28, believing that she would be paid for the same, the court then proceeds in the manner above set out.

The sum of $5.00 per month will not pay, nor begin to pay for the stenograhpic work required in my office.

I am writing you at this time requesting your opinion upon the following matters:

(1) Would I be entitled, under section 3004, to pay the reasonable and necessary stenographic expense incurred in my official capacity?

(2) Would it be different had the court made no allowance whatever?

I also desire your opinion upon the following question:

Is it necessary for the prosecuting attorney to file an additional bond, under section 3004 as amended, before he can avail himself of the benefits of said section, or if his original bond is for more than the amount of his salary, will it serve this purpose?

On the above question, I am somewhat undecided as the same refers to his oath of office, being enclosed and deposited with the bond referred to therein, and it seems that the provisions of the bond under that section are substantially the same as the general bond required. The common pleas court in our county fixed my original bond at $2,000, which exceeds the salary received by me."

Your questions may be stated thus:

(1) Does section 3004 G. C. authorize the incurring of expense by a prosecuting attorney for the payment of a stenographer?

(2) Is an additional bond required under section 3004 G. C.

Section 5, Article X of the constitution of Ohio and sections 2914 and 3004 G. C. are applicable to your first question.

Section 2914 in part provides:

"On or before the first Monday in January of each year in each county, the judge of the court of common pleas, * * * may fix an aggregate sum to be expended for the incoming year, for the compensation of assistants, clerks and stenographers of the prosecuting attorney's office."

Section 3004 in part is:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses, * * * not otherwise provided for. * * *"

Section 5, Article X of the constitution provides that:

"No money shall be drawn from any county * * * treasury, except by authority of law."

By the plain and specific terms of sections 2914, supra, provision is made for compensation of stenographers in the prosecuting attorney's office. This fulfills the requirement of the constitutional provision above quoted, and at the same time it eliminates such an expense from being comprehended in that authorized by section 3004 G. C. under the provision for expenses "not otherwise provided for." It is quite clear that this expense, being specifically provided for, cannot be authorized in a statute which authorizes incurring expenses not provided for.

From this it follows that the opinion of this department is that such expense may not legally be paid under section 3004 G. C., and the answer to your first question is therefore in the negative.

However, it is suggested as a matter of practical assistance to you that the judge may make a further allowance under section 2914 G. C. on the same theory that the commissioners may increase the allowance to deputy county officers, as held in Opinion No. 323, rendered by this department to the Bureau of Inspection and Supervision of Public Offices, a copy of which is herewith enclosed.

It may be observed that, consistent with the above conclusion, it would not be different had the court made no allowance.

For the proper solution of your second question consideration of section 2911 and the latter part of section 3004 G. C. is necessary.

Section 2911 requires that before entering upon the discharge of his duties the prosecuting attorney shall give bond to the state in a sum not less than one thousand dollars, to be fixed by the common pleas or probate court, and to be approved, conditioned and deposited as therein provided.

Section 3004, after providing for an additional allowance to the prosecuting attorney of an amount equal to one-half his salary, contains this language:

"Provided that nothing shall be paid under this section until the prosecuting attorney shall have given bond to the state in a sum not less than his official salary to be fixed by the court of common pleas or probate court."

It is not necessary to quote all of the further requirements of the bond referred to, and it is sufficient to say that in its execution, conditions, approval and disposition the terms of section 3004 do not differ from the provisions of section 2911.

It is to be noted, however, that the penalty of the bond in this section is that it shall be not less than the salary.

It is also to be noted that by the last paragraph of section 3004 it is contemplated that this fund shall or may be drawn by the prosecuting attorney in a lump sum, so that in the beginning of the year he may draw the entire amount from the county treasury. This is evidenced by that part of the section which, after providing that each year the prosecuting attorney shall file an itemized statement "as to the manner in which fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay the same into the county treasury."

It is to be observed that under this section the prosecuting attorney draws not his own salary but trust funds of the county to be expended by him for certain purposes, and from its later enactment as part of a separate and additional allowance made for the prosecuting attorney it indicates a legislative requirement that two bonds must be given by the prosecuting attorney: one in a sum not less than

one thousand dollars, and another in a sum not less than his official salary. It is to be observed that these constitute the minimum penalties for the bonds, and they may be for a greater amount.

From the foregoing observations the opinion of this department is that the original bond given under section 2911 G. C., unless the penalty amounts to the combined penalties required by both of these sections, is not sufficient and an additional bond must be given under section 3004. The answer to your second question is therefore in the affirmative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

359.

DITCH CONSTRUCTED WHOLLY IN ONE COUNTY—WHEN PAYMENT IS TO BE MADE BY ADJOINING COUNTY ASSUMING PART OF EXPENSE.

Where, in pursuance of sections 6536, 6540 *and* 6541, *G. C. a ditch is constructed wholly in one county as to the cost of which contribution from an adjoining county is sought, the portion payable by such adjoining county becomes due upon the collection of assessments for said improvement against lands in such adjoining county, and not at the time of the agreement of the boards of commissioners apportioning the cost as between the two counties.*

COLUMBUS, OHIO, June 3, 1919.

HON. CLYDE L. CANFIELD, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—You have requested the opinion of this department upon the following:

> "The prosecuting attorney of Lucas county and myself disagree as to the time the upper county should pay its agreed share of the cost of a proposed ditch construction when the entire line of improvement is in the lower county.
>
> The facts are briefly as follows:
>
> More than a year ago a petition was presented to the commissioners of Lucas county, asking that a ditch, wholly in Lucas county, be enlarged. This ditch drains land in Fulton county. The petition was granted and the joint board met on the line of the ditch and at that meeting the commismissioners of Fulton county agreed to pay twenty per cent of the cost of construction. G. C. 6536, 6540, 6541.
>
> Said ditch has not been sold and the total cost ascertained.
>
> The prosecuting attorney of Lucas county contends that by reason of said agreement there is now due Lucas county from Fulton county the said twenty per cent of the *estimated* cost of constructing said ditch.
>
> I maintain that the ditch should be sold and the total cost of construction ascertained, after which the total sum should be certified to Fulton county and procedure had as in single county ditches, which would delay the payment until the amount was apportioned and collected. G. C. 6489, 6490."

Your communication has reference to an improvement proposed to be made under authority of sections 6536, 6540 and 6541 G. C. These sections are found in the chapter entitled "Joint County Ditches" and in their form as amended 103 O. L. 836 and 838, read in part as follows:

> *Sec.* 6536.—"Ditches, drains or watercourses which provide drainage, or, when constructed, will provide drainage for lands in more than one county, may be located and constructed, enlarged, cleaned, or repaired or boxed or tiled as provided in this chapter and the laws prescribed for constructing, enlarging, cleaning or repairing single county ditches, drains or water courses, * * *."
>
> *Sec.* 6540.—"When the board of county commissioners * * * cause to be constructed, enlarged, cleaned or repaired a ditch, drain or watercourse * * * which is, or may be, an outlet for a ditch, drain or watercourse, or river, creek or run, of lands of an upper county, or which by reason of the improvement thereof, will provide better drainage * * * for lands of an upper county * * * the commissioners of said upper county shall pay the commissioners of such lower county such sum as is agreed upon by a majority of the joint board of the commissioners of all counties for the use and benefit of such outlet. The commissioners of such upper county shall apportion such sum to the lands in their county, for whose benefit said ditch or improvement was or is made or constructed."
>
> *Sec.* 6541.—"Before work is begun in the construction, enlarging, cleaning, or repairing, of a ditch, drain or watercourse, or the improving of the channel or a part thereof, of a river, creek or run, in either of such counties, as provided in the next preceding section, the amount to be paid by the commissioners of the upper county to the commissioners of the lower county, for the use and benefit, or burden of such outlet, or better outlet, shall be agreed upon or be determined at a joint meeting of the commissioners of the upper and lower counties upon the line or proposed line of such ditch, drain, or watercourse, river, creek or run."

At the outset, reference is made to an opinion of this department of date August 22, 1917, (Opinions of Attorney-General for 1917, p. 1575), in the course of which attention is called to the fact that the proceedings for compelling contribution from an "upper county" where the improvement lies wholly in a "lower county" (sections 6540 et seq.) are different from those leading to the apportionment of the cost between or among counties where the improvement lies in more than one county (sections 6537 to 6539). Our present discussion concerns only the situation first stated, an improvement lying wholly within a lower county, as to the cost of which contribution is sought from an upper county. Such an improvement, by virtue of section 6536, is authorized to be made as prescribed "in this chapter," (that is, the chapter headed "Joint County Ditches,") "and the laws" authorizing single county ditches.

However, as heretofore pointed out by this department in the opinion above referred to, and in another opinion (Opinions of Attorney-General for 1917, p. 1653), the proceedings leading to the ordering of such an improvement are carried on wholly within the lower county just as in the case of the ordinary single county ditch, resort being had to certain sections (6540 to 6553) of the chapter entitled "Joint County Ditches," only by way of what may be termed supplementary proceedings for the purpose of determining the amount to be paid by the upper county, and collecting such amount. It would seem that section 6557 offers an alternative to the plan just referred to; but inasmuch as your inquiry indicates

that such alternative was not resorted to, no further mention need be made of it in the present discussion.

Coming, then, to consider the proceedings relating to single county ditches (sections 6442 to 6535), we find a general plan whereby after the filing of a petition, giving of bond, serving of notices, etc., the county commissioners hold a hearing as to the necessity of the improvement; whereupon, if the commissioners find against the improvement, they dismiss the petition, while if they find for the improvement, they proceed as directed in sections 6454 and 6455; that is, they order the county surveyor to go on the line of the proposed improvement, set stakes, make an estimate of cost of construction, and prepare an apportionment schedule based on benefits to the several tracts which will be benfited. On the return of the surveyor's report, the commissioners go into the matter of the apportionment as made by the surveyor, and make such changes therein as they may deem just. (Section 6457). Provision is also made (section 6460-6462) for the consideration by the commissioners of the matter of compensation for land taken and damages that will result from the construction of the improvement. Likewise, there is provision for the filing of exceptions (section 6468), as well as for an appeal to the probate court (sections 6467-6469-6480). Upon the completion of the appeal proceedings, if they result favorably to the improvement, or, if there has been no appeal, then upon the completion of the proceedings of the commisioners relative to granting the improvement, compensation, damages, apportionment, etc., the commissioners proceed to let the contract (sections 6481-6488).

Then follows section 6489, reading as follows:

> "When the working sections of the improvement are let, and the costs and expenses of location and construction, and all compensation and damages are ascertained, the county commissioners shall meet and determine at what time and in what number of assessments they will require them to be paid, and order that such assessments be placed on the duplicate, against the lots, lands, corporate roads or railroads assessed. They shall also determine whether they will issue the bonds of the county to raise the money necessary to pay such costs and expenses, and if they so determine, the bonds may be issued for a term of years, not exceeding twenty, at a rate of interest not exceding six per cent per annum, payable semi-annually. They shall cause an entry to be made upon their journal, setting forth their finding and determination under this section."

Sections 6490 to 6493 provide for collection of assessments and issuing of assessment bonds.

At this point let us leave the chapter devoted to single county ditches and return to the chapter relating to joint county ditches, of which above quoted sections 6536, 6540 and 6541 are a part.

It will be noted that said sections 6540 and 6541 contemplate an agreement between the commissioners of the two affected counties as to the share of the cost to be paid by the commissioners of the upper county to those of the lower county. On the other hand, the next section, 6542, establishes a rule as to what shall be considered a *prima facie* case of failure to agree; and then comes a series of statutes, 6543 to 6551 (some of which were amended 103 O. L. 838) by virtue of which the matter may be laid before the common pleas court by either of the disagreeing boards of commissioners. Of this last named series of statutes, two sections are here quoted, namely, sections 6543 and 6550, as follows:

> *Section* 6543.—"On failure to agree or pay, as provided in the next

three preceding sections, the commissioners of any of said counties and within twenty days after such proposed joint meeting, may commence their action in the common pleas court of the county in which the greatest length of such ditch or improvement or the greatest length of the channel of a river, creek or run ordered improved is located against the commissioners so failing to agree or refusing to pay, setting forth the fact that proceedings have been begun for such improvement, and the reason why the commissioners of the upper county should pay to the commissioners of the lower county compensation for such outlet, or the improvement of such outlet, or proposed outlet, and the failure to agree or pay, as provided in such sections, and praying for the relief provided in this chapter."

Section 6550.—"The court shall order the commissioners of such upper county, to apportion and assess the amount provided in said report, together with the entire expense of the proceedings, to the land in said county, in a like ratio as the expense of constructing said ditch or ditches, or the improving of the channel of said river, creek or run or part thereof in the upper county was apportioned and assessed and cause the sums so apportioned to the respective tracts of land in the upper county to be placed on the special duplicate thereof against such lands for collection. If the proposed improvement is abandoned, the court shall order the commissioners of the county from which the proposed improvement came to pay the costs of such proceedings."

Section 6551 refers to apportionment and assessment of costs of such court proceedings, and section 6552 reads as follows:

"The treasurer of the upper county shall collect said sum as other taxes are collected, and pay it to the treasurer of said adjoining county, upon the warrant of the auditor thereof."

In choosing between the two theories which are advanced as to the time and method of payment by the upper county to the lower county, as contemplated by the statutes outlined above—one theory being that the amount is payable in full promptly after the agrement of the commissioners, and the other that the amount promptly after the agreement of the commissioners, and the other that the amount upon lands in upper county—the following considerations seem to be determinative:

(1) While section 6543 stipulates that "on failure to agree or pay," resort may be had to the courts, yet section 6550 relating to the order to be made by the court, does not provide for a summary money judgment—it states that the court shall order the commissioners of the upper county to apportion and assess the amount, etc., and cause the sums apportioned against lands in upper county to be placed on special duplicate, etc.

(2) Section 6552 provides that the treasurer of the upper county shall collect "said sum as other taxes are collected, and pay it to the treasurer of the adjoining county." It is evident that the words "said sum" refer to the amount apportioned to lands in the upper county, whether in pursuance of agreement of county commissioners or upon order of court; for the last sentence of section 6540, and the terms of section 6550 are to the effect that in any event the amount is to be apportioned to the lands in the upper county by the commissioners thereof; and in addition, a reference to the earlier forms of sections 6540 and 6552 (see 86 O. L. 123) readily shows that such is the meaning of the two words. We are therefore reverted to the method named in said section 6552 as seemingly providing the only channel through which the share of the upper county may pass to the lower county.

(3) If there is any way out of the situation arising because of the matters noted in next preceding paragraphs (1) and (2), it would have to be found in some express or clearly implied authority in the lower county to procure funds with which to make the payment in cash. Provision for such authority seems not to have been made. It is true that section 6493, appearing in chapter on single county ditches, provides for an issue of bonds by a county in anticipation of assessments; but certainly the upper county does not by virtue of said section have authority to issue bonds in anticipation of assessments which it does not retain, but which according to statute must be paid over by its treasurer to the lower county. With much more reason may it be claimed that the lower county has authority under section 6493, taken in connection with sections 6536 and 6540 et seq. to issue such bonds, since after all it is the lower county wherein the main proceedings take place and which is secured in its expenditures by an assessment lien on lands in the upper county of equal standing with the assessment lien on lands within its own boundaries, accompanied by a specific statutory direction to the treasurer of the upper county to pay over the assessment receipts.

Section 6508 provides only for bonds to cover compensation and damages—authority having been provided in section 6463 for the county to assume all or a part of the compensation and damages; while section 6505, relating to tax levy, provides that out of the receipts of such levy the county may pay that part of cost of ditch construction apportioned to the county, and shall pay any sum assessed against the county lands. So that from neither of these sources of revenue is there authority given the upper county to anticipate the collection of the landowners' share.

It is therefore to be concluded that payment is to be made to the lower county through the medium of receipts from assessments as they become due, and not in a lump sum immediately after the agreement of the commissioners.

Respectfully,
JOHN G. PRICE,
Attorney-General.

360.

APPROVAL OF BOND ISSUE OF BUTLER COUNTY, OHIO IN SUM OF $200,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 3, 1919.

361.

APPROVAL OF BOND ISSUE OF DELAWARE COUNTY, OHIO, IN SUM OF $90,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 3, 1919.

362.

APPROVAL OF BOND ISSUE OF CITY OF LIMA IN SUM OF $75,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 3, 1919.

363.

APPROVAL OF BOND ISSUE OF VILLAGE OF WEST LIBERTY, LOGAN COUNTY, IN SUM OF $2,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 4, 1919.

364.

TAXES AND TAXATION—SENATE BILL NO 175 PROVIDING FOR LEVY AND COLLECTION OF TAX ON INHERITANCES GOES INTO IMMEDIATE EFFECT WHEN IT BECOMES A LAW.

Senate bill No. 175 providing for the levy and collection of a tax on inheritances will, if it becomes a law, go into immediate effect as an entirety.

COLUMBUS, OHIO, June 5, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have requested the opinion of this department as follows:

> Senate bill No. 175 provides for the levy and collection of a tax on inheritances and has passed both houses of the General Assembly. Upon the assumption that it will be signed by the governor the commission desires to know whether it will become effective from the date of its approval by the governor or not until ninety days thereafter .
>
> The commission deems it highly important that information along this line be transmitted by it to the various county officers having duties to perform in connection with the administration of the law and, if it becomes effectve upon the approval of the governor, it desires to issue instructions to county officers immediately. You are therefore requested to furnish the commission your opinion in this matter at the earliest possible moment."

Article II, section 1d of the constitution provides, in part, as follows:

> "Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws

necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. * * * The laws mentioned in this section shall not be subject to the referendum."

Senate Bill No. 175 provides, as you state, for the levy and collection of a tax on inheritances. It contains no emergency clause. Section 3 of the bill, which is in the nature of a schedule, contains language intimating the understanding of the General Assembly that the bill will become effective as a law upon its approval. Such language, of course, will not supply the need of an emergency clause, if such a clause is otherwise necessary. The question remains as to whether the bill, if signed by the governor or otherwise made a law, will upon its approval or other event having the effect of making it a law go immediately into effect as a "law providing for a tax levy."

The bill need not be quoted. The characterization of it which has already been made is sufficient for the purposes of this discussion. Of course, it contains many machinery provisions providing the method of the assessment of the tax, its collection and its distribution. Some of these provisions relate to judicial procedure, some to administration. Provision is made for the fees of officers having duties to perform in connection with the assessment and collection of the tax. All the provisions of the bill, however, of whatever character, are intimately related to and necessarily concerned with the levy of the tax in the sense that they are essential to a complete and effective exercise of the taxing power of the state with respect to inheritances.

I mention this fact because in one case there is an intimation on the part of the Supreme Court that a law, one section of which provides for a tax levy, is not thereby necessarily withdrawn entirely from the operation of the ninety day referendum period, as provided by Article II, section 1c of the constitution, as a whole but that the sections other than the one specifically imposing the tax may be subject to the referendum.

State ex rel. vs. Roose, 90 O. S., 345.

Examination of the law before the court in that case shows that it was of a charcter entirely different from that under consideration here; it provided (103 O. L. 155, 863) not only for the levy and collection of a tax for the purpose of constituting the "State Highway Improvement Fund," not only for the distribution of that fund and its application in part to the improvement of inter-county highways and in part for the construction and improvement of designated main market roads; but it also contained provisions relative to the powers and duties of the state highway commissioner, governor and board of administration with respect to the construction of state highways which may have had no necessary relation to the taxation provisions of the law. The only question involved in the case was whether or not the tax should have been extended on the then current tax duplicate, so that an affirmative holding on this point did not necessitate any decision as to the effect of Article II, section 1d upon all the sections of the law. Therefore what is intimated in the syllabus and in the opinion in this case as to the severable character of a law providing for a tax levy for the purpose of the operations of the constitutional provision referred to was really dictum.

In this connection it will be observed that while Article II, section 1c reserves the right to the people to order the submission to the electors of "any law, section of any law or any item in any law appropriating money," yet section 1d withdraws from the effect of the previous section not merely the sections of a law which provide for tax levies but "laws providing for tax levies," and hence the natural inference would arise that the entire law should be withdrawn from the effect of

the referendum, at least if it might partake mainly of the character of a law providing for a tax levy.

However this may be, it is at least clear that there is a wide distinction between a case like that presented in the case cited and that presented by Senate bill No. 175, in that all of the sections of the latter are germane and essential to the exercise of the taxing power as such.

It is the opinion of this department, therefore, that said Senate bill No. 175, should it become a law, will go into effect as an entirety, i. e., all of its sections will become effective at the same time.

This conclusion, however, leaves open the further question as to whether or not it is a law providing for a tax levy. We are here without precedent in this state on the precise question, which may be stated thus:

> "Are any and all laws passed in the exercise of the taxing power 'laws providing for tax levies' or does the constitution refer merely to laws levying taxes on property?"

To be sure, we have the case previously cited, which holds that a levy on the taxable property in the state is such a law as is pointed out by section 1d of Article II of the constitution; and we have, on the other hand, the case of State ex rel. vs. Milroy, 88 O. S. 301, holding that a law regulating the machinery of levying property taxes is not such a law.

The decisions themselves obviously do not touch the point. However, there is certain language in the *per curiam* opinion in the case last cited which may be looked to in this connection. Speaking of what was known as the "Kilpatrick Law" amending certain sections of the Smith one per cent law, so-called, the court say, at page 304:

> "The General Assembly did not, in this act, impose a tax, stating distinctly the object of the same, nor did it fix the amount or the percentage of value to be levied, nor did it designate persons or property against whom a levy was to be made. * * * The act cannot be said to be one 'providing for tax levies,' within the meaning of those words as used in section 1d of Article II of the constitution."

In using this language the court at least suggested a definition of a "law providing for a tax levy." The definition thus suggested is not limited to property taxes; so that in so far as its decision may be taken as a precedent it at least tends to establish the conclusion that any law which imposes a tax, complying with the further provision of Article XII, section 5, that:

> "every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied,"

fixes the amount or percentage of value to be levied and designates the persons or property against whom the levy will be made, is a law "providing for tax levies." Senate bill No. 175, if it should became a law, will satisfy these requirements. It is a complete law in itself and meets every condition of the definition thus suggested.

On principle, it is clear that this conclusion must be reached. Undoubtedly the reason actuating the people in the adoption of Article II, section 1d of the constitution must have been to avoid delay in the going into effect of a measure designed to produce revenue needed for the state and its sub-divisions.

This reason applies just as forcibly to an excise or other special tax as it does

to a property tax. Therefore, if there is need of construction in the application of Article II, section 1d of the constitution and it is permissible, as it would be in such event, to have regard to the mischief to be remedied as indicating that spirit of the law which is its life, such considerations would compel the conclusion that a complete inheritance tax law, like Senate bill No. 175 will be if it becomes a law, is within the operation of the section.

For these reasons, then, the commission is advised that it is the opinion of this department that Senate Bill No. 175, if it becomes a law, will go into effect as an entirety immediately upon its approval by the governor or the happening of such other event as may give it vitality as an act of legislation.

Respectfully,
JOHN G. PRICE,
Attorney-General.

365.

APPROVAL OF BOND ISSUE OF CLINTON COUNTY IN SUM OF $69,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 5, 1919.

366.

APPROVAL OF BOND ISSUE OF SUMMIT COUNTY IN SUM OF $25,876.40.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 5, 1919.

367.

APPROVAL OF BOND ISSUE OF MARION COUNTY IN SUM OF $17,250.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 5, 1919.

368.

Industrial Commission of Ohio, Columbus, Ohio.

APPROVAL OF BOND ISSUE OF MARION COUNTY IN SUM OF $14,000.00.

COLUMBUS, OHIO, June 5, 1919.

369.

Industrial Commission of Ohio, Columbus, Ohio.

APPROVAL OF BOND ISSUE OF MARION COUNTY IN THE SUM OF $14,500.00.

COLUMBUS, OHIO, June 5, 1919.

370.

APPROVAL OF SYNOPSIS OF HOUSE BILL NO. 24 (CRABBE ACT FOR ENFORCEMENT OF PROHIBITION.)

COLUMBUS, OHIO, June 6, 1919.

MR. L. H. GIBSON, *Mgr., The Ohio Home Rule Association, Cincinnati, Ohio.*

DEAR SIR:—You have submitted to me under date of June 3, for my certificate under section 5175-29e a synopsis to be embodied in a referendum petition, said synopsis in words and figures being as follows:

> "The purpose of the act known as House Bill No. 24, passed by the General Assembly of Ohio, April 17, 1919, approved by the governor, May 16, 1919, and filed in the office of the secretary of state, May 19, 1919, is to provide for state prohibition of the liquor traffic, for the enforcement of such prohibition and the repeal of all sections of the General Code inconsistent therewith. The act defines intoxicating liquor to include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor and any alcoholic liquid or compound capable of being used as a beverage; except for pharmaceutical, medicinal, sacramental, industrial, and certain other specified purposes, makes it unlawful to manufacture, sell, barter, receive, possess, transport, export, deliver, furnish or give away intoxicating liquor, or possess any equipment used or to be used for the manufacture of intoxicating liquor, but the word 'possess' as used in this act in reference to intoxicating liquors does not apply to such liquors in a bona fide private residence as described in section 50 of this act; provides for a system of permits to be issued by a prohibition commissioner for the manufacture and sale of intoxicating liquor where authorized; authorizes the commissioner to issue additional rules and regulations relating to the manufacture, pos-

session and sale not inconsistent with the act; provides for removal of liquors from possession except those specifically permitted; makes it unlawful to advertise or solicit orders for liquors, or to advertise, sell, deliver, furnish or possess any preparation or recipe for making intoxicating liquors except for permitted purposes; enacts regulations as to liquor shipments by common carrier; except for permitted purposes, makes it unlawful for any one to have liquor on his person or in a vehicle, or to sell or dispose of the same by gift or otherwise; makes it unlawful to keep or use any building where any offense prohibited by the act is committed, and provides for the abatement of such place as a nuisance; provides for civil damages for injury caused by intoxication; provides for search of buildings and places, but no warrant shall be issued to search a private dwelling occupied as such unless some part of it is used as a store or shop, hotel or boarding house, or for any other purpose than a private residence, or unless such residence is a place of public resort for drinking liquors, or intoxicating liquor is manufactured, sold or furnished therein in violation of the law; provides for seizure of certain chattels when used or believed to be used unlawfully under this act; provides for trial of offenders, for penalties for violation of each and every provision of the act and for the disposition of the fines; prescribes the duties of certain officers; relieves officers of the law from civil or criminal liability for acts done in good faith with or without process of law in enforcing or attempting to enforce the provisions of this act; enlarges the writ of quo warranto giving certain officers including private persons the right to bring action for removal of officers of the law in certain cases; provides for the further prosecution of certain pending actions; repeals the license laws, sections of the local option and regulatory laws and certain other existing statutes."

I, John G. Price, Attorney-General of the State of Ohio, do hereby certify that the foregoing synopsis is a truthful statement regarding the purpose and contents of said House Bill No. 24.

Respectfully,
JOHN G. PRICE,
Attorney-General.

371.

HON. CLINTON COWEN, *State High Commissioner, Columbus, Ohio.*

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN SENECA AND GEAUGA COUNTIES.

COLUMBUS, OHIO, June 6, 1919.

372.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN OTTAWA AND CRAWFORD COUNTIES.

COLUMBUS, OHIO, June 6, 1919.

373.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN MONTGOMERY COUNTY.

COLUMBUS, OHIO, June 9, 1919.

374.

APPROVAL OF DEED FROM STATE OF OHIO TO JONATHAN D. PHILLIPS.

COLUMBUS, OHIO, June 9, 1919.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—

In re J. D. Phillips Deed, Section 16, 1871.

Upon receipt of your recent communication accompanied by letter of Attorney W. B. Brattain, of Paulding, Ohio, this department examined the record of deeds in the auditor of state's office and the legislative acts under which the deed from the state to Jonathan D. Phillips was made on July 21, 1871.

This clearly discloses an error in the recitals of the deed in that the act of congress appropriating land for the support of religion and acts of the General Assembly of the state of Ohio providing for the sale of section 29 were erroneously recited as the authority for executing and delivering said deed, whereas it should have referred to and recited the act of congress relating to the appropriation for the support of schools and the act of the General Assembly of the state of Ohio providing for the sale of section 16.

Further consideration of section 8528 G. C., convinces this department that the error above referred to is such that may be corrected by a proper conveyance under that section, pertinent parts of which are:

> "When, by satisfactory evidence, it appears to the governor and attorney-general that an error has occurred in a deed executed and delivered in the name of the state * * * the governor shall correct such error by the execution of a correct and proper title deed * * * to the party entitled to it, his heirs or legal agents as the case may require."

As stated in the enclosed deed, Albert Kemerer is the present owner of said real estate by virtue of certain mesne conveyances from Jonathan D. Phillips, the original grantee, and his successors in title.

Supplementing the application of said Albert Kemerer made to the auditor of state, as more fully appears in the records of that office, this department required of and received from the present owner an abstract of the land described in the deed showing the chain of title from said original grantee to Albert Kemerer, the grantee in the enclosed deed, which abstract is also certified under the seal of the county recorder of Paulding county, Ohio, and a copy of which is also on file in the office of the auditor of state.

Consistent with the conclusion of this department that the occurrence of the

error above referred to has been proven by satisfactory evidence and agreeable to the provisions of section 8528 and at the request of the auditor of state the enclosed deed has been prepared and is herewith submitted to you with the approval of this department endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

375.

DISAPPROVAL OF CONTRACT BETWEEN OHIO BOARD OF ADMINISTRATION AND S. Q. HENKE & SONS FOR CONSTRUCTION OF DINING ROOM ADDITION, AT OHIO HOSPITAL FOR EPILEPTICS, GALLIPOLIS, OHIO—SECTION 2318 G. C. IN REGARD TO PUBLICATION OF NOTICE FOR PROPOSALS NOT COMPLIED WITH.

COLUMBUS, OHIO, June 9, 1919.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Acknowledgement is made of your letters of June 4 and 5, submitting to me for approval, as per section 2319 G. C. (107 O. L. 455), a contract between your board and S. Q. Henke & Sons, Gallipolis, O. Said contract relates to the construction and completion of a dining room addition to West Hall, at the Ohio Hospital for Epileptics, Gallipolis, O. You have also submitted the bond covering said contract.

I find myself unable to approve the contract in question, because it does not appear, from the data furnished me, that compliance with section 2318 G. C. was had. Said section refers to publication of notice of the time and place when and where proposals for the improvement will be received, and says (107 O. L. 454):

> "The notice shall be published once each week for four consecutive weeks, the last publication to be at least eight days next preceding the day for opening the bids, in such newspaper or newspapers, and in such form and with such phraseology as the state building commission shall order. Copies of the plans, details, bills of material and specifications shall be open to public inspection at all business hours between the day of the first publication and the day for opening the bids, at the office of the auditor of state, and such other place or places as may be designated in such notice."

The state building commission designated the following newspapers in which the required notice was to be published: Ohio State Journal, Columbus; Cincinnati Enquirer, Cincinnati, and the Gallipolis Bulletin, Gallipolis. As to the first two papers named, to wit, the Journal and Enquirer, the requirements of section 2318 G. C. seem to have been met, said notice having been published therein once each week for four consecutive weeks, the last publication being at least eight days next preceding the day for opening the bids.

This cannot be said, however, as to the publication in the Gallipolis Bulletin. The proof of publication as to the notice in this paper shows that said notice "was published in said newspaper weekly for four consecutive weeks, beginning on the 4th day of May, A. D. 1919." If the first publication was not until May 4, 1919, the last publication (assuming that publication was had once each week for four consecutive weeks, as section 2318 G. C. requires) was not until May 25, which day

was not "at least eight days next preceding the day for opening the bids." The bids were opened on the date mentioned in the notice, to wit, May 26, 1919.

While it is not necessary, under section 2318 G. C., that the state building commission designate more than one paper for the publication of the notice, yet the commission may, in its discretion, do so; and when more than one paper *is* designated, the publication in each and all of the papers so designated must be in accordance with the statute just mentioned.

Being of the opinion that the defect just referred to is vital to the validity of the contract, I cannot approve the same.

I return, herewith enclosed, all papers submitted to me in connection with said contract.

Respectfully,
JOHN G. PRICE,
Attorney-General.

376.

DISTRICT HOSPITAL FOR TUBERCULOSIS—QUALIFICATIONS OF SUPERINTENDENT—INTERPRETATION OF "SUITABLE PERSON MEDICAL SUPERINTENDENT" IN SECTION 3153 G. C.

The provision of section 3153 *G. C.* (107 *O. L.* 498) *that the board of trustees of a district hospital for tuberculosis shall appoint a "suitable person medical superintendent," requires that a person be appointed who possesses the qualifications of a person authorized to practice medicine in the state, and who has had experience with tuberculosis.*

COLUMBUS, OHIO, June 9, 1919.

HON. WALTER S. RUFF, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Your letter requesting my opinion as to the qualifications of a medical superintendent of a district hospital for tuberculosis, was duly received.

The appointment of a medical superintendent of a district hospital for tuberculosis, is provided for by section 3153 G. C. (107 O. L. 498), which reads as follows:

> "They (board of trustees) shall appoint a suitable person medical superintendent of the hospital who shall not be removed except for cause, and, upon the recommendation of the superintendent, such nurses and other employes as may be necessary for the proper conduct of the hospital. * * * Subject to the rules and regulations prescribed by the board of trustees, the superintendent shall have entire charge and control of the hospital. * *"

Considering the statute in its entirety, and in connection with all the statutes on the subject of tuberculosis, I am of the opinion, that the legislative intent is, that the medical superintendent must possess the qualifications of a person authorized to practice medicine in the state, and who has had experience with tuberculosis.

This conclusion is strongly evidenced not only by the fact that the person to be appointed must be a suitable person who shall have entire charge and control of the hospital, etc., but also because the appointing power of the board of trustees is limited to the appointment of, first, a medical superintendent, second, such nurses, and third, such other employes, as may be necessary for the proper conduct of the

hospital. Unless the person appointed medical superintendent is a person possessing the qualifications of a person authorized to practice medicine under the laws of the state, and who has had experience with tuberculosis, it would follow that the hospital might in some instances be in charge of persons having no knowledge whatever of medicine or tuberculosis, thus rendering ineffective the very object and purpose for which these hospitals are established. A construction which would sanction such a condition of affairs would, in my opinion, be unreasonable and not within the intent of the general assembly, which undoubtedly had in mind the accomplishment of the most beneficent results possible, and should not be tolerated, in the absence of a clear statutory provision to the contrary.

As before indicated, while the language used by the legislature may not be particularly choice or clear, yet considering the section as a whole, and the entire scheme and object in view in establishing and maintaining a district hospital for the care and treatment of persons suffering from tuberculosis, I am of the opinion that section 3153 G. C. (107 O. L. 498) requires that the board of trustees shall appoint as medical superintendent a person who possesses the qualifications of a person authorized to practice medicine under the laws of Ohio, and who has had experience with tuberculosis.

Respectfully,
JOHN G. PRICE,
Attorney-General.

377.

SECURITIES—EXAMINATION UNDER OATH—APPLICABLE TO VIOLATORS OF CHATTEL LOAN LAWS NOT LICENSED.

The provision of section 6346-4 G. C. relative to examination under oath by the commissioner of securities and his deputy and examiners is not limited to cases involving licensees, but is equally applicable to violators of the chattel loan laws who are not licensed thereunder.

COLUMBUS, OHIO, June 9, 1919.

Department of Securities, Chattel Loan Bureau, Columbus, Ohio.

GENTLEMEN:—Under date of April 10, 1919, you submitted for my written opinion the following inquiry:

> "The Chattel Loan Bureau of the Department of Securities, has, in the past, often found it difficult to obtain evidence which would be satisfactory to a magistrate, against a violator of the Lloyd act (sections 6346-1 to 6346-10 G. C.) when such suspected violator was not a licensee under the bureau, for the reason that we did not think said act granted the Commissioner of Securities or the examiners any right or power to examine the books, papers, etc., of non-licensees or to issue subpoenas and enforce testimony.
>
> It has recently been suggested that the last four words of section 6346-4 do give us authority to subpoena witnesses and possibly to demand free access to books, papers and accounts.
>
> Will you greatly favor us by rendering your opinion as to our rights and powers under section 6346-4, as against non-licensees of this department, whom we may have good reason to believe to be violators of other sections of this act?"

You further advise me in a personal interview that you are only concerned with the application of the provision of the section relative to examination under oath, in respect to alleged violators other than licensees, and not with respect to procedural questions in the carrying of the provision into operation.

The section to which you refer is as follows:

> "The commissioner of securities shall, either personally, or by such person or persons as he may appoint for the purpose at least once a year, and oftener, if he deems it advisable, investigate the business and affairs of every licensee, and for that purpose shall have free access to the vaults, books and papers thereof, and other sources of information with regard to the business of such licensee and whether it has been transacted in accordance with this act. Said commissioner of securities and his deputy and every examiner appointed by him, shall have authority to examine, under oath or affirmation, any person whose testimony may relate to the business of any such licensee or alleged violator herein."

It is provided in section 6346-1 of the act that it shall be unlawful for any person, firm, etc., to engage or continue in the business of making loans as therein stipulated at a charge or rate of interest in excess of 8 per cent. per annum, including all charges, without having obtained a license so to do from the commissioner of securities and otherwise complying with the provisions of the act. It is provided in section 6346-8:

> "Any person, firm, partnership, corporation or association, and any agent, officer or employe thereof, violating any provision of this act, shall for the first offense be fined," etc.

Section 6346-9 provides that the commissioner of securities shall enforce the provisions of the act and make all reasonable efforts to discover alleged violators, etc.

The particular language of section 6346-4 to which you call attention is as follows:

> "Said commissioner of securities and his deputy and every examiner appointed by him, shall have authority to examine, under oath or affirmation, any person whose testimony may relate to the business of any such licensee or alleged violator herein."

Sufficient provisions of the act have been noted to show that the commissioner is charged not only with administering the act with respect to licensees, but also with enforcing its provisions with respect to those engaged in making loans of the character cognizable by the act, at a charge or rate of interest in excess of 8 per cent. per annum without being licensed, and shall make all reasonable effort to discover alleged violators.

I construe the term "violator" as used in this act to comprehend both licensees and nonlicensees engaging in the chattel loan business without observing the requirements of the law, and therefore that the provision for examination under oath or affirmation may be invoked as well in the case of an alleged violator who is not licensed as in the case of a licensee alleged to be violating the law.

This constitutes a determination of your question as limited in your personal interview, and I have confined my consideration accordingly.

Respectfully,

JOHN G. PRICE,
Attorney-General

378.

COUNTY SURVEYOR—COMPENSATION OF ASSISTANTS AND EMPLOYEES—HOW DETERMINED—SECTIONS 2787 AND 2788 G. C. GOVERN—SERVICES RENDERED AT DIRECTION OF TOWNSHIP TRUSTEES CONSTITUTE OFFICIAL DUTIES OF SURVEYOR'S ASSISTANTS—AN EXCEPTION IN SECTION 3298-15k G. C.

The method of providing compensation for assistants and employes in the office of the county surveyor is governed by sections 2787 and 2788 G. C., which sections direct that the county commissioners shall fix an aggregate compensation to be expended for such purpose during the year and further that if an additional allowance is found to be necessary, the same may be granted by the court of common pleas upon proper application therefor; the compensation so authorized to be paid shall be drawn from the general fund of the county.

The services rendered by assistants or employes of the county surveyor in township road improvements at the direction of the township trustees constitute part of the official duties of the surveyor and compensation for such service is governed by the aforesaid statutes subject to the exception provided in section 3298-15k G. C., which authorizes payment of compensation of an inspector on a township road to be paid out of funds available for the construction of the improvement.

COLUMBUS, OHIO, June 9, 1919.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—I have your communication requesting my opinion as follows:

"I have request from the county surveyor in his letter which I am inclosing, with reference to the payment of his assistants in office which from an exhibit shows the appointment of an assistant per diem at $6.00, while working at county work, under section 2787. The county commissioners have not allowed sufficient money to pay the necessary help for the office and the fund will soon become exhausted if the surveyor is required by the township trustees to perform the duties imposed on him by order of the trustees in road improvements, and the work cannot be charged entirely to the improvement and upon collection returned to the salary fund or paid directly to the assistant personally in charge of the improvement.

I have advised the surveyor, Mr. Ford, that all salaries paid for assistants from his office under the provisions of the law must be paid from that fund set aside by the commissioners or appropriated by the court and set aside for that fund, and that the work is chargeable to the improvement and that the return of the collection be to the county treasurer."

The surveyor's letter accompanying your communication reads as follows:

"My regularly appointed engineers are certified on the per diem basis.

The appropriation of the county commissioners is not sufficient for us to handle the work required of us by the township trustees. I would like to know if the engineers thus employed on township work could be paid by townships, requiring their services on road work directly, or whether their services must be paid out of the appropriation and the county reimbursed by the township."

The matter of providing funds for compensation of assistants and employes

of the county surveyor is governed by section 2787 as found in the enactment of 1917 (107 O. L. 79), which section is as follows:

> "On or before the first Monday of June of each year, the county surveyor shall file with the commissioners of such county a statement of the number of all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office for the year beginning on the first Monday of September next succeeding and their aggregate compensation. The county commissioners shall examine such statement and, after making such alterations therein as are just and reasonable, fix an aggregate compensation to be expended therefor for such year. Provided, however, that if at any time any county surveyor requires an additional allowance in order to carry on the business of his office, such county surveyor may make application to a judge of the court of common pleas of the county wherein such county surveyor was elected; and thereupon such judge shall hear said application, and if upon hearing the same said judge shall find that such necessity exists he may allow such a sum of money as he deems necessary to pay the salaries of such assistants, deputies, draughtsmen, inspectors, clerks or other employes as may be required. Notice in writing of such application and the time fixed by such judge for the hearing thereof shall be served by the county surveyor five days before said hearing upon the board of county commissioners of such county; and said board shall have the right to appear at such hearing and be heard upon said application and evidence may be offered both by the county surveyor and the county commissioners."

It is further to be noted that various provisions of the highway law make it the duty of the county surveyor in his official capacity, and as a part of the functions of his office to perform various services in relation to the establishment and improvement of township highways, so that such services so performed by the county surveyor or by his assistants, engineers, etc., are services, the compensation for which is to be made in pursuance of said section 2787 G. C. supra.

Without attempting an exhaustive enumeration of sections conferring duties upon the county surveyor in reference to township road improvements, I might call attention to section 3298-6 authorizing the trustees to order the county surveyor to make surveys, plans, specifications, etc.

Section 3298-15k provides that the road improvements undertaken by the township trustees shall be done under the general supervision and direction of the county surveyor, etc.

Also, similar provisions are made in section 3298-31 and various other sections.

Your inquiry raises the question as to authority for charging to the township the amount of compensation for assistants and engineers of the county surveyor's force when working upon township roads, which inquiry is substantially answered by the provisions of section 2787 and 2788 G. C. which provides for the method of fixing the compensation, and further that

> "after being so fixed, such compensation shall be paid to such persons in monthly installments from the general fund of the county upon the warrant of the county auditor."

One exception to this provision is found, however, in section 3298-15k (107 O. L. 82) which provides:

> "The work shall be done under the general supervision and direction of the county surveyor and he may appoint some competent person or per-

sons to act as inspector during the construction of such improvement. The person so appointed as inspector shall receive for each day actually employed at such work a sum not to exceed four dollars to be fixed by the county surveyor and to be paid out of any fund available for the construction of the improvement upon the order of the township trustees with the approval of the county surveyor."

With this one exception, I find that the compensation of engineers and other assistants of the surveyor for services upon township improvements is payable from the general fund of the county, and there is no provision for charging the same either to the township or against the special fund available for the improvement.

Therefore, since the services rendered by the surveyor's office in connection with improvements made under the direction of township trustees, constitute part of the official duties of the surveyor, and are chargeable against the allowance which may be provided in pursuance of section 2787 G. C., I advise that if the amount fixed and allowed by the county commissioners is found insufficient, the proper course is by way of an application to the common pleas judge for such additional allowance as the duties of the office make necessary.

Respectfully,
JOHN G. PRICE,
Attorney-General.

379.

VILLAGE MARSHAL—COMPENSATION—VILLAGE FIRE CHIEF AND STREET COMMISSIONER COMPATIBLE.

1. *Where a village council, under section 4387 G. C., has not prescribed any additional compensation for the village marshal, such council may validly provide for the payment of regular monthly compensation for such marshal during the term for which he was elected.*

2. *The positions of village fire chief and street commissioner are not incompatible and where the fire chief has also been appointed as street commissioner, he may legally be paid additional compensation for the rendition of his services as such street commissioner.*

COLUMBUS, OHIO, June 9, 1919.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your letter, accompanied by copies of a communication from the village clerk of Geneva, Ohio, and of village resolutions No. 426 and No. 427. It is noted that you request the opinion of this department upon the three questions as stated in your letter.

Question No. 1 is as follows:

"Even though there is no ordinance or resolution fixing compensation for the marshal other than his fees of office, and providing he has received no other compensation than his fees of office, can resolution granting regular compensation of $20.00 per month become legally operative in the midst of the term for which the marshal was elected, this being in addition to the fees of office?"

Section 4219 and 4387 G. C. are pertinent and in part are:

Sec. 4219.—"Council shall fix the compensation * * * of all officers * * * in the village government, except as otherwise provided by law. * * * The compensation *so fixed* shall not be increased or diminished during the term for which any officer * * * may have been elected or appointed."

Sec. 4387.—"He (the marshal) * * * shall receive the same fees as sheriffs and constables in similar cases, * * * *and such additional compensation as the council prescribes.*"

It is to be noted that section 4387 G. C. vests in the city council the power to fix the compensation of the marshal, in addition to the fees he shall receive for services similar to those of sheriffs and constables, and that the inhibition contained in section 4219 is against increasing or diminishing the compensation of any officer "so fixed" during the term for which he was elected or appointed.

In State ex rel. vs. Madigan, 16 O. C. C. (n. s.) 202, a similar question was involved. The Madigan case arose under section 126 of the then Code, which, like section 4219, provided that except as otherwise provided therein, council shall fix the salaries of all officers and employes and that such salary *so fixed* should not be increased or diminished during the term for which such officers were elected or appointed, and it was held in that case that until council *had fixed* the salary, there was no inhibition preventing the council from fixing such salary during the term of an officer. This case is directly in point.

To the same effect was the holding in the case of State ex rel. vs. Carlisle, 16 O. D. N. P., 263, in the opinion of which the court asked and answered this question:

"Would it be constitutional for an incumbent in office, for which no salary or compensation was provided, when his term began, to take the salary enacted for such office after the beginning of his term, but before it ended?"

Here, prior to the enactment of resolution 427, there had been no salary or additional compensation provided for the marshal.

In considering the question which he had asked, Judge Evans quotes with approval Rucker vs. Supervisors, 7 W .Va., 661:

"That in order that a constitutional or statutory provision forbidding the increase or diminution of an officer's compensation should apply to a particular officer's compensation, it is necessary that such compensation should have been definitely fixed before the passage of the statute purporting to make the change."

After citing similar holdings, in other states, Judge Evans also says:

"The reason for the above holding is, that if there is no salary definitely fixed, or if no salary whatever has theretofore been provided, then there is no salary to increase or diminish by an act providing for a salary during an incumbency."

And, consistent with those principles, the court in the Carlisle case held that where a status, providing compensation for county commissioners, had been held invalid so that during the term of the then commissioners of Franklin county there had been no valid provision for compensation, and during their term later valid

legislation provided such compensation, which was an increase over the former amount thereof, such commissioners were entitled to the compensation fixed by such later legislation during their term of office. Without quoting additioal authorities, it is sufficient to state that these cases correctly state the law of Ohio on this subject.

This department is not unmindful of the holding in Griffith vs. Newark, 6 O. N. P., 521, where it was held that the rate which the marshal of Newark could charge for feeding prisoners could not be changed during his term. This case, however, arose under old section 1717 R. S., which was much broader in its terms and prohibited changing the salary, compensation or "the emoluments" of an office, and is not applicable to the present statute.

For the foregoing reasons it is concluded that the act of the village council, as stated in your question, may become legally operative during the term of the marshal.

Your second question is:

> "Are the positions of fire chief and street commissioner compatible?"

A general rule as to the incompatibility of officers may be quoted from L. R. A., 1917-a, page 216, as follows:

> "The settled rule of common law prohibits a public officer from holding two incompatible offices at one time. This rule has never been questioned and its correctness and propriety are so well established as to be assumed, without discussion, in practically every case in which the matter of common law incompatibility arises."

And again, on the same page:

> "When it comes to stating what constitutes incompatibility, the courts invariably evade the formulation of a general definition and content themselves with a discussion of specific cases and the particular facts which, in separate instances, have been looked upon as creating incompatibility."

The general rule in Ohio is stated in State vs. Gebert, 12 O. C. C. (n. s.) 274, 21 O. C. D., 355, to be:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other."

The holding in other cases are to the effect that it must be physically possible for the incumbent to discharge the compatible duties.

The special facts as to the extent and variety of the duties attached to these two offices in this particular village are not stated in your letter. The village council, presumably better acquainted with such duties, by these ordinances indicate their opinion that it is physically possible for one person to discharge the duties of both. For present purposes such opinion is assumed to be correct, and in the absence of such special facts, the question of such possibility is not here considered.

So it appears that the solution of this question lies in a consideration of the duties and functions of these two officers.

As to the fire chief, the laws authorizing the establishment of village fire departments and defining the duties of the marshal, are found in sections 4393, 4389

and 4390, which are found in Chapter 9, entitled "Public Safety." Sections 4393 and 4389 provide:

> *Sec.* 4393.—"The council may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damage and accidents resulting therefrom and for such purposes may establish and maintain a fire department * * * establish the hours of labor of the members of its fire department * * * and provide such by-laws and regulations for the government as is deemed necessary and proper."
>
> *Sec.* 4389.—"In each village having or hereafter establishing a fire department, the head thereof shall be a fire chief, appointed by the mayor for a term of two years, and shall be an elector of the corporation."

It is to be observed that these sections relate to the safety and protection of the property and persons of the inhabitants of the corporation with reference to fires.

As to the powers and duties of the village street commissioner, sections 4363 and 4364 are pertinent. It may also be noted that these sections are found in the chapter entitled "public service," being Chapter 8, and should be read in connection with section 3714 G. C., which provides that municipal corporations "shall have special power to regulate the use of the streets, to be exercised in the manner provided by law." In part section 4363 provides:

> "The street commissioner shall be appointed by the mayor and confirmed by council for a term of one year. * * * He shall be an elector of the corporation. * * * In any village the marshal shall be eligible to appointment as street commissioner."

Section 4364, defining the duties of the street commissioner, provides:

> "Under the direction of council, the street commissioner * * * shall supervise the improvement and repairs of streets, avenues, alleys, * * *. Such commissioner * * * shall also supervise the lighting * * * of all public places, and shall perform such other duties *consistent with the nature of his office* as council may require."

It is to be observed that these sections relate to the use, control and care of municipal property as distinguished from the safety of persons and property of its inhabitants, and that after committing the things therein enumerated to the street commissioner's direction, section 4364 makes provision for council requiring him to perform "such other duties consistent with the nature of his office," and there being ample specific authority for establishment and maintenance of fire prevention agencies in a separate department in sections 4393, 4389 and 4390, it is concluded that the term "other duties" by the rule of *ejusdem generis* relate to other duties of a like character, that is, those relating to public streets and alleys, from which it follows that the duties of the chief of fire department would not be consistent with the office of street commissioner in the sense that council could direct the street commissioner as such to discharge those duties.

It is noted that section 4389 does not define the duties of the fire chief nor are his duties directly defined by other sections.

Section 4393, supra, vests the power in the council to establish a fire department, fix the hours of labor and provide for its government by proper regulations, and the council is thus placed in control of the fire chief.

Consideration of the express purposes for which a fire department may be established and maintained as distinguished from the object and purpose of creating a street commissioner, leads to the opinion that neither of these offices are in any way subordinate to or a check upon the other, and tested by the above cited Ohio rule there is no incompatibility between the two offices and the answer to your second question is in the affirmative.

Your third question is:

> "Since the fire chief was appointed for two years, beginning with 1918, can he legally receive the additional compensation of $15.00 or $20.00 per month as street commissioner?"

Section 4219, supra, contains an inhibition against increasing or diminishing an officer's compensation as fixed by council during the term for which he is appointed or elected.

The conclusion reached as to your second question, viz., that the positions of fire chief and street commissioner in villages are not incompatible, necessarily results in an affirmative answer to this last question, especially as it is to be noted that the additional compensation therein referred to is not paid to the fire chief as such, but is paid by reason of his appointment to another independent compatible office. However, if the facts in this case should be that an ordinance was passed consolidating the two positions, it may be well to call attention to the fact that in State vs. Coughlan, 18 O. D., N. P., 289, and in other cases in Ohio, it has been held that such inhibition has no application where new duties, not germane to an office, are created and it is there held that such compensation may be thus provided for.

Without quoting at length from this case, it is sufficient to quote in part from the first syllabus:

> "Hence, the duties of a member of either board of equalization, not being part of the duties of a county commissioner, as such, and there being no rule of law prohibiting by legislative action extra compensation for additional services performed by an officer in some other capacity, the county is not entitled to recover compensation paid to a county commissioner for services rendered as a member of the county board of equalization."

In State vs. Lewis, 10 O. D., 537, the second branch of the syllabus is:

> "The provisions of section 20, article 2, of the constitution, that the salary of a county official cannot be increased during his term of office, apply only to compensation for duties germane to his office or incidental or collateral thereto, and do not apply to services rendered in an independent employment to which he is appointed by an act of the state legislature."

To the same effect are other decisions of this state, and also that of United States vs. Sounders, 120 U. S., 126. It is noted that these decisions arise under section 20, article 2 of the constitution, but that section, so far as the questions involved are concerned, by analogy has the same force and effect as section 4219 G. C.

By force of the conclusion reached as to your second question, it is concluded that the duties of street commissioner are not germane to the office of fire chief, and, consistent with the authorities above cited, you are advised that the additional compensation referred to in your letter is not within the inhibitions of section 4219 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

380.

Industrial Commission of Ohio, Columbus, Ohio.

APPROVAL OF BOND ISSUE OF VILLAGE OF NORTH CANTON, OHIO, IN SUM OF $12,000.00.

COLUMBUS, OHIO, June 9, 1919.

381.

Industrial Commission of Ohio, Columbus, Ohio.

APPROVAL OF BOND ISSUE OF SANDUSKY COUNTY IN SUM OF $230,000.

COLUMBUS, OHIO, June 9, 1919.

382.

MUNICIPAL CORPORATIONS—CITY DEPOSITORY—ORDINANCE ESTABLISHING SAME AND CONTRACT GIVEN AS TO WHETHER DEPOSITORY OBLIGED TO ACCEPT FOREIGN CHECKS AS CASH ON WHICH INTEREST COMPUTED.

The obligation of a city depository is determined by the provisions of the ordinance establishing the depository and the contracts actually entered into. Whether or not the depository is obliged to accept foreign checks as cash on which interest is to be computed depends upon such provisions.

COLUMBUS, OHIO, June 10, 1919.

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

GENTLEMEN:—Receipt is acknowledged of your letter of recent date enclosing copy of a letter from the Provident Savings Bank and Trust Company of Cincinnati with reference to an opinion of the Attorney-General found in Opinions of the Attorney-General for 1916, Volume 1, page 666. In that opinion it was held, in the language of the head-note, that:

> "When deposits in the form of checks are made by the county treasurer in a depository duly designated by the county commissioners under authority of section 2715 et seq. G. C., and in compliance with the requirements of said sections, and the account of said county treasurer is credited by said depository with such deposits, the same go to make up daily balances on the respective days on which said deposits are made and the average of such daily balances, as shown by the statement which the depository bank is required to furnish the county treasurer on the first day of each month, by provision of section 2737, G. C., determines the basis for the computation of interest provided for in said section."

The vice-president of the Provident Savings Bank and Trust Company submits that this ruling is unfair and that interest ought not to be charged on daily balances until the moneys are actually in the hands of the depository bank. His question relates to the law relative to city depositories, whereas the ruling of the Attorney-General related to county depositories. Moreover, the vice-president inquires:

> "If the law is drawn in such a way that interest starts on the day that the deposit is made and entered in the pass book, * * * would there be any objection if depository banks accept the out-of-town checks for collection only and credit the same when proceeds are received?"

Your question requires consideration of the city depository act with a view to determining whether or not the ruling of the Attorney-General previously referred to applies to that act as well as to a county depository law. It may be said, however, that even under the county depository law the specific question of the vice-president may be answered in the language of the opinion referred to, as follows: (p. 668)

> "It must be conceded, however, that a lawfully designated depository of county funds is not charged by any provision of the statute with the duty of making such collections, and could not be required to accept checks from the county treasurer and credit his account with a sum equal to their aggregate amount in the absence of a provision to that effect in the contract between the county commissioners and the depository. In other words, in the absence of such a provision in the contract, the depository might insist on the county treasurer making cash deposits rather than deposits in the form of checks, and this would place the burden of collecting the same on the county treasurer, and would deprive the county of the interest on the sum represented by said checks during the time the same are being collected.
>
> It has been the practice, however, in so far as county depositories are concerned, for the depository bank to make such collections and credit the county treasurer with the amount represented by checks deposited, on the day on which such deposits are made. It seems to me, in view of this practice, that the bank in question should have taken this situation into consideration at the time of bidding for the county funds and should have governed its bid accordingly. In this way any embarrassment on account of loss to the bank in the respect above mentioned would be avoided.
>
> The plan suggested by Mr. Firestone, i. e., to withhold crediting the county treasurer with a deposit of checks until the same are collected, is unauthorized, and the danger of the abuse of such an arrangement can readily be seen."

These observations in the body of the opinion, together with the main holding itself as abstracted in the head-note above quoted, furnish a complete answer to the question of The Provident Savings Bank and Trust Company, if applicable as well to the city depository law as to the county depository law. That question remains to be decided.

Sections 4295 and 4296 of the General Code govern this subject-matter as to cities. They provide in part as follows:

> "Sec. 4295.—The council may provide by ordinance for the deposit of

all public moneys coming into the hands of the treasurer, in such bank or banks, * * * as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond * * * or secure said moneys by a deposit of bonds * * *."

"Sec. 4296.—In such ordinance the council may determine the method by which such bids shall be received, the authority which shall receive them, and which shall determine the sufficiency of the security offered, the time for the contracts for which deposits of public money may be made, and all details for carrying into effect the authority here given. Proceedings in connection with such competitive bidding and the deposit of money shall be conducted in such manner as to insure full publicity, and shall be open at all times to the inspection of any citizen. As to any deposits made under authority of an ordinance of the council, pursuant hereof, if the treasurer has exercised due care, neither he nor his bondsmen shall be liable for any loss occasioned thereby."

These sections differ from the county law in the following particulars, as evidenced by quotations from the latter law:

"Sec. 2715.—The commissioners in each county shall designate in the manner hereinafter provided a bank or banks or trust companies, situated in the county and duly incorporated under the laws of this state, or organized under the laws of the United States, as inactive depositaries, and one or more of such banks or trust companies located in the county seat as active depositaries of the money of the county. * * *"

"Sec. 2716.—When the commissioners of a county provide such depositary or depositaries, they shall publish for two consecutive weeks in two newspapers of opposite politics and of general circulation in the county a notice which shall invite sealed proposals from all banks or trust companies within the provisions of the next two preceding sections, which proposals shall stipulate the rate of interest, not less than two per cent per annum on the average daily balance, on inactive deposits, and not less than one per cent per annum on the average daily balance on active deposits, that will be paid for the use of the money of the county, as herein provided. * * *"

"Sec. 2736. Upon the receipt by the county treasurer of a written notice from the commissioners that a depositary, or depositaries, have been selected in pursuance of law, and naming the bank or trust companies so selected, such treasurer shall deposit in such bank or banks or trust companies as directed by the commissioners, and designated as inactive depositaries to the credit of the county all money in his possession, except such amount as is necessary to meet current demands, which shall be deposited by such treasurer in the active depositary or depositaries. * * *"

"Sec. 2737. All money deposited with any depositary shall bear interest at the rate specified in the proposal on which the award thereof was made, computed on daily balances, and on the first day of each calendar month, or at any time such account is closed, such interest shall be placed to the credit of the county, and the depositary shall notify the auditor and treasurer, each separately, in writing of the amount thereof before noon of the next business day."

It will be observed that both acts speak of the deposit of "moneys" in the possession of the respective treasurers. They are therefore alike in this particular. They

differ in that the nature of the undertaking of the depository under the county law is completely regulated by law; whereas under the city law the council by its ordinance is to determine in detail the terms of such undertaking. For example, nothing is said in the city law as to the manner of the computation of interest, nor is there anything to prevent a special undertaking for special deposits of foreign checks to be received for collection only. All such matters may be fully regulated by the ordinance of council.

From the foregoing it follows that the previous opinion of the Attorney-General is not necessarily applicable to a city depository, and in fact is only applicable to such depository if the provisions of the ordinance under which bids are received and the contract entered into in accordance therewith are substantially similar to those of the county law as construed by my predecessor.

Upon the merits of the question submitted by the Provident Savings Bank and Trust Company it will be impossible to pass without the other documents referred to herein.

Respectfully,
JOHN G. PRICE,
Attorney-General.

383.

MUNICIPAL CORPORATION—CONSTRUCTION OF DITCH WITHIN CORPORATE LIMITS—LAWS WHICH GOVERN—ASSESSMENTS—HOW MADE.

1. *A municipality has power by virtue of sections* 3647, 3677, 3784 *and* 3939 *G. C. to provide for the construction of a ditch within its municipal limits, upon the plan of its paying the entire cost of the improvement without any assessment against benefited lands.*

2. *Section* 3812 *permits of assessment against benefited lands, subject to constitutional and statutory limitations, of the cost of the improvement of a street or other public place as specified in said section, by the construction of a ditch, whether such ditch be within the limits of the street or public place, or on land specially appropriated for the construction of the ditch.*

3. *Former opinions of Attorney-General referred to in connection with section* 6494 *G. C.*

COLUMBUS, OHIO, June 10, 1919.

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

GENTLEMEN:—Your bureau has submitted for opinion the following inquiries:

"1. What is the proper procedure for a municipal corporation to pursue in constructing a ditch across and through private property?

"2. Does section 3812 of the General Code empower municipal corporations to assess property for the construction of a ditch,

(1) On a public highway,

(2) Across private property?"

With your communication you transmit a letter from Mr. Roland A. Baskin, solicitor for the village of Brook Park, Ohio, in which he states that the inquiries are being made in connection with the desire of the council of that village to con-

struct a ditch across and through private property to drain a certain highway and lowlands lying contiguous thereto. Mr. Baskin states that the impression has prevailed among members of the village council that where the limits of a village are co-extensive with those of a township, the procedure applicable to township ditches may be followed within the village. This question was dealt with in an opinion of this department of date July 11, 1913, Annual Reports of Attorney General, 1913, Vol. 2, page 1650, from which the following is quoted:

> "I, therefore, conclude that when the corporate limits become identical with those of a township, the corporation is confined to its municipal powers in ditch procedure and that individuals residing therein have no powers under the statutes providing for procedure in townships."

Coming, then, to the matter of municipal procedure as to the construction of a ditch across and through private property:

It has been held in previous opinions of this department that municipal corporations are authorized under section 6494 G. C., appearing in the chapter relating to single county ditches, to apply to the county commissioners for the construction of a ditch within the corporate limits. See Opinion of Attorney-General dated December 19, 1912, Reports of Attorney-General for 1913, Vol. 2, page 1085; and see also, opinion of July 11, 1913, supra. However, it should be stated as a matter of information that a bill is now pending in the General Assembly (amended S. B. No. 100), providing for the revision and codification of the ditch laws, and among other things includes the proposed repeal of said section 6494.

A procedure available to a municipality upon the plan of its paying the whole cost of the improvement, without any assessment against benefited lands, may be found by reference to sections 3647, 3677, 3784 and 3939 G. C. The first of these sections is to the effect that the municipality shall have power, among other things, "To open, construct and keep in repair * * * drains and ditches." Section 3677 confers on municipalities special power to appropriate real estate within their corporate limits "For sewers, drains, ditches. * * *" Section 3784 authorizes municipal corporations to levy and collect taxes "for the purposes of paying the expenses of the corporation, constructing improvements authorized, and exercising the general and special powers conferred by law." Section 3939 (Longworth act) provides, among other things, that municipalities may issue bonds "For constructing sewers * * * drains and ditches."

These several sections provide ample power for appropriating the real estate, and procuring the funds necessary for the improvement. The procedure in connection with appropriation of the property and issuing of bonds for such purpose is set forth in the sections immediately following sections 3677 and 3939 respectively. Mr. Baskin refers to section 3888, but an examination of that section shows that it has reference to joint sewer construction by two or more municipalities.

The second inquiry is as to whether section 3812 authorizes municipal corporations to assess property for the construction of a ditch (a) on a public highway, and (b) across private property; and in this connection Mr. Baskin makes the following statement:

> "I am in doubt as to the power of municipal corporations to assess property for the construction of a ditch even where the same is located in a public highway, as section 3812 of the General Code, providing for assessments, does not specifically include ditches, as do sections 3647, 3677 and 3939. Said section 3812 also includes only improvements in or along public streets, etc., and not improvements constructed through private property."

Said section 3812, as amended 107 O. L., 629, reads in part as follows:

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost and expense connected with the improvement of any street, alley * * * by grading, draining * * * constructing sidewalks, * * * sewers, drains, water courses * * *"

It thus appears that while, as suggested by Mr. Baskin, said section does not contain the word "ditch" as do the other specified sections of the Municipal Code, yet it does permit assessment for expense incurred in improving a street or other public place by "draining" and by "constructing sewers, drains, water courses." Is this difference in the wording of the statutes to be taken as indicating a legislative intent that section 3812 should not permit of assessment by municipalities for ditch construction?

Webster's Dictionary defines "drain" as

"That by means of which anything is drained; a channel; a trench; a watercourse; a sewer; a sink."

In 14 Cyc. 1023, the following appears as a definition:

"A drain is an artificial channel or trench through which water or sewage is caused to flow from one point to another; a ditch; or as sometimes defined by statute, an open ditch."

On the other hand, in 14 Cyc. 552, a ditch is defined as follows:

"A drain; a hollow space in the ground, natural or artificial, where water is collected or passes off."

In section 6442 G. C. relating to single county ditches, the following is found:

"The word 'ditch' as used in this chapter shall be held to include a drain or water course."

It would therefore appear that the intent of the legislature in using the expression "sewers, drains and ditches" in certain sections of the Municipal Code, and the expression "by draining and constructing sewers, drains and water courses" in said section 3812, was in both instances to confer general powers of drainage improvement, rather than to limit the municipality to particular types of improvement. In any event, it is quite clear that the words "ditch" and "drain" are practically synonymous, and that if there be any difference between them, the word "drain" is the broader term and includes "ditch." It is therefore concluded that section 3812 authorizes assessment for a ditch constructed on a public highway.

The remaining inquiry, * * * whether section 3812 permits of assessments against benefited property for construction of a ditch on private property—would, if answered in terms, probably have to be answered in the negative, since the municipality has no right to construct an improvement through private property. (See Harbeck vs. Connelly, 11 O. S., 227; Baker vs. Norwood, 22 O. C. C. 173). However, it is assumed that the inquiry has relation to the point whether there is any way open to the municipality of first securing title to the land necessary for a ditch and then assessing the cost of construction against benefited lands. From that standpoint it may be said that it is well understood that in practice the work of im-

proving a street or public place cannot always be confined to the limits of the street or public place itself. Hence, we find in section 3677 power conferred on municipalities to appropriate real estate "for opening, widening, straightening, changing the grade of and extending streets * * * and for obtaining material for the improvement of streets and other public places;" and we also find in the same section like power to appropriate "for sewers, drains, ditches." Assuredly, the conferring of this latter power would be a vain thing had it not been contemplated that sewers, etc., would in some instances extend beyond street limits. True enough, as Mr. Baskin suggests, section 3812 relates to the improvement of streets or public places; but the theory of assessments is that in improving the street or public place, benefit will result to adjoining lands. It is not perceived how the improvement of a street by the construction of a ditch is any different in principle, so far as assessments are concerned, than improvement by paving, constructing sidewalks, sewers, etc. However, it has been held that in calculating for assessment purposes the cost of such improvements, the compensation and damages incurred by reason of an appropriation are not to be included. In the case of City of Dayton vs. Bauman, 66 O. S. 379, the following appears in the statement of the case:

> "None of the lots or lands of Mr. Bauman were appropriated, but an assessment was made on his lots for the payment of compensation, damages and costs awarded to others whose lots had been appropriated for the extension of said streets. He enjoined the city and proper officers from enforcing the assessments, and the circuit court having decided the case in his favor, the city came here on error, seeking to reverse the judgment below."

The court holds, as shown by the first syllabus:

> "The limitation of section 19 of article 1 of the constitution on section 6 of article 13 as to assessments, goes to the full extent of prohibiting the raising of money directly or indirectly by assessment to pay compensation, damages or costs for lands appropriated by the public for public use. Railway Co. vs. Cincinnati, 62 Ohio St., 465, approved and followed."

Therefore, the inquiry under consideration may be answered by the statement that if the municipality proceeds to improve a street by constructing a ditch, and provides at its own expense the right of way necessary for such ditch, it may by virtue of section 3812 assess for such ditch even though the same is not within the street limits.

Of course, the power of assessment is subject to certain constitutional and statutory limitations, which find general expression in section 3819 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

384.

WHAT CONSTITUTES A VIOLATION OF SECTION 12911 G. C.—OFFICER OF TRUST PROHIBITED FROM BEING INTERESTED IN ANY CONTRACT OF A POLITICAL SUBDIVISION—EXCEPTIONS.

Under section 12911 *an officer of trust is prohibited from being interested in any contract for purchase of property by a county or other political subdivision*

or a public institution with which he is not connected, if the amount of such contract exceeds the sum of $50.00, *unless the contract is let on bids advertised according to laws requiring such contracts to be advertised.*

COLUMBUS, OHIO, June 10, 1919.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your letter dated April 30, 1919, as follows:

> "In view of the fact that considerable discussion has arisen by and between several officers of the department of auditor of state, and we have been unable to agree, we are respectfully submitting the question to you for written opinion.
>
> In doing so we respectfully call your attention to the following opinions of the Attorneys-General:
>
> Opinion of July 25, 1916, Annual Reports for 1916, page 1275;
>
> Opinion of April 4, 1912, Annual Reports for 1912, page 1238;
>
> Opinion of September 12, 1914, Annual Reports for 1914, page 1201.
>
> The contention in our office is for the following reason: There are two constructions claimed for this section: One is that the limitation generally applies to all purchases in excess of $50.00; and the next following words are merely an exception to the rule permitting the officer in question to bid and have a contract where public bidding is required by the law and the letting had pursuant to such law. The other contention is that a strict construction of this criminal statute would make the inhibition only in cases where the statute provided for advertising and bidding because of the general text and the use of the qualifying words 'as provided by law.' The department is in doubt, and anticipating the possibility of the question being judicially raised would like to be fully advised as to the correct construction. Therefore, we respectfully request your written opinion upon the following matter:
>
> (1) Does section 12911 G. C. only apply in such cases where advertising for bids is demanded by statute, or does such section apply in any contract exceeding $50.00 wherein the statute does not provide for advertising and competitive bid?
>
> To bring out a concrete case:
>
> (2) May a common pleas judge legally sell the county commissioners an automobile for the sum of $300.00, such sale being made without advertisement or competitive bidding?"

Sections 12910 and 12911 G. C. are pertinent. The former section prohibits an officer or public agent from being interested in public contracts for the purchase of property, supplies or fire insurance for the use of a political subdivision, or, as stated therein, "a public institution *with which he is connected,*" and as punishment therefor provides a penalty of from one to ten years imprisonment in the penitentiary.

Section 12911 G. C. in part is:

> "Whoever, holding an office of trust * * * is interested in a contract for the purchase of property, supplies or fire insurance, for the use of the county, * * * or a public institution *with which he is not connected,* and the amount of such contract exceeds the sum of fifty dollars,

unless such contract is let on bids duly advertised, *as provided by law,* shall be imprisoned in the penitentiary not less than one year nor more than ten years."

These sections had their beginning in the acts found in 73 Ohio Laws, pp. 31, 43 and 86, which prohibited the officers and employes of the Ohio Soldiers' and Sailors' Orphans' Home, the Ohio penitentiary and the hospitals for the insane, respectively, from being interested in any contracts or purchases made for and in behalf of those institutions and by the terms of those sections applied only to the trustees or employes.

In 1900 (94 O. L., 391), by enacting section 6969 R. S., the same provisions were carried into the general crimes act and the application of the statute was extended so as to embrace all officers elected or appointed to any office of trust or profit in the state.

Section 6969 R. S., as then enacted, provided:

"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 contract for the purchase of 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. And it shall be unlawful for any such person, agent, clerk, servant or employe to become interested in any contract for the purchase of property, supplies or fire insurance for the use of any county, township, city, village, hamlet, board of education or public institution with which he is (not) connected when the amount of such contract exceeds the sum of fifty dollars, unless the contract is let on competitive bids, duly advertised as provided by law. Any person violating the provisions of this act shall be imprisoned in the penitentiary not more than ten years nor less than one year."

This section retained its original form without amendment until February 14, 1910, the time of the passage of the act adopting the codification of the committee appointed by the General Assembly for that purpose.

In the General Code, then adopted, section 6969 R. S. was, with changes which are immaterial to the question herein concerned, divided into what is now section 12910 and 12911.

It is to be observed that section 12910 relates to the officers being interested in contracts with the political subdivision or public instruction with which they are connected, while section 12911 relates to such interest in contracts with such political subdivision and institutions with which the officer or employe is not connected. It may also be observed that these are criminal statutes and as such must receive a strict construction, consistent, however, with carrying out their manifest purpose.

These sections have previously received the attention of this department, especially in opinions rendered in 1912, Volume II, Annual Report of Attorney-General, page 1238, and Volume II, 1914, page 1201, and Volume II, 1916, page 1275.

In the 1912 opinion the question of the legality of a deputy state supervisor furnishing fire insurance to the county commissioners on county property was considered and the conclusion reached, as stated on page 1239, supra, is:

"In the opinion which I have herewith enclosed, I have construed the question of fire insurance in reference to the amount of such contract to relate to the premium * * * and that, therefore, if the premium on a policy exceeds the sum of fifty dollars, *the contract must be let on bids duly advertised as provided by law.*"

In the 1914 opinion the facts were that a member of a city board of education contracted to furnish coal to municipal corporation which was the city in which a part of the city school district was located, and the conclusion reached in that opinion may be shown by quoting the last paragraph as follows:

"This statute prohibits interest on the part of an officer of trust in a contract for the purchase of property or supplies for the use of a city with which he is not connected, when the contract amounts to more than fifty dollars and when the same is not let on bids duly advertised as provided by law. * * * If the amount of the sale exceeds fifty dollars, therefore, and if the contract was not let on bids duly advertised *as provided by law,* the facts presented will constitute a violation of this statute."

The 1916 opinion raised the question of the legality of a deputy state supervisor of elections writing insurance on county and city property and furnishing bonds for the county, city and state officials.

The Attorney-General in that opinion concluded (No. 1276 supra) that:

"A member of the board of * * * elections holds an office by appointment of both trust and profit. He is, however, a state officer and is not therefore 'conected with' any political subdivision in the sense the same is used in sections 12910 and 12911 G. C."

And again, on the same page, it is stated:

"A member of a firm is necessarily 'interested in' the business transacted by the firm. It follows, therefore, that if such firm makes any contract for furnishing fire insurance, the premium of which amounts to more than fifty dollars, the member of said firm, who is also a member of the board * * of elections, would become liable to prosecution and conviction under said section 12911 G. C. unless such contract is let on bids duly advertised *as provided by law.* I might add that I know of no provision in law for advertising and receiving bids for fire insurance."

It is to be noted that in each of these opinions the guilt or innocence of the official seems to turn entirely on the question whether the contract was let on bids "duly advertised as provided by law" without special consideration, unless it be in the last of these opinions, to the question of whether such last quoted part of section 12911 is of itself a mandate that such contracts, that is, between an officer or agent and such political subdivision or public institution, with which he is not connected, shall be *"duly* advertised as provided by law," or whether those provisions mean to make it a criminal offense for the official or agent to be interested in such a contract unless the contract is let on bids which are duly advertised according to or as provided by *other laws* requiring such procedure in making that kind of a contract. In other words, it is suggested that the key to the proper construction of this section lies in ascertaining the meaning of the words "unless such contract is let on bids duly advertised as provided by law."

The Attorney-General, in the opinion last quoted, stated:

"I know of no provision in law for advertising and receiving bids for fire insurance."

It may be observed that as to the purchase of an automobile, as stated in your letter, this department is aware of no statute requiring the commissioners to advertise and receive bids and it may be stated that as to such contract of purchase there is no procedure "provided by law" and such advertisement would not be necessary unless it is made so by section 12911. If the latter part of section 12911 had provided that the interest in such contracts were punishable unless the contract was let in a manner therein provided, there would be little left to construction, but it saw fit to require such contracts to be let in a manner "as provided by law."

It has been already stated herein that there is no such manner provided by law for purchases of the kind suggested in your concrete illustration.

It may be argued that the words "provided by law" relate only to the manner and method of such advertisement and that the rest of the sentence, of which these words are a part, specifically provides that the contract shall be duly advertised.

If we adopt this theory, then we must turn to other statutes for a method of duly advertising, which it is suggested must provide a general standard of method and procedure for advertising contracts of cities, townships, counties, villages, boards of education or public institutions. Without citing all of the statutes relating to the various contracts which must be advertised, it is sufficient to say that the law provides no such standard or general method for advertisement. Of course, there are many statutes providing especially for advertising in connection with certain contracts, wherein the details of the method of advertising is defined, but the nearest approach to a general provision is section 6252, which in effect provides that notices (including notices to contractors) shall be published "in two newspapers of opposite politics at the county seat." But this section does not provide for the number of times the notice shall be published and is apparently a further provision for the publication of those notices which are made necessary under other laws.

It may then be added that there is no provision in law requiring the advertisement of the particular contract of purchase contained in your question, nor is there any general provision relating to all such contracts which may be used as a standard for complying with this section, requiring such bids to be duly advertised as provided by law.

To make this statute enforcible, it is certain that whichever horn of the dilemma is chosen, there must be some definite legal method of advertising such contracts provided before it could correctly be said that it was "provided by law." As above indicated, no such method has been provided unless section 12911 is self-sufficient and self-executing by reason of its terms "duly advertised as provided by law." This, to say the least, is very doubtful.

The phrase "as provided by law" has been defined as synonymous to "according to law." In 5th Corpus Juris, 597, defining "as," we find:

"Like; similar to; of the same kind; in the same manner."

Thus in Dawson vs. State, 38 O. S., p. 3, it is held:

" 'according to law' embraces statute law in force during the term of office, whether passed before or after the execution of the bond."

The Dawson case was an action on an official bond conditioned for the faithful discharge of official duties "according to law," and, as above indicated, that phrase was held to include the statute law of the state then in force.

To the same effect are the authorities cited in Corpus Juris, Volume I, page 585.

In the case of In Re Okkots, 9 Hawaiian, page 402, a question similar to the one under consideration was considered in an application for a writ of habeas corpus. Section 37, subdivision 8, of an act of 1892, applicable to the judicial department of Hawaii, provided that circuit judges should have power "to issue writs of habeas corpus *according to law.*"

It was contended by counsel for the petitioner, as stated in the opinion, page 403:

> "that this act gives to the circuit judges the discretionary power formerly exercised by the supreme court justice, and that the words 'according to law' relate to the *procedure or manner,* and not to the class of cases, provided by law. For otherwise it is argued, why repeat or affirm such restrictive legislation? We cannot agree with counsel."

The court in that case further holds with reference to the effect of such a phrase, at page 404:

> "The insertion in the act of 1892 of the phrase 'according to law' does not indicate an intention to alter the law. It rather indicates a contrary contention."

The same general effect is reached in the conclusion of Chester, etc., Co. Marshall, 40 S. C., 59; 18 S. E., 247.

Consideration of section 12911, in the light of the foregoing decisions results in the conclusion of this department that there is no provision in law for advertising for bids for a purchase, as stated in what is termed a concrete case in your letter, from which it follows that the exception of conditions upon which the person holding an office of trust may be interested "in a contract for the purchase of property, supplies or fire insurance," as provided in section 12911, for the political subdivision or public institution with which he is not connected, viz., that the contract therefor "is let on bids duly advertised, *as provided by law,*" does not apply because no provision in law being made for such advertisement the contract could not bet let on bids duly advertised as provided by law.

It must be noted that the particular thing which it is sought to prevent in this section is the interest in such contracts on the part of officers of trust and the first part of the section is an outright prohibition of such interest, the only exception to which prohibition is found in the latter part of the section. Under this exception if such contract be advertised *as provided by law,* the officer may legally be interested in such contract. In all others, as for example where there is no provision for so advertising, he is prohibited from having any interest.

Consistent with the above conclusion, the question involved in your concrete case may be answered in the negative with the further observation that no provision in law for competitive bidding, after advertisement in such case, being made, the further fact that it was advertised or not would not affect the question, as under the laws applicable to such sales and on the facts stated by you, section 12911 prohibits such official from being interested in such purchase, even if an unauthorized or unprovided for advertisement is made.

Respectfully,

JOHN G. PRICE,
Attorney-General.

385.

COUNTY JAIL BUILDINGS—COUNTY COMMISSIONERS HAVE AUTHORITY TO PROVIDE LIVING QUARTERS FOR COUNTY JAILER IN ERECTION OF SUCH BUILDING.

In the erection of a county jail building, under section 2419 G. C., the county commissioners have authority to provide living quarters for the county jailer therein.

COLUMBUS, OHIO, June 10, 1919.

HON. LOUIS H. CAPELLE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for the opinion of this department as follows:

> "The county commissioners of Hamilton county have received a request from the sheriff that living quarters be provided for the county jailer in the jail building of the new court house now nearing completion. Some time past State Examiner Bliss of the state bureau of uniform accounting, made a finding in this county opposing the quartering of the jailer and his family in the jail building, and we are desirous of ascertaining whether or not there is authority for providing living quarters for the jailer in the new court house building. An opinion from your department has been requested by the county commissioners of this county and we have been directed to transmit their request to you."

Your letter in reference to this request dated May 17, 1919, has also been received and considered.

It is also noted you state that you find no direct authority for providing living quarters in the jail building of the new court house, but that the decision in the case of State of Ohio on relation of L. B. D. G. & N. Ry. Co. vs. N. W. Toan, auditor, 13 O. C. C. (n. s.) 276, rather supports the opposite view.

Article X, section 5, of the constitution of Ohio, and sections 2419, 3157, 3161, 3177 and 3178 G. C. are applicable.

Section 2419 G. C., as amended in 106 O. L., 423, provides:

> "A court house, jail, * * * offices for county officers, * * * shall be provided by the commissioners when, in their judgment, they, or any of them, are needed. Such buildings and offices shall be of such style, dimensions and expense as the commissioners determine."

Section 3157 is:

> "The sheriff shall have charge of the jail of the county, and all persons confined therein, keep them safely, attend to the jail and govern and regulate it according to the rules and regulations prescribed by the court of common pleas."

Section 3161 provides:

> "The sheriff may appoint one of his deputies to be the keeper of the jail."

Section 3177 provides in part:

> "The county commissioners, at the expense of the county, shall pro-

vide suitable means for warming the jail and its cells and departments, frames and sacks for beds, * * * bed clothing, washing, nursing when required, and such fixtures and repairs as are required by the court. They may appoint a physician for the jail, at such salary as is reasonable, to be paid from the county treasury."

Section 3178 provides:

"The sheriff may appoint not more than three jail matrons, * * * and the commissioners shall provide suitable quarters in such jail for the use and convenience of such matrons while on duty."

Section 5, Article X, is:

"No money shall be drawn from any county or township treasury, except by authority of law."

It is at once apparent that no express authority is given in these statutes to the county commissioners to provide living quarters for the jailer and such authority, if found at all, must be found in the clear and necessary implication arising from the express authority to provide a jail, concerning which it is to be noted that such jail "shall be of such style, dimensions and expense as the commissioners determine," as provided in section 2419 G. C.

Other sections of the laws relating to the care, custody and control of inmates of the jail, however, shed some light on the question of what the legislature had or may have had in mind in providing for jails and jailers without specifically indicating that such jailer could or should reside in such jail in quarters provided for him.

Without quoting at length from these statutes, it is sufficient to say that Chapter 5, the title of which is "Jails," in sections 3157 and 3180 G. C., specifically define the duties of the jailer with respect to the custody of the inmates.

In this connection the character of the detention, the class of persons detained and the purposes of their detention may be considered in deciding whether or not the legislature contemplated the constant presence of the jailer at the jail.

Consideration of these matters leads this department to the conclusion that the legislature in placing the sheriff in charge of the jail, and authorizing him by section 3161, supra, to appoint one of his deputies as keeper of the jail, contemplated that such sheriff or deputy should be in constant attendance or in close proximity to the inmates with whose detention and custody he is charged by law. This is further strengthened by that part of section 2419 which vests in the commissioners full discretion as to the size, style and expense of such buildings.

There is no specific authority in these statutes for the sheriff to occupy rooms in the jail building as his residence, but this is a common practice throughout the state, sanctioned by the courts, as indicated by the opinion in the Toan case, supra, as follows:

"It is true that in most counties the jail buildings are so built as to furnish a residence for the sheriff, and so far as our opinion goes, in no county is the sheriff expected to pay anything as a rental for the building he occupies."

The authority to provide such quarters for the sheriff seems necessarily implied in consideration of the character of the services required and responsibilities

placed upon the county sheriff and the same rule is applicable to the deputy appointed by the sheriff as jailer.

It is therefore concluded that the county commissioners, in the erection of a jail building, have implied authority to provide living quarters for the county jailer therein.

Your letters refer to the jail as "the jail building of the new court house now nearing completion." From this it is inferred that the jail building to which your question relates is a county jail, as provided for by section 2419 supra, and this opinion is based entirely upon that inference.

Respectfully,
JOHN G. PRICE,
Attorney-General.

386.

DISAPPROVAL OF BOND ISSUE OF DOVER TOWNSHIP RURAL SCHOOL DISTRICT IN SUM OF $8,500.00—COAL BILL NOT A REFUNDING OBLIGATION BY STATUTE.

COLUMBUS, OHIO, June 10, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

RE: Bonds of Dover Township Rural School district in the amount of $8,500, being 8 bonds of $1,000 each and 1 bond of $500.

GENTLEMEN:—I have examined the transcript of the proceedings of the board of education and other officers of Dover Township Rural School district, relating to the above bond issue, and hereby decline to approve the same.

The transcript recites that the bonds under consideration are refunding bonds issued for the purpose of paying certain indebtedness to banks for money borrowed from such banks to pay teachers' salaries, janitors' compensation and bills for coal and other supplies. The transcript does not indicate what portion of these obligations were incurred for each of the above named purposes.

Assuming that the teachers and janitors were legally employed, their salaries and compensations are valid debts which may be refunded. Sec. 5661 G. C. The board of education, however, was without authority to contract for coal and other supplies, unless the money therefor was in the treasury and set apart for the payment thereof. Sec. 5660 G. C.

Since the board is only authorized to refund legal obligations and since a part of the obligations, according to the recital of the transcript, is for coal and other supplies and hence incurred without legal authority, I decline to approve the issue.

If the board of education will amend its bond-issuing resolution, and limit the issue to an amount sufficient to pay obligations incurred in paying teachers' salaries and janitors' compensation, I am of the opinion that such bonds will be valid and binding obligations of the district and will approve the same.

Respectfully,
JOHN G. PRICE,
Attorney-General.

387.

APPROVAL OF BOND ISSUE OF GUERNSEY COUNTY IN SUM OF $60,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 12, 1919.

388.

DISAPPROVAL OF BOND ISSUE OF GENOA TOWNSHIP RURAL SCHOOL DISTRICT, DELAWARE COUNTY, OHIO—INTERPRETATION OF SECTION 4751 G. C. AS TO NOTICE—PROPER DETERMINATION UNDER SECTION 7625 G. C.—WHAT MUST BE INCORPORATED IN RESOLUTION SUBMITTING ISSUE OF BONDS—CANNOT LATER MAKE CORRECTION.

1. *Section 4751 of the General Code seems to require that notice of a called meeting of a board of education be given in writing as therein provided, whether the board has previously adjourned to meet at the call of the president or not.*

2. *A determination "that for the proper accommodation of the schools of the district it is necessary to purchase a site and to erect a school house," etc., is a jurisdictional prerequisite to the valid issuance of bonds under sections 7625 et seq. by a board of education.*

3. *The jurisdictional findings and determinations required to be made by section 7625, if not incorporated in the resolution submitted the question of the issuance of such bonds to the electors, cannot be supplied by later correction of the minutes of the meeting at which the same is adopted after the election has been held.*

COLUMBUS, OHIO, June 13, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE: Bonds of Genoa Township Rural School District, Delaware county, Ohio, in the sum of $32,000, for the purpose of providing funds to purchase a site and building and equipping a centralized school in said school district.

I have examined the transcript of the proceedings of the board of education of Genoa Township Rural School district in the issuance of the above described bonds, and find myself unable to approve them as an investment by the Industrial Commission, for the following reasons:

(1) The meeting of the board at which the preliminary resolution providing for the submission to the electors of the question of issuing the bonds was not a regular meeting of the board. Two members of the board were not present at the meeting.

Attached to the transcript is the following acknowledgment:

"Westerville, Ohio, May 20, 1919.

"I hereby acknowledge that I received notice of a called meeting of the Genoa Township School Board in ample time held March 21, 1919."

This acknowledgment is signed by the two members whom the transcript shows to have been absent from the meeting of March 21, which was the meeting at which the resolution above referred to was adopted.

If the meeting of March 21 be regarded as a special meeting the acknowledgment does not show compliance with section 4750 of the General Code, which provides in part that:

> "* * * No meeting of a board of education, not provided for by its rules or by-law, shall be legal, unless all the members thereof have been notified, as provided in the next section."

Section 4751 G. C. provides that:

> "A special meeting of a board of education may be called by the president or clerk thereof or by any two members, by serving a written notice of the time and place of such meeting upon each member of the board either personally or at his residence or usual place of business. Such notice must be signed by the official or members calling the meeting."

It will be observed that the "special" meeting referred to in section 4751 is a called meeting. The meeting of March 21, 1919, was also a called meeting; but it happens that the call was authorized by the adjournment of the previous meeting of March 10, 1919, which was in turn an adjournment of the regular meeting of March 4, 1919. The following excerpts from the transcript will show the relation of these three meetings:

> "March 4, 1919.
>
> The board adjourned to Monday, March 10, at one o'clock p. m."
>
> "March 10, 1919.
>
> The board adjourned to the call of the president."
>
> March 21, 1919.
>
> The board of education met this day at two p. m., pursuant to the call of President Fisher."

I do not believe that the requirement for special notice which is embodied in section 4751 can be avoided by adjourning to meet at the call of the president. Such a meeting is not an adjourned meeting in the proper sense, as would be, for example, the meeting of March 10, which was a continuation of the previous meeting by reason of that meeting having been adjourned to an hour and day certain. Section 4751 provides expressly how meetings shall be called by the president. There is no showing that its provisions were complied with.

The facts presented here have not been passed upon by any court, though in State ex rel. vs. Evans, 90 O. S. 243, at pages 250 et seq., a meeting which, in the language of Wanamaker, J., "might be considered either an adjournment of the regular meeting or a special meeting" was held to be a legal meeting because "proper notice was given to each and every member of the board, agreebly to the statute."

At all events the facts regarding the nature of the meeting of March 21, 1919, are such as to raise in my mind considerable doubt as to its legality.

(2) Another and more certainly fatal defect which the transcript shows lies in the character of the resolution submitting the proposition of issuing bonds to the people. The minutes of March 21, 1919, show the passage of the following:

> "Resolved by the board of education, etc., * * * that there be an

election held in said school district on the 23d day of April, 1919, to consider the question of the bond issue in the sum of $32,000.00, for the purpose of building and equipping a new school house as provided by the General Code of Ohio."

The minutes of the same meeting show a resolution that

"a copy of these resolutions be certified to the clerk of the board of elections of Delaware county, Ohio," etc.

Presumably the resolution as above quoted was the resolution certified to the board of elections.

This resolution is insufficient under section 7625 G. C., which requires a determination

"that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a school house or houses, etc., * * * that the funds at its disposal or that can be raised under the provisions of sections seventy-six hundred and twenty-nine and seventy-six hundred and thirty are not sufficient to accomplish the purpose and that a bond issue is necessary."

This department has frequently held that these findings and determination are jurisdictional.

An attempt seems to have been made to supply the deficiency here by resolution adopted on May 20, 1919, purporting to correct the minutes of March 21, 1919, as follows:

2. "Whereas the minutes of this board dated March 21, 1919, are incomplete. Therefore, Be it Resolved, that they be corrected to read as follows:

As the funds at the disposal of this board of education or that can be raised from section 7629 and 7630 G. C., are insufficient to build and equip a new school house, that an election be held, etc."

Even with these additions one of the findings required to be made by section 7625, viz.:

"that for the proper accommodation of the schools of such district it is necessary to purchase a site * * * to erect a school house * * *"

is lacking. However, I do not believe that it is possible to correct the proceedings in this manner. An election has already been held and, so far as the trancript shows, in pursuance of a resolution passed on March 21, 1919, and correctly shown on the minutes thereof. In other words, there is nothing in the action of May 20 to show with certainty that the resolution shown on the minutes of March 21 was not the resolution passed by the board and certified to the board of deputy state supervisors of elections. If such were the fact and the resolution as actually passed and certified was the resolution shown by the minutes of May 20, I would still have to hold, as previously stated, that such proceedings are illegal and fatally defective because of the failure to incorporate a determination as to the necessity of the purchase of a site or the erection of a building for the proper accommodation of the schools.

Respectfully,
JOHN G. PRICE,
Attorney-General.

389.

APPROVAL OF CONTRACT BETWEEN THE FRANKLIN ASPHALT PAVING COMPANY AND BOARD OF TRUSTEES OF OHIO STATE UNIVERSITY FOR CONSTRUCTION OF NEIL AVENUE DRIVEWAY.

COLUMBUS, OHIO, June 13, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between The Franklin Asphalt Paving Company and The Board of Trustees of Ohio State University for the construction and completion of the Neil avenue driveway, from the oval to Woodruff avenue, on the Ohio State University campus.

The contract calls for payment to the contractor on the unit basis, of a sum not to exceed $18,842.85. You have also submitted the bond securing the performance of said contract.

Having received from the auditor of state a certificate that there is money available for the purpose, and finding said contract and bond to be in compliance with law, I have approved the same.

I am this day filing said contract and bond with the auditor of state and am herewith returning to you all other data not necessary to be so filed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

390.

APPROVAL OF LEASE FROM NETTIE HIGHLANDS TO BOARD OF AGRICULTURE OF OHIO.

COLUMBUS, OHIO, June 13, 1919.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—

RE—Highlands lease.

The lease from Nettie Highlands, et al., to the Board of Agriculture of Ohio, for 56/100 of an acre of land in Hamilton county, formerly submitted to this department for its approval and by it referred back for correction, in its correct form has been received by this department.

Consideration of section 1390 (107 O. L., 486) and section 1460 (107 O. L., 490) of the General Code, convinces this department that the uses and purposes for which this leasehold is required, to wit, to obtain land for and establish a fish hatchery, is within the authorized uses and purposes provided for in these sections.

Section 1390 G. C. provides:

> "The secretary of agriculture shall have authority and control in all matters pertaining to the protection, preservation and propagation of * * fish within the state * * * and in and upon the waters thereof. He shall * * * establish fish hatcheries and propagate fish therein or in any other manner for the waters of the state, and, so far as funds are pro-

vided therefor, shall adopt and carry into effect such measures as he deems necessary in the performance of his duties."

Section 1460 provides that all

"fines, penalties and forfeitures arising from prosecutions, convictions, * * under this act * * * shall be paid * * * into the state treasury to the credit of a fund which shall be appropriated biennially for the use of the secretary of agriculture."

It further appears, from personal conference, that the land described in the within lease is leased for and to be used as a fish hatchery and it further appears that available funds for the payment of the rental in said lease is available from the appropriation for uses and purposes—fish and game division, board of agriculture of Ohio—as evidenced by the auditor of state's certificate hereto attached.

Examination of the laws applicable to such matters and the purpose and form of the lease therefor, leads this department to approve said lease, which, with the approval of this department endorsed thereon, is herewith enclosed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

391.

OFFICES COMPATIBLE—COUNTY RECORDER—MAYOR OF CITY.

The offices of county recorder and mayor of a city or village are not incompatible and may be held by one and the same person, if it is physically possible for one person to perform the duties of both offices.

COLUMBUS, OHIO, June 13, 1919.

HON. PHIL. H. WIELAND, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Your letter of May 29, 1919, reads as follows:

"I wish to submit to your office the following question:

Are the offices of county recorder and mayor of a city or village incompatible?"

I know of no constitutional or statutory provision which forbids the mayor of a city or village to act as county recorder, although the legislature has seen fit to forbid the mayor to act as deputy sheriff. See section 2830 G. C.

You will notice that the office of mayor of a city or village is not mentioned in section 11 G. C., reading thus:

"No person shall hold at the same time by appointment or election more than one of the following offices: Sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, probate judge, and justice of the peace."

The further question arises whether the offices of county recorder and mayor are regarded as incompatible by the common law.

The case of State ex rel. vs. Gebhart, 12 O. C. C. (N. S.) 274, is frequently cited as containing a succinct statement of the common law rule as to incompatibility of offices. That case says:

> "Offices are considered incompatible when one is subordinate to or in any way a check upon the other, or when it is physically impossible for one person to discharge the duties of both."

I am unable to see that either of the offices in question is subordinate to or in any way a check upon the other. Whether it is physically possible for one person to discharge the duties of both is a question of fact. Assuming it is so possible, you are advised that the office of county recorder and mayor of a city or village are not incompatible and may be held by one and the same person.

Respectfully,
JOHN G. PRICE,
Attorney-General.

392.

JUSTICES OF THE PEACE—NO AUTHORITY FOR PAYMENT OF COSTS OF SAID OFFICERS IN SEARCH AND SEIZURE PROCEEDINGS UNDER SECTION 1408 G. C.

There is no authority in law for the payment of justices of the peace costs in search and seizure proceedings under section 1408 *G. C.*

COLUMBUS, OHIO, June 13, 1919.

HON. CHARLES L. FLORY, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department, as follows:

> "It has been the custom of deputy game wardens to appear before a justice of the peace in Licking county, file an affidavit and receive a search warrant under favor of section 1408, General Code, to make the inspection and search provided for by sections 1407 and 1408, General Code, to obtain evidence upon which to base a prosecution for violation of the fish and game laws. If, acting under the search warrant so obtained, no evidence were discovered upon which to base the commencement of a criminal proceeding, no further step was taken; but if such evidence were discovered, as the result of the search, then the warden would file an affidavit before the same justice, charging some person with a violation of the fish or game law, and such criminal proceeding would then proceed in due course.
>
> "The justice of the peace has now presented to the auditor of Licking county bills of costs made in numerous search and seizure proceedings, carried out under section 1408, General Code, in which the search disclosed no evidence of law violation, and no criminal proceeding against any person was subsequently commenced as the result of the search so made, the whole situation ending then and there. The justice has also presented to the auditor cost bills in such search and seizure proceedings where evidence was discovered and upon which evidence a regular action for violation of the fish or game law was later commenced and disposed of in due course.

"I shall be pleased to receive your opinion as to whether the costs made in such search and seizure proceeding under section 1408, General Code, are to be paid under section 1404, or any other section, of the General Code, (1) when, as the result of such search proceeding, no evidence of law violation of any kind is discovered, and (2) when, as the result of such search proceeding, evidence is found upon which a regular action for violation of the fish or game law is commenced."

It is noted that you call attention to the distinction between the proceeding under section 1408 G. C. and that referred to in section 1404 G. C., and the proceeding under the former, viz., search and seizure, where nothing was seized and no criminal prosecution followed, is the only kind of a proceeding on which this opinion is based or to which it may apply.

This opinion is to be distinguished from 234, date April 25, 1919, directed to the Department of Agriculture, which was based upon criminal prosecution under the fish and game laws and did not involve a question of costs in search and seizure proceedings.

Section 5, article 10, of the Constitution of Ohio, and sections 3016, 3017, 3018 and 3019 G. C. are applicable to your question. Section 5 provides:

"No money shall be drawn from any county or township treasury, except by authority of law."

The pertinent part of section 3016 is:

"In felonies, when the defendant is convicted, the costs of the justice of the peace * * * constable and witnesses, shall be paid from the county treasury."

In part section 3017 is:

"In no other case whatever shall any cost be paid from the * * * treasury to a justice of the peace, * * * or constable."

That these sections are of a general nature and may and have been modified by certain other special statutes relating to justices of the peace costs, is evidenced by section 3019, which provides:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such causes, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

Sections 1404 and 1408 G. C., of the Commissioners of Fish and Game chapter, must also be considered as special statutes on this subject.

Section 1404 provides:

"A person authorized by law to *prosecute* a case under the provisions of this chapter, shall not be required to advance or secure costs therein. *If the defendant be acquitted or discharged* from custody, *or if he be convicted and committed* in default of payment of fines and costs, such costs shall be certified under oath by the justice to the county auditor, who shall

correct all errors therein and issue his warrant on the county treasurer, payable to the person or persons entitled thereto."

Section 1408 in part provides:

"Upon filing an affidavit in accordance with law before an officer having jurisdiction of the offense, and receiving a search warrant issued thereon, such warden may forcibly open such package * * * or other place, and if upon inspection he finds any birds, fish or game * * * or other device unlawfully in possession of the person, he shall forthwith seize them and arrest the person in whose custody or possession they are found."

It may be observed that if the search is successful in this that any of the unlawful things are found in the possession of the person, ample authority is found in this and other sections of the fish and game statutes for a criminal prosecution, but that on the contrary when the search discloses no such unlawful possession, no further provision as to procedure or costs is found in this or other fish and game statutes unless section 1404, supra, can be construed as to bear upon proceedings for search and seizure.

Section 13484 G. C., relating to search warrants generally, before justices of the peace, is likewise lacking in such provision. Directing attention to section 1404, it is to be noted that the conditions which must obtain before that section will authorize the payment of such costs are (a) "if the defendant be acquitted or discharged from custody" or (b) "if he be convicted or committed in default of payment of fines and costs."

From the position of this section, following those provisions for criminal trial and procedure in cases of forfeiture, as well as from the intrinsic evidence in the statute itself, it is clear that this section relates to prosecutions and not to the preliminary procedure which is later provided for in section 1408, which latter statute, it may be observed, does not refer in any way to section 1404.

In the face of the inhibitions of section 5 of the constitution and section 3017, the general statute relating to the payment of justices of the peace from the county treasury, warrant must be found in these special statutes before it can be maintained that the payment of costs in such proceedings is authorized by law, and in view of the limitations to which section 1404 may be applied, and the non-existence of any other statute authorizing the payment of such expenses from the county treasury, this department is of the opinion that such payment is unauthorized and a negative answer is thus given to both of your questions, as, for the foregoing reasons, it is immaterial whether the search and seizure proceedings are or are not followed by criminal prosecutions as the costs the payment of which is authorized by section 1404 includes only those incurred in a criminal prosecution independent of the preliminary search and seizure proceedings. It is deemed advisable to call your attention to House Bill No. 45 which, when it becomes operative, will materially change the Fish and Game statutes.

Respectfully,
JOHN G. PRICE,
Attorney-General.

393.

MUNICIPAL CORPORATIONS—OFFICERS ATTEND CONFERENCE AT STATE CAPITAL FOR DRAFTING PROPOSED LEGISLATION—EXPENSES NOT PAYABLE FROM CITY TREASURY—OPINION NO. 85 DATED MARCH 1, 1919, AFFIRMED.

Municipal officers in attending a conference at the state capital for the purpose of drafting proposed legislation of a general nature which must have uniform operation throughout the state, are not exercising a power of local self-government.

COLUMBUS, OHIO, June 13, 1919.

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

GENTLEMEN:—Since the preparation and transmission to you of my opinion No. 85, dated March 1, 1919, relating to the use of public funds to pay the expenses of municipal officers in attending a meeting of mayors and city solicitors held for the purpose of drafting legislation for the relief of cities, one of the city solicitors interested has prepared a brief on the subject, and requested a reconsideration on behalf of the charter cities.

It is now contended that the duty of mayors to attend the Columbus meeting is imposed, or is at least authorized, by section 4250, G. C., which makes the mayor the chief conservator of the peace, and that the authority of the city solicitor to attend is found in section 4309 G. C., which makes that officer the legal adviser of the municipal officers. In support of this contention it is argued:

> "The mayor, being the chief conservator of the peace, and being the head of the administrative departments of the city, it certainly is of concern to him if the city is without sufficient funds derived from taxation and other sources to properly conserve such peace and to manage the administrative offices over which he has control. If, in view of such lack of finances and at the special direction of the council of the city he makes a trip to Columbus in order to petition the legislature to afford the city financial relief, it cannot be contended with any show of reason that his expenses on such trip are not necessarily implied in and reasonably and directly incident to his prescribed duties.
>
> And this is also true with respect to the city solicitor. His attendance upon the meeting in Columbus was, as set forth in the statement of facts, in order to assist in the draft of the proposed legislation. By section 4309 he is made the legal adviser of the various officers and boards of the city and is required to furnish opinions, and we submit that inasmuch as his attendance at said meeting was to consult with the mayor in connection with the draft of said proposed legislation, his expenses likewise were incurred in a matter necessarily implied in and reasonably and directly incident to his prescribed duties."

All municipal officers are interested in the conservation of the peace; and if the mayor and city solicitor, without authority other than the two statutes above referred to, are justified in attending at public expense a meeting held for the purpose of drafting state legislation for the levying and collection of taxes, it could also be argued with equal force that the other municipal officers, and probably citizens should be permitted to do the same.

Subjects of state legislation are for the General Assembly to investigate and

determine, and it is for that purpose that representatives and senators from the several counties and senatorial districts of the state are elected, who represent not only the state as a whole, but also the political subdivisions and municipalities thereof. In the exercise of this power, the General Assembly, through its various committees and officers, is clothed with ample power to inquire into and make investigations concerning matters affecting the municipalities of the state, including the conservation of the peace and the levying and collection of taxes to be expended in that connection.

Municipal officers may instruct their representatives and petition the General Assembly for relief, but the right of municipal officers in that regard is no greater than that of citizens generally. It may also be noted in this connection that neither the state constitution nor any statute or city charter, so far as I have been able to ascertain, enjoins any duty upon municipal officers to instruct the members of the General Assembly as to what legislation should or should not be enacted, or as to the form legislation should take, or to petition the General Assembly on any subject. Whatever any municipal officer may do in that direction must be held to be his personal voluntary act.

It is contended that if there be no statute warranting mayors or city solicitors to attend meetings for the purpose of drafting such legislation, then a charter adopted under authority of section 7 of Article XVIII of the state constitution may furnish the authority, and that charter provisions such as the following have that effect:

> "The city shall have all powers of local self-government and Home Rule and all other powers possible for a city to have under the constitution of the state of Ohio."
>
> "All legislative power of the city shall be vested in council," etc.

All the power that the first provision attempts to confer, is the power of local self-government, including the authority to adopt and enforce such local police, sanitary and other similar regulations as are not in conflict with general laws (see sections 3 and 7, Art. XVIII); and the legislative power vested in the city council by the second charter provision is not unrestrained or unbounded, but is necessarily limited in its scope to subjects or matters embraced in the first provision, as distinguished from those of a general governmental nature affecting the entire state.

The right of charter city councils to legislate within constitutional limits is not denied, but I am unable to reach the conclusion that municipal officers in attending a meeting held for the purpose of drafting state legislation of a general nature which must have uniform operation throughout the state, are exercising any power or authority contemplated by the constitutional provision referred to.

Respectfully,
JOHN G. PRICE,
Attorney-General.

394.

JUVENILE COURT—IN ADMINISTRATION OF ACT MINOR'S RESIDENCE SHOULD DETERMINE MINOR'S STATUS—MINOR RESIDENT OF ONE COUNTY VIOLATES LAW IN ANOTHER COUNTY—JUVENILE CAN BE PROCEEDED AGAINST IN EITHER COUNTY—COURT FIRST ACQUIRING JURISDICTION RETAINS IT TO EXCLUSION OF ANY OTHER COURT.

1. *In the administration of the juvenile act, good policy in most cases suggests that the juvenile court of the county of the minor's residence be permitted to determine the minor's status.*

2. *Where a minor child under the age of eighteen years is a resident of A——— county, but while in W——— county violates a law of the state of Ohio, such minor may, as a matter of law, be proceeded against as a juvenile delinquent person in either the juvenile court of A——— county, or the juvenile court of W——— county.*

3. *The court first acquiring jurisdiction would, however, retain it to the exclusion of any other court, until the case were finally disposed of.*

COLUMBUS, OHIO, June 13, 1919.

HON. B. O. BISTLINE, *Probate Judge, Bowling Green, Ohio.*

DEAR SIR:—Your letter of recent date reads in part as follows:

> "A sixteen year old boy who resides in and is a legal resident of Athens county, Ohio, has been arrested for driving an automobile over the highways of this (Wood) county at a speed of forty miles per hour, and the justice before whom he was taken certified him over to me as juvenile judge.
>
> You have already ruled that the juvenile judge of the county in which the offender lives has jurisdiction of juvenile cases, although the offense was committed outside of the county in which the offender lives. Now, have I, as juvenile judge, jurisdiction of this offender since he is a resident of Athens county?"

In Opinion No. 154, dated March 31, 1919, addressed to Hon. Charles G. White, prosecuting attorney, Batavia, Ohio, the Attorney-General held that where a minor child under the age of eighteen years is a resident of W——— county, but while in C——— county violates a law of this state, said minor may be proceeded against in the juvenile court of W——— county. In that opinion it was said:

> "* * * It is unquestionably the intent of the juvenile court act that the interests of the child itself should be the paramount consideration in all proceedings taken under that act. 'That proper guardianship may be provided for the child' is not only the express direction set forth in section 1683 G. C., but is, indeed, the theme of the whole measure. In most juvenile cases, the main subject of investigation is the child's environment, and as a general rule the juvenile court of the county of the child's residence is the court best suited to ascertain that environment.
>
> In other words, assuming that the law permits a juvenile court, in a proceeding against an alleged juvenile delinquent residing in that county, to predicate a finding of delinquency upon a violation of law committed

by said minor while in another county, good policy, in most cases, suggests that the juvenile court of the county of the minor's residence be permitted to determine the minor's status."

Occasion is taken to reaffirm the view just set forth as to the policy of allowing the juvenile court of the county of the child's residence to determine the status of that child.

Observations as to the policy of administering the law do not, however, furnish an answer to the legal aspects of your query, which is whether the juvenile court of a given county has the *power* to determine the status of an alleged delinquent minor who is a resident of another county, but who commits in the first mentioned county the act constituting an alleged delinquency.

The fact that under the law of crimes the non-residence of the defendant in the county of venue is immaterial to the court's jurisdiction, is of no weight in the present inquiry, for the reason that delinquency under the Ohio juvenile act is not a crime. In re Januszewski, 196 Fed. 123, 156. It is necessary, therefore, to go to the juvenile act itself for an answer to the question.

After careful study of that act, I find no provision therein that either expressly or impliedly makes the authority of a juvenile court of a county to determine the status of an alleged delinquent juvenile person depended upon the residence of such juvenile in that county.

On the contrary, the juvenile act contains evidence of an intention to dispense with the necessity of residence on the part of the minor delinquent. This evidence consists not alone of what is in the act, but also of significant omissions therefrom.

Section 1642 G. C. (103 O. L. 868) says:

"Such courts of common pleas, probate courts, insolvency courts and superior courts within the provisions of this chapter shall have jurisdiction over and with respect to delinquent, neglected and dependent minors, under the age of eighteen years * * *."

Section 1644 G. C. (106 O. L. 458), after defining the words "delinquent child," conclude with the provision that:

"A child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and be preceeded against in the manner hereinafter provided."

It is considered significant that these sections wholly omit any requirement that the alleged juvenile delinquent be a resident of the county wherein the court is held.

Section 1648 G. C. (103 O. L. 870) provides, among other things, that the juvenile judge may in the first instance issue a warrant for the arrest of the minor. Under the terms of section 1660 G. C. (103 O. L. 874), such warrant may issue to a probation officer of any such court or to the sheriff of *any* county. Section 1663 G. C. defines the duties and powers of the probation officer and says, in part, that such officer "shall serve the warrants and other process of the court *within* or *without* the county * * *."

In view of the fact that express provision is made for the service of warrant upon the minor outside of the county wherein the juvenile court is held, it is not likely that the legislature intended to make the jurisdiction of such court dependent upon the residence of the alleged delinquent minor in the county wherein such court was held.

Again, certain practical difficulties suggest themselves in connection with the view that the minor's residence in the county where the juvenile court proceeding is instituted is a jurisdictional condition. Under such a view, just what would be meant by "residence?" The juvenile act nowhere defines such a term, and whether it was "residence" of the kind demanded by the election laws of Ohio, or "residence" under the laws relating to poor relief, or "residence" of some other description—this, under the view referred to above, would be left entirely to conjecture on the part of the juvenile judges of the several counties. Diversity of opinion and consequent uncertainty in enforcing the juvenile act could be the only result of such an interpretation.

It is therefore considered that where a minor child under the age of eighteen years is a resident of Athens county, but while in Wood county violates a law of the state of Ohio, such minor may be proceeded against as a juvenile delinquent person in either the juvenile court of Wood county or the juvenile court of Athens county. The court first acquiring jurisdiction would, however, under the general rule, retain it to the exclusion of any other court, until the case were finally disposed of. Orphan Asylum vs. Soule, 24 O .C. C. (n. s.) 151. Under section 1643 G. C. (103 O. L. 869), the jurisdiction of the juvenile court over a child under the age of eighteen years continues, for all necessary purposes of discipline and protection, until said child attains the age of twenty-one years.

The conclusion hereinabove stated goes, of course, only to the question of the *power* of the juvenile court of the county wherein the alleged delinquent minor does not reside. I deem it important to repeat that only extraordinary circumstances would, in my judgment, justify a departure from the wise policy that has thus far characterized the administration of the juvenile act, namely, the policy of permitting the juvenile court of the county of the minor's residence to determine the minor's status.

Respectfully,
JOHN G. PRICE,
Attorney-General.

395.

AGRICULTURAL LIME—WHEN SALE OF SAME IS PERMITTED AND WHEN PROHIBITED BY STATUTE—LIME AS FERTILIZER.

1. *Sections* 1150 *to* 1163 *G. C.* (107 *O. L.*, 474) *do not prohibit the sale of agricultural lime.*

2. *Sections* 1177-43 *to* 1177-54 *G. C.* (107 *O. L.*, 481) *prohibit the sale of unregistered agricultural lime or the sale of such lime which is not branded as therein provided, and the sale of agricultural lime under an unregistered trade name of "lawn and garden fertilizer," is thereby prohibited.*

COLUMBUS, OHIO, June 13, 1919.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department as follows:

"The opinion of your department is requested with reference to the meaning of certain sections of the Ohio fertilizer law, as amended in

107 O. L., 474, and being sections 1150 to 1163, General Code, inclusive.

The particular questions may be stated as follows:

Under the above law, could lime be sold as a fertilizer, either with or without analysis?

Also under the Ohio agricultural lime and limestone law, 107 O. L. 481, could it be permissible to sell an agricultural lime when the bags are properly branded as to analysis and give the product a trade name, as 'Lawn and Garden Fertilizer?'"

It is noted that your inquiry refers first to the sale of lime under sections 1150 to 1163 G. C., and, second, to the sale of agricultural lime under sections 1177-43 et seq., G. C.

As to the first, viz., can lime be sold as a fertilizer, sections 1150 G. C. to 1163 G. C. are pertinent. These sections comprise the Ohio fertilizer law.

Without quoting all of the sections, it is sufficient to state that by the exceptions contained in section 1150, defining commercial fertilizer in this language,

> "which means any substance for fertilizing * * * except * * * lime,"

the sale of lime is not regulated or controlled by sections 1150 to 1163 G. C., and your first question may be answered by stating that the sale of lime as a fertilizer, either with or without analysis, is not prohibited by the sections last referred to.

As stated in your letter, the second question is:

> "Could it be permissable to sell an agricultural lime when the bags are properly branded as to analysis and give the product a trade name, as 'Lawn and Garden Fertilizer?'"

The Ohio limestone act, as amended, is found in 107 O. L., 481, in sections 1177-43 to 1177-54. Pertinent parts of these sections are:

> *Sec.* 1177-43.—"Before any agricultural lime * * * is sold * * * offered or exposed for sale in Ohio, the manufacturer, importer, dealer, agent or person who causes it to be sold or offered for sale, by sample or otherwise, within the state, shall file with the secretary of agriculture at Columbus, Ohio, a statement that he desires to offer such agricultural lime * * * for sale in this state, and also a certificate, the execution of which shall be sworn to before a notary public * * * for registration, stating the name of the manufacturer, or shipper, the location of the principal office of the manufacturer or shipper, and the place of manufacture, the *name, brand, or trademark* under which the agricultural lime * * * shall be sold."

Section 1177-44 G. C. provides that any person selling or exposing for sale such lime,

> "shall affix or cause to be affixed, to every package * * * of such agricultural lime * * * a tag or label, which shall be accepted as a guarantee of the manufacturer, importer, dealer or agent, and which shall have plainly printed thereon * * * the name or trademark under which the agricultural lime * * * is sold."

Section 1177-46 requires the payment of an annual license fee

"before any person, firm, company or corporation shall sell, offer for sale or expose for sale in this state any agricultural lime * * * for each brand or kind of agricultural lime * * * and shall receive from said secretary of agriculture a certificate to sell *such* brand or kind of agricultural lime."

Section 1177-47 makes it a misdemeanor for the sale of such lime

"which has not been registered * * * as required in this act, or which does not have affixed to it the tag required by this act * * * or which shall be labeled with a false or inaccurate guarantee, or who shall adulterate any agricultural lime * * * without plainly stating on the label hereinbefore described, the kind and amount of such mixture,"

and provides that such offenses shall be punishable by a fine

"in the sum of fifty dollars for the first offense and in the sum of one hundred dollars for each subsequent offense."

Section 1177-50 G. C. empowers the secretary of agriculture

"to prescribe and enforce such rules and regulations relating to agricultural lime * * * as may be deemed necessary to carry into effect the full intent and meaning of this act, and *to refuse the registration of any agricultural lime * * * under a name which would be misleading.*"

Section 1177-53a provides further penalties as follows:

"Whoever sells, offers for sale, or keeps for the purpose of selling within the state agricultural lime * * * without complying with the provisions of this law relating to agricultural lime, * * * shall be guilty of a misdemeanor and upon conviction shall be fined not less than two hundred dollars nor more than five hundred dollars or imprisoned not more than six months or both.

The possession of agricultural lime, except by a person who has the same for his private use, without complying with the provisions of this chapter, relating to agricultural lime. * * * shall be a prima facie evidence of keeping the same for the purpose of selling."

By personal conference with Mr. Palmer, of the division of feeds and fertilizer, it is learned that the lime with which your department is concerned was not registered under the name of "lawn and garden fertilizer," from which it is concluded that that lime is not registered.

From this it follows that its sale is unlawful, as such registration is plainly made a condition precedent to its lawful sale under section 1177-43, and such a sale would clearly be within the prohibition contained in sections 1177-47 and 1177-53a, being a sale of agricultural lime "which has not been registered * * * as required by this act," as stated in the former, and being a sale "without complying with the provisions of this law relating to agricultural lime" as prohibited in the latter section.

Therefore it is the opinion of this department that the sale of such an unregistered agricultural lime in this state is unlawful.

It is deemed proper to call your attention to the fact that by vesting the sec-

retary of agriculture with the discretion of registration, the prevention of registering a product under a misleading name may be accomplished under section 1177-50 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

396.

BOARD OF EDUCATION—MILITARY TRAINING—CANNOT ESTABLISH SAME UNDER EXISTING LAW.

1. *Boards of education cannot establish military training in public schools under section 7721 G. C. of existing law.*
2. *All courses of study in high schools must be in compliance with section 7649 G. C.*
3. *A pupil cannot be discriminated against in his general standing in school because he does not join a military unit in such school.*
4. *There is no provision in law for a board of education to purchase military ordnance or pay expenses of physical training teachers at a military camp.*

COLUMBUS, OHIO, June 13, 1919.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following statement of facts:

> "On January 3, 1918, the board of education of the city school district of the city of Cleveland passed and adopted the following, known as Resolution No. 7596, 'To Provide Military Training:'
>
> 'WHEREAS, present conditions demand the extension of the course in physical training to include military training for pupils in the senior high school; therefore, be it
>
> 'RESOLVED, by the board of education of the city school district of the city of Cleveland,
>
> "1. That an approved course in military training shall be provided by the Assistant Superintendent of Schools in charge of physical education under the direction of the Superintendent of Schools, to be installed in the Cleveland senior high schools as a part of the prescribed course of study, to go into effect at the opening of schools in September, 1918.
>
> '2. That said course of study shall consist of such adaptation of the manual of arms, drills, physical exercises, studies, etc., as shall be prescribed by the Assistant Superintendent in charge of physical education, with the approval of the Superintendent.
>
> '3. That all male students in the tenth, eleventh, and twelfth years of the public schools shall be required to take the said course with the exception of the following:
>
> '(a) All male students who shall be found on examination by the Assistant Superintendent in charge of physical training, to be physically unfit to pursue the course, provided that exemption from the course shall cease with the restoration of the pupil to a state of physical fitness.
>
> '(b) All male students whose parents or guardians make oath that, in

obedience to the dictates of conscience, they petition the board of education to excuse their children from such study or exercise as is exclusively military in content.

'(c) All male students who, for reasons which are good and sufficient in the judgment of the Superintendent of Schools, may be excused from such drill.

'4. Dress.

That all male students of the tenth, eleventh and twelfth years of the public schools shall be required to provide themselves such uniform dress as shall be determined by the board of education; it being understood that the prescribed uniform shall conform to style, quality and cost prevailing in educational institutions of high school rank where military uniforms are required.

'5. Credit.

That credit shall be allowed for military training under conditions applying to other regular subjects.

'6. Time.

That five periods per week shall be assigned to military training, such periods to be adjusted to the demands of the course of study.

'7. Equipment.

That the board of education shall provide training rifles and other ordnance, colors, drums, etc.

'8. Supervision.

That the immediate supervision of military training shall be carried out, under the general direction of the Assistant Superintendent in charge of physical education, by an experienced military officer employed for that purpose.

'9. Teachers.

That not less than ten and not more than fifteen teachers of physical training—or others qualified—shall be selected and assigned by the Superintendent of Schools to training camps for instruction preparatory to teaching and directing this work; the board of education to reimburse each teacher so assigned in the sum of one hundred dollars ($100) to cover necessary expenses.

'10. Officers' Training.

That a two weeks' officers' training course for high school seniors be provided under the direction of the supervising military officer immediately preceding the opening of the schools in September.

'11. And be it further RESOLVED, that an appropriation of sixteen thousand five hundred dollars ($16,500) be and is hereby made to meet the expense to the board of education of the inauguration and installation of said course in military training.'

"On Monday, August 19, 1918, Resolution No. 7822, 'Adopting Official Uniform and Designating The Halle Bros. Company as the official uniform outfitters of this board,' was passed and adopted as follows:

'WHEREAS, in accordance with and by virtue of the authority given in Resolution No. 7693, bids from manufacturers for the furnishing of standard uniforms to pupils in the Cleveland High Schools, who are to take military training, were received under date of August 7, 1918, and,

'WHEREAS, the bid of The Halle Bros. Company, low bidder in accordance with the specifications is as follows:

Unit prices per uniform as provided in Item No. 5 (breeches and leggings)	$21 85
Unit price per uniform as provided in Item No. 6 (long trousers)	20 50
Unit price per coat	12 00
Unit price per breeches	7 50
Unit price per trousers	7 50
Unit price per cap	1 50
Unit price per leggings	1 40
Unit price per belt	45

now, therefore,

'Be it Resolved, by the board of education of the city school district of the city of Cleveland that the uniform described in Item No. 5 of the specifications, consisting of coat, breeches, cap, leggings and belt be, and the same is hereby adopted as the official uniform for the purpose above indicated, and, further,

'RESOLVED, that The Halle Bros. Company be, and is hereby designated as the official uniform outfitter until December 31, 1918, and, further,

'RESOLVED, that the clerk be instructed to notify The Halle Bros. Company accordingly.'

"On January 6, 1919, Resolution No. 9067, 'Continuing Military Training,' was passed and adopted as follows:

'WHEREAS, this board by Resolution No. 7596, adopted June 3, 1918, provided for military training for male pupils in the tenth, eleventh and twelfth years of the high schools, as an extension of the course in physical training, and

'WHEREAS, the signing of the armistice in the world war has raised a doubt in the minds of the public as to the permanency of military training in the Cleveland public schools; therefore be it

'RESOLVED, by the board of education of the city school district of the city of Cleveland, that military training be and is hereby declared to be a permanent part of the curriculum of the Cleveland high schools; and be it further

'RESOLVED, that said military training shall be conducted for pupils in the tenth, eleventh and twelfth years during the remainder of the present school year, in accordance with the provisions of said Resolution No. 7596, except that military training may also be taken voluntarily by male pupils in the ninth year, during the second semester of this school year; and that beginning with the school year 1919-20, in September next, military training shall be compulsory (save as exemptions may be made under paragraphs a, b and c, of Division 3 of said Resolution No. 7596) for all male pupils in the ninth, tenth and eleventh years, and shall be voluntary for all male pupils in the twelfth year.

'Submitted and approved by the Acting Superintendent of Schools.'

"Query: Can the board of education of the city of Cleveland require *all* male students of the ninth, tenth and eleventh years of the public schools of the city of Cleveland to provide for themselves uniform dress as prescribed by the board and designated in Item No. 5 of Resolution No. 7822, the same costing $21.85 for suit, unless exempted under paragraphs a, b and c of division 3 of said Resolution No. 7596, and if the pupils mentioned above fail or refuse to provide for themselves the prescribed uniform, can the board of education refuse to permit such pupils to participate in this military training and further refuse to grant them promotion because of such failure or refusal?"

In seeking further information upon this subject, the board of education of the city of Cleveland was communicated with, and the secretary to the Superintendent of Schools of that city furnishes the following statement:

> "At present about twenty-eight hundred pupils in the ten senior high schools of Cleveland are taking military training. These pupils are included in the 10th, 11th and 12th years of the classes of 1918-19, for whom military training is compulsory under the action of the board on Resolution No. 7596, and also some pupils in the 9th year who are permitted to take military training during the remainder of this school year under Resolution No. 9067. You will note that Resolution No. 9067 provides that with the beginning of the next school year military training will be compulsory for pupils in the 9th, 10th and 11th years, and will be optional with those in the 12th year. This training is made a part of the curriculum for the high schools, and is intended to supplement the regular physical training or to be correlated with it."

As this military instruction is based on physical training, the section of the statutes governing such training is here given and reads as follows:

> "*Sec.* 7721 *G. C.* Physical training shall be included in the branches regularly to be taught in public schools in city school districts, and in all educational institutions supported wholly or in part by money received from the state. Boards of education of city school districts, and boards of such educational institutions must make provisions in the schools and institutions under their jurisdiction for teaching physical training, and adopt such methods as will adapt it to the capacity of pupils in the various grades therein. Other boards may make such provisions. The curriculum in all normal schools of the state shall contain a regular course on physical education."

Any instruction in military training contemplated under Ohio law must come from the language of this section, for this is the only enactment on physical training. This section was passed and approved by the Governor on April 25, 1904, at a time when this country was at peace with the world and it has existed without change or amendment for fifteen years. It was passed at a time when gymnasiums and courses in manual training were being advocated and introduced, and it is clear that no thought of compulsory military training in the public schools was in the mind of the General Assembly at that time, nor has any law ever been passed since then, indicating that the law-making body of the state desired compulsory military training in the public schools for which they legislate.

The question before us is not upon the merits of military training, but simply the question as to whether under *existing* law in Ohio any board of education can do the following things:

1. Establish military training under section 7721 G. C. which covers physical training, or section 7649 G. C. which governs the course of study.
2. Make such military training compulsory on any pupil.
3. Make such military training a part of the "prescribed course" of study, which all pupils are required to take for promotion or graduation.
4. Require parents of pupils to make an oath of any kind as to their dictates of conscience.
5. Require the pupils to wear certain designated wearing apparel in order to avail themselves of the public school facilities.

6. Require the parent to make an expenditure of $21.85 to a certain firm for apparel for such pupil.

7. Limit the participation in a study in the curriculum to one sex, or part of the pupils.

8. Expend any school funds for rifles and ordnance under existing laws.

9. Expend $100 for each instructor's expenses in a military training camp away from the school.

10. Refuse a pupil any part of the physical training granted under section 7721 G. C. unless such pupil provides a suitable and specified uniform.

11. Refuse promotion or graduation to a pupil who fails to either provide certain dress or participate in military training.

As all male pupils in the high schools in question are required by the resolution of the board of education to take military training unless specially excused, or their parents take a certain oath as to conscience, it is entirely proper to examine the rules governing such military training and affecting in more or less degree the entire male student body.

A thorough examination of the printed "Regulations" of the Cleveland High School Cadets (which is the male student body, except those specially excused) shows the following drastic excerpts taken briefly from the fifty-one sections in such regulations:

"6. The board of education will provide the necessary blank forms for *reports and records* for each of said High School Cadet Companies.

13. Each cadet shall keep himself supplied with the regulation uniform which he must *maintain in good order.* During the school day he shall *wear no other dress except by permission.* * * *

17. The *general standing* of a cadet (pupil) shall be determined by *combining* the academic standing, the military standing and the deportment, the weight given each standing being as follows:

Academic—Fifty per cent.
Military—Thirty per cent.
Deportment—Twenty per cent.

18. * * * violations of these regulations committed by any cadet shall be triable by court martial * * * according to the nature of the offense. * * *

19. The organization, procedure and records of all *court martial* shall conform to those *prescribed by the United States Army Regulations.*

22. At the beginning of each semester each cadet shall receive a credit of one hundred merits. Any cadet who exhausts his full credit of merits during the semester, shall forfeit his half credit for the term. * * *

23. * * * It must be borne in mind that a demerit materially *affects a cadet's standing in the school.* * * *

24. No cadet shall address an officer or cadet who may have reported him for a delinquency on the subject of such report, unless *specially authorized* by the principal or commandant to do so, and no officer or cadet who has made a report against a cadet *shall hold any conversation with him* in regard to it unless by permission of the commanding officer.

31. * * * Any cadet who in concert with others under pretense of procuring redress of grievance adopts any measure, or signs any paper * * * or does anything to the prejudice * * * of military discipline * * * *shall be dismissed* or otherwise punished according to the nature of the offense.

43. No cadet should appear in uniform on the streets or in any public

places with his hands in his pockets, nor should any uniformed cadet appear except in proper uniform. Never wear a mixed civilian and military dress or leave buttons unbuttoned.

51. * * * Ignorance of a regulation will not be accepted as an excuse for violation of the same."

The above are part of the regulations promulgated by the Superintendent of Schools, with the knowledge and consent of the Board of Education, as an extension of physical training under section 7721 G. C. and are in addition to the requirements of the three resolutions of the board of education heretofore quoted. Every male pupil in the high school of the city must be a cadet unless (1) he is physically unfit, (2) his parents have made an oath as to their belief, and (3) or specially excused by one person, the Superintendent of Schools. The natural result, where it is compulsory, is that those pupils who do not dress a certain way become marked by civilian attire, which indicates at once either physical defect, views of conscience, or *special* excuse, and there is attendant questioning and embarrassment not contemplated by the constitution or laws, in giving to every child equal opportunity for the mental education for which the public schools were established.

Pertinent parts of the Ohio Constitution are:

Article I, Sec. 4:

"* * * and the military shall be in strict subordination to the civil power."

Article I, Sec. 7:

"* * * nor shall any *interferences* with the rights of *conscience* be permitted. * * * *Religion, morality* and *knowledge,* however, being essential to good government, it shall be the *duty of the General Assembly to pass suitable laws* * * * to encourage schools and the *means of instruction.*"

Article I, Section 11:

"* * * and no law shall be passed to restrain or abridge the liberty of speech. * * *"

Article I, Sec. 20:

"* * * and all powers, not herein delegated, *remain with the people.*"

The General Code of Ohio has provided for the curriculum of high schools in the following language:

Section 7649:

"A high school is one of higher grade than an elementary school, in which instruction and training are given in approved courses in the history of the United States and other countries; composition, rhetoric, English and American literature; algebra and geometry; natural science, political or mental science, ancient or modern foreign languages, or both, commercial and industrial branches, or such of the branches named as the length of its curriculum makes possible. Also such other branches of higher grade than those to be taught in the elementary schools, with such advanced studies and advanced reviews of the common branches as the board of education directs."

Nothing in such section provides for military training as a branch in Ohio high schools.

The enactment of the board of education in question goes farther than many laws or ordinances subject to a referendum in that, among other things, it inaugurates a study not named in section 7649 G. C., it regulates mode of dress, its operation is limited to one sex, it demands an oath from parents over whom boards of education have no jurisdiction, it lays an additional tax on the parent who has already been assessed his school taxes by law, and abridges his right of contract in purchasing his son's wearing apparel for the public schools, when and wherever he chooses, rather than from one designated firm, called the "official outfitter."

In the case at hand the board of education put into force in its large geographical jurisdiction, *by resolution*, an enactment that was compulsory in its nature and effective upon passage, without warrant of law; and an ultra vires enactment that carried the penalty of a denial of promotion and proper rating in the public schools, unless it was complied with, including certain limited exceptions.

Military training in schools is a subject as large, or larger than physical training itself, for the former has been the subject of law by Congress, passed June 3, 1916, and creating voluntary courses of training in both colleges and high schools for the Reserve Officers' Training Corps. But this is purely voluntary as to whether an institution or school unit shall avail itself of such act, in those states which have provided for it. On the other hand there has been no federal enactment on physical training, but the Regulations on Military Training, issued by the War Department following such act of June 3, 1916, make "3. Physical Drills" as but one out of twenty-one subjects in Military Training (Army General Order 49) and such "physical drills" shall be "calisthenics, bayonet practice and combat fencing." It would seem, therefore, that military training is a larger subject than "physical training" in public schools as contemplated in section 7721 G. C. Here the instructors were sent, at the school board's expense, to the number of ten or fifteen, to various military training camps to qualify them in teaching military training in the public schools on their return and as the Cadet Regulations say the "court martial shall be as prescribed by the United States Army Regulations," seemingly the military training contemplated would also follow army regulations, and if so, then these are the standard subjects:

1. Infantry Drill Regulations.
2. Manual of Interior Guard Duty.
3. Physical Drills (calisthenics).
4. Military Hygiene.
5. Military Policy.
6. Small-arms firing regulations.
7. Administration and Organization.
8. Map Reading.
9. Field Service Regulations.
10. Marches and Camps.
11. Signaling (semaphore and flag).

Can any one say that the legislature had in mind, when it passed Section 7721 G. C., the above subjects as "physical training," or did it mean the "physical culture" gotten in the gymnasium, as so many schools for fifteen years have interpreted it? Clearly they meant the latter and not military training.

Much can be said in favor of military training in public schools, but its merits or demerits is not the question before us; the question is whether, under *existing Ohio law*, a board of education can inaugurate any military training under the head of "physical training" mentioned in section 7721 G. C. While a board of education has broad powers in its management of the public schools under its control, it cannot go beyond those things contemplated by the legislature and until further legis-

lation is had on the subject, a board of education has no authority to establish military training in the public schools (Sec. 7649 G. C.) or compel its student body to dress in a certain manner during school hours, with the attendant expense on the parent. The public schools of the state are intended to be free in the fullest sense of the word; they are civil institutions and not military, and will always remain so, the state, while granting wide powers to charter cities in other matters, has ever kept control of the public school system and all boards of education are operating under the laws of the state, and a board of education that spends school funds for a course in military training, does so without authority under existing law, and against the prohibition in section 7649 G. C.

A board of education cannot add to its study curriculum a branch for which there is no warrant of law, and then compel pupils to take such branch; neither can it deny physical training privileges established under section 7721 G. C. to any pupils who fail to buy a certain uniform; nor can failure to take military training by any pupil be made to militate against his general standing in the public school as regards promotion. There is no authority for a board of education to establish military training under section 7721 G. C., as "physical training" and expend money therefor from their own funds, or compel parents to buy uniforms for pupils, and the branches taught in Ohio high schools under section 7649 G. C. do not include military training.

Under existing state law a board of education cannot include military training in its course of study and compel students to furnish uniforms, the penalty for failure to do so being a loss of standing for promotion in the school. And before boards of education in Ohio have power to establish such military training or expend money for rifles and ordnance, there must be further legislation on the subject. The subject is larger than the "physical training" contemplated in section 7721 G. C., which section also means that the "physical training" open to one pupil shall be open to every other pupil; instructors in physical training can be paid for such training under section 7721 G. C. and their salaries increased during employment, but a board cannot expend money from school funds to send them away to be further educated any more than they could send the music teacher to a conservatory at public expense.

It is therefore the opinion of the Attorney General that:

1. Boards of education cannot establish military training in public schools under section 7721 G. C. of existing law.
2. All courses of study in high schools shall be in compliance with section 7649 G. C.
3. A pupil cannot be discriminated against in his general standing in school because he does not join a military unit in such school.
4. There is no provision in law for a board of education to purchase military ordnance or pay expenses of physical training teachers at a military camp.

Respectfully,
JOHN G. PRICE,
Attorney-General.

397.

COUNTY COMMISSIONERS—WITHOUT AUTHORITY TO JOIN WITH MUNICIPALITY FOR IMPROVEMENT OF STREET FORMING NO PART OF STATE OR COUNTY HIGHWAY.

Section 6949 G. C. does not authorize county commissioners to undertake the improvement, or to join with a municipality in undertaking the improvement of a municipal street forming no part of a state or county highway.

COLUMBUS, OHIO, June 13, 1919.

HON. ROY R. CARPENTER, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication submitting for opinion an inquiry which may be summarized as follows:

> The board of county commissioners of Jefferson county has been requested to undertake the improvement of a part of Adams street within the city of Steubenville. Such section of street, which for convenience may be referred to as the newer part of Adams street, was laid out and dedicated to the city in 1890, as shown by plat of an addition accepted by ordinance of council passed in that year a highway known as Inter-County Highway No. 7 leading from Bridgeport to Wellsville enters and leaves Steubenville on Third street, while another highway known as Inter-County Highway No. 26 enters the city on Market street. The older section of Adams street intersects Third street at right angles; but neither the older or newer part of Adams street intersects Market street or Inter-County Highway No. 26, Adams street, speaking generally, being parallel to Market street and connected with the latter street by cross streets, among which is Lawson avenue. The particular part of Adams street which it is now sought to have improved leads from what is known as the old city property up the side of a hill to more recent additions.
>
> The question is whether the county commissioners may legally undertake the improvement of such part of Adams street, or enter into an agreement with the city to make the improvement in conjunction with the city.

With your inquiry you submit a plat of the city of Steubenville showing in detail the location of Adams street.

The particular statute involved in a consideration of your inquiry is section 6949 G. C., which reads as follows:

> "The board of county commissioners may construct a proposed road improvement into, within or through a municipality, when the consent of the council of said municipality has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council. If no part of the cost and expense of the proposed improvement is assumed by the municipality, no action on the part of the municipality, other than the giving of the consent above referred to, shall be necessary; and in such event all other

proceedings in connection with said improvement shall be conducted in the same manner as though the improvement were situated wholly without a municipality." (107 O. L. 107)

Previous to its amendment as appearing in 107 Ohio Laws said section 6949 did not contain the word "within," the earlier form of the statute reading simply that the board of commissioners "may extend a proposed road improvement into or through a municipality," etc. As it stood in this earlier form, the section was passed upon by this department in an opinion appearing in Volume I, at page 313, Opinions of the Attorney-General for 1917, wherein it was held in substance, as shown by the head-note:

"The county commissioners and the council of a municipality are not authorized to co-operate in the improvement of a part of the inter-county highway system of the state, where the part to be improved lies entirely within the limits of the municipality."

The situation dealt with in the opinion just referred to was that an inter-county highway had been constructed to the corporation line on both sides of a village, leaving a gap in the improvement. It was noted in the opinion that the legislature evidently did not consider that the county commissioners had authority to construct a road improvement lying wholly within the corporate limits of a village, even though such proposed improvement might form part of a continuous inter-county highway improvement, and that the seeming purpose of the amendment then under consideration by the legislature and afterwards appearing in 107 Ohio Laws was to meet the very situation discussed in the opinion.

In considering the effect of this amendment, we must bear in mind that while the word "road" as a generic term is no doubt broad enough to include "street," yet our legislature has for many years past made use of the word "road" in dealing with improvements outside of municipalities and the word "street" in dealing with improvements within municipalities. In fact, as a matter of common usage, the word "street" is understood as referring particularly to public ways within municipalities and the word "road" to like ways outside of municipalities. Hence, we find in the series of statutes providing for improvements by county commissioners (sections 6906 to 6953 G. C.) that the word "road" is used to the exclusion of the word "street" except in section 6952, hereinafter referred to.

It is therefore quite evident that the legislative intent in amending section 6949 was not to confer general power on the commissioners to improve any street within a municipality, but merely to give them power to enter a municipality with the consent of the council thereof for the purpose of such road improvement as might be necessary to connect or complete county or state road improvements. In section 6949 the terms "into, within or through" are used conjunctively, and in that sense are certainly plainly to the effect that the proposed road improvement must be such an improvement as the commissioners are authorized generally to construct, special power being conferred in certain necessary instances to conduct the improvement into, within or through the municipality. Further support for this construction, if any is needed, may be found in the last sentence of section 6952, reading as follows:

"The word 'road,' as used in sections 6906 to 6953 inclusive of the General Code, shall be construed to include any state or county road or roads, or any part thereof, or any state or county road or roads, and any city or village street or streets, or any part thereof, which form a continuous road improvement."

This sentence means that sections 6906 to 6953 are to be give a broad enough meaning to include either a state or county road or roads, or part thereof, which form a continuous road improvement; or a state or county road or roads, and a city or village street or streets, or any part thereof, which form a continuous road improvement.

It is hardly necessary to add that in our municipal code we have very comprehensive provisions for the improvement of municipal streets by the municipality itself. Certainly the provisions of section 6949 are to be treated as exceptions to the general rule that the municipality shall have charge of improvements within its limits, rather than as conferring any general power on the commissioners to take up the improvement of streets within a municipality not connected with state or county highway improvements.

This construction of the law, of course, leads to a negative answer to your question, unless it appears that the part of Adams street proposed to be improved is part of a state or county highway improvement. The facts show that not even from the broadest viewpoint may said section of street be so considered; for even if Adams street were improved for its entire length from Third street to Lawson avenue, and then Lawson avenue improved from Adams street to Market street, the result would be simply an additional connecting link of improved road between Third street and Market street; because, as above noted, Market street intersects Third street and hence there is formed a direct connection between Inter-County Highway No. 26 and Inter-County Highway No. 7.

You are therefore advised in answer to your inquiry that the commissioners are without power either to undertake the improvement or to enter into an agreement with the city to make the improvement in conjunction with the city.

Respectfully,
JOHN G. PRICE,
Attorney-General.

398.

STATE BOARD OF PHARMACY—HOW MEMBER OF BOARD APPOINTED—SEE ALSO OPINION NO. 417, DATED JUNE 20, 1919.

Under section 1296 *G. C., it is not necessary that an appointment by the governor of a member of the state board of pharmacy be confirmed by the senate.*

COLUMBUS, OHIO, June 16, 1919.

State Board of Pharmacy, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion of this department as follows:

> "Under section 1296 of the General Code is it necessary that an appointment to the state board of pharmacy be confirmed by the Senate?"

Section 27, Article II, section 21, Article IV and section 2, Article VII of the constitution of Ohio and section 1296 G. C. are pertinent. In part, section 27, Article II, supra, provides:

> "The election and appointment of all officers, and the filling of all

vacancies, not otherwise provided for by this constitution, * * *, shall be made in such manner as may be directed by law; * * *."

It is to be noted that the appointment of officers, except as otherwise provided by the constitution, shall be made according to law.

Section 21, Article IV of the constitution provided for the appointment of a supreme court commission, which appointment was to be made by the governor, with the advice and consent of the senate.

Section 2, Article VII, is in part as follows:

"The directors of the penitentiary shall be appointed or elected in such manner as the General Assembly may direct; and the trustees of the benevolent, and other state institutions, * * *, shall be appointed by the governor, by and with the advice and consent of the senate; * * *."

The last two quoted sections of the constitution are the appointments referred to in section 27, Article II, supra, as being "otherwise provided for by this constitution," and there is no other or further provision in the constitution for the confirmation of the appointment of a member of the state board of pharmacy, for it must be at once apparent that such board is not a state institution within the contemplation of section 2, Article VII, and the solution of your question lies in consideration of the manner of appointment as provided by law.

A brief history of what is now section 1296 G .C. is as follows: The original act regulating pharmacy applied only to Cincinnati and was passed in 1870 (70 O. L. 287). This law was amended by the creation of city boards of pharmacy in 1873 (72 O. L. 16).

The original act creating the state board of pharmacy was passed in 1884 and is found in 81 O. L. 62. This act provided for the appointment of a state board of pharmacy by the governor, with the consent and approval of the senate, and provided that each year thereafter the governor should appoint one member with the consent of the senate.

In 1898 (93 O. L. 181), this law was amended and that part which related to the annual appointments was changed by the omission of that part of the statute which provided for the senatorial confirmation and that is the form in which it remained after further amendments in 1908 (99 O .L. 503).

It is to be noted that after its amendment and in its present form, section 1296 G. C., relating to the annual appointments to such board, provides:

"* * * The Ohio state pharmaceutical association may annually submit to the governor the names of five registered pharmacists, and from the names so submitted or from others, at his discretion, the governor each year shall appoint one member of the board for a term of five years and until his successor is appointed and qualified."

To give meaning and purpose to the act of the General Assembly in omitting the requirement of consent and approval of the senate in the amendment of 1898, no other conclusion can be reached except that the method of the appointment to such board was intended to be changed by that amendment, and from this it follows that the opinion of this department is that confirmation by the senate is not necessary to the valid appointment by the governor of a member of the state board of pharmacy.

Respectfully,
JOHN G. PRICE,
Attorney-General.

399.

APPROVAL OF LEASES FOR CANAL LANDS IN AKRON AND BARBERTON, OHIO.

COLUMBUS, OHIO, June 16, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of June 9, 1919, enclosing for my approval leases (in triplicate) for canal lands, as follows

	Valuation.
To The Williams Foundry & Machine Company, land in Akron, Ohio	$56,950 00
John Landis, land in Barberton, Ohio	1,360 00

I have carefully examined said leases, find them correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

400.

APPROVAL OF LEASE FOR CANAL LANDS TO A. B. LEVY.

COLUMBUS, OHIO, June 16, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of June 11, 1919, enclosing for my approval lease (in triplicate) for canal land, as follows:

	Valuation.
To A. B. Levy, being embankment lot No. 2, north of Stubbs Landing at Lakeview, Ohio	$1,666 67

I have carefully examined said lease, find it correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

401.

APPROVAL OF LEASES TO THE INDEPENDENT COMPANY, ROMER, WINKELJOHN AND ROMER, DANA D. REED, E. KIESEWETTER, MRS. ESTHER DEAL, JOHN R. ALLEN, G. C. BLAUSER, MAURICE A. DONAHUE, THE HOCKING VALLEY MANUFACTURING COMPANY AND THE NORTHERN OHIO TRACTION & LIGHT COMPANY.

COLUMBUS, OHIO, June 16, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of May 31, 1919, enclosing for my approval leases (in triplicate) for canal lands, as follows:

	Valuation.
To The Independent Company, Ohio Canal land in Massillon, Ohio	$2,500 00
To Romer, Winkeljohn and Romer, Reservoir lands in Mercer county	1,000 00
To Dana D. Reed, cottage site at Buckeye Lake, Ohio	500 00
To E. Kiesewetter, cottage site at Buckeye Lake, Ohio	400 00
To Mrs. Esther Deal, canal land at Barberton, Ohio	576 00
To John R. Allen, Reservoir lands in Mercer county	250 00
To G. C. Blauser, Ohio Canal lands at Baltimore, Ohio	325 00
To Maurice A. Donahue, cottage site at Buckeye Lake, Ohio, (half lot)	200 00
To The Hocking Valley Manufacturing Company, abandoned Hocking Canal land at Lancaster, Ohio	115 00
To The Northern Ohio Traction & Light Company, land in Navarre for pole line purposes	500 00

I have carefully examined said leases, find them correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

402.

APPROVAL OF BOND ISSUE OF EAST LIVERPOOL CITY SCHOOL DISTRICT IN THE SUM OF $104,500.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 16, 1919.

403.

APPROVAL OF BOND ISSUE OF MASSILLON CITY SCHOOL DISTRICT IN THE SUM OF $11,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 16, 1919.

404.

APPROVAL OF BOND ISSUE OF VILLAGE OF BREMEN IN THE SUM OF $6,608.29.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 16, 1919.

405.

APPROVAL OF ARTICLES OF INCORPORATION OF THE AMERICAN LIABILITY COMPANY.

COLUMBUS, OHIO, June 16, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am herewith returning the articles of incorporation of The American Liability Company with my approval endorsed thereon.

Very respectfully,
JOHN G. PRICE,
Attorney-General.

406.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ADAMS, COLUMBIANA AND KNOX COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, June 17, 1919.

407.

APPROVAL OF BOND ISSUE OF STARK COUNTY IN THE SUM OF $16,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 18, 1919.

408.

APPROVAL OF BOND ISSUE OF STARK COUNTY IN THE SUM OF $57,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 18, 1919.

409.

APPROVAL OF BOND ISSUE OF STARK COUNTY IN THE SUM OF $98,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 18, 1919.

410.

APPROVAL OF BOND ISSUE OF STARK COUNTY IN THE AMOUNT OF $39,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 18, 1919.

411.

APPROVAL OF BOND ISSUE OF STARK COUNTY IN THE AMOUNT OF $13,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 18, 1919.

412.

APPROVAL OF BOND ISSUE OF STARK COUNTY IN THE AMOUNT OF $24,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 18, 1919.

413.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HANCOCK, COLUMBIANA AND TRUMBULL COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, June 19, 1919.

414.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN COLUMBIANA, MAHONING, HARRISON AND HENRY COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, June 19, 1919.

415.

TAXES AND TAXATION—ACTIONS UNDER SECTION 2667 G. C. TO ENFORCE LIENS OF TAXES AND ASSESSMENTS AGAINST REAL ESTATE BY COUNTY TREASURER—PROCEEDS OF SALE HOW DISTRIBUTED—LANDS SOLD FOR AMOUNT NOT SUFFICIENT TO PAY COSTS, TAXES, ASSESSMENTS, ETC.

1. *In an action under section 2667 G. C., by the county treasurer, to enforce liens of taxes and assessments against real estate, the proceeds of the sale thereof* ***should be distributed in the following manner:***

(*a*) *To the payment of costs.*

(*b*) *To the payment of the state's claim for all the taxes (including penalties and interest) which have become a lien on the property.*

(*c*) *To the payment of special assessments, in the order in which the liens therefor attached.*

No part of the taxes should be subordinate to assessments, although the lien of the latter may have attached before that of the former.

2. *In the event that said lands or lots or parcels thereof are not sold for enough to pay the costs, taxes, interest, assessments and penalties, in full, the entry confirming the sale may direct the county treasurer to apply the amount received to the various liens according to the priority thereof and then to clear his duplicate of any deficiency remaining charged against said lands or lots or parcels thereof so sold. Such entry should further contain the recital that the purchaser is subrogated to all the rights of the state, and that the orders, findings and judgments therein are made without prejudice to the right of the treasurer to proceed against any party personally liable for any of such assessments.*

COLUMBUS, OHIO, June 20, 1919.

HON. MILO L. MYERS, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR:—You advise that you have some foreclosure suits pending in your court of common pleas, under section 2667 G. C., and that in some of these cases you have had the real estate advertised and sold, but have not had the sales confirmed, and request my opinion on the following questions:

> "First. In the event that said lands or lots or parcels thereof are not sold for enough to pay the costs of sale, taxes, assessments and penalties thereon in full, how should the balance from the proceeds of said sale, after paying costs as provided in section 2670, be applied as to priority of claims, that is, taxes, assessments, penalties, etc., and should the date of the lien for taxes levied and assessment made be taken in consideration?
>
> Second. In the event that said lands or lots or parcels thereof are not

sold for enough to pay the costs of sale, taxes, assessments and penalties in full, or any of said items in full, would it be proper to contain in the journal entry confirming the sale an order directing the county treasurer to apply the amount received to the various liens as to priority thereof and then balance and clear his duplicate of any deficiency remaining thereon charged against said lands or lots or parcels thereof so sold, and if not, state what procedure to follow so that duplicates may be cleared and started anew?"

Section 2670 G. C. is in part as follows:

"Judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty and costs, for the payment of which the court shall order such premises to be sold without appraisement. From the proceeds of the sale the costs shall be first paid, next the judgment for taxes and assessments, and the balance shall be distributed according to law. * * *"

The same language appears in 107 O. L. 738 (Sec. 16). Section 10 of this act is as follows:

"The state shall have a first and best lien on the premises described in said certification, for the amount of taxes, assessments and penalty, together with interest thereon at the rate of eight per cent. per annum, from the date of delinquency to the date or redemption thereof, and the additional charge of twenty-five cents for the making of said certification, and sixty cents for advertising. If the taxes have not been paid for four consecutive years, the state shall have the right to institute foreclosure proceedings thereon, in the same manner as is now or hereafter may be provided by law, for foreclosure of mortgages on land in this state, and there shall be taxed by the court as costs in the foreclosure proceedings instituted on said certification, the cost of an abstract or certificate of title to the property described in said certification, if the same be required by the court, to be paid into the general fund of the county treasurer."

As the statute plainly states and your questions suggest, the costs are to be first paid from the fund realized from the sale.

The syllabus of the case of Security Trust Co. vs. Root, 72 O. S. 535, is in part as follows:

"By virtue of section 2838 R. S. the lien of the state for taxes is paramount to all other liens. * * *"

In Treasurer of Athens County vs. Dale, Rec'r, 60 O. S. 180, where the receiver of a railroad questioned the priority of the state's claim for taxes, it was said by the court (p. 186):

"The right of the state to the receipt of its taxes is paramount to that of all others; without the protection of the state and its laws, the road could not be run and operated, and the property would be of little, if any value; so that it is apparently of as much importance to the road, that the taxes due the state, on which all rights of property depend, should be paid without delay, as that wages, salaries and other expenses of running and operating it, should be paid."

In McCollum vs. Uhl, 27 N. E. 152, the Supreme Court of Indiana said:

> "The lien of the state for taxes is paramount, and is superior to the lien of the ditch assessment."

Section 5671 G. C. provides that the lien of the state for taxes levied for all purposes in each year shall attach to all real property subject to such taxes on the day preceding the second Monday of April, annually, and continue until such taxes, with any penalties accruing thereon, are paid.

The statutes providing for the collection of assessments begin with section 3892 G. C., which is as follows:

> "When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes."

Section 3897 G. C. provides that special assessments shall be a lien, from the date of the assessment, upon the respective lots or parcels of land assessed.

Section 3898 G. C. provides for the collection of assessments, with a penalty of five per cent., in suit, before a justice of the peace or other court of competent jurisdiction, in the name of the corporation, against the owner or owners.

Section 3906 G. C. is also pertinent and its language is as follows:

> "Sec. 3906. The lien of an assessment shall continue two years from the time it is payable, and no longer, unless the corporation, before the expiration of the time, causes it to be certified to the auditor of the proper county, for entry upon the tax-list for collection, or causes the proper action to be commenced in a court having jurisdiction thereof, to enforce such lien against such lots or lands, in which case the lien shall continue in force so long as the assessment remains on the tax list uncollected or so long as the action is pending, and any judgment obtained, under and by virtue thereof, remains in force and unsatisfied."

In Central Ohio R. R. Co., et al., vs. City of Bellaire, 67 O. S. 297, it is said in the syllabus:

> "After an assessment for a street improvement has been certified to the county auditor and placed on the tax list as provided in section 2295, Revised Statutes, the right of action for the collection of such assessment rests alone in the county treasurer."

Burket, C. J., speaking for the court, said (p. 301):

> "So that when this action was begun by the city it had no lien to en-

force, and had no right of action for the collection of the assessment by judgment and execution, that right, if it existed at all, being vested in the county treasurer from and after the time said assessment was so certified to the county auditor.

It is therefore clear that the city of Bellaire had no cause of action against said defendants below and that the first ground of demurrer should have been sustained."

I have directed attention to sections 3897 and 3898 G. C. and to the case of Central Ohio R. R. Co., et al., vs. City of Bellaire, supra, because they afford some inference that there might be a claim maintained against the parties who were the owners of the property at the time the special assessments were levied, and I think it wise, therefore, in the disposition of these cases, not to foreclose that right if any exists, although that question has not been submitted to me.

So far as the priority of assessments is concerned, the rule seems to be that, in the absence of statutory provisions to the contrary, liens therefor take precedence in order of the times of the levying of the assessments. See note to Baldwin vs. Morency, 30 L. R. A. (N. S.) 767.

Answering your first question, then, it is my opinion that after payment of costs the state's claim for *all* the taxes (including penalty and interest) which have become a lien on the property in question should next be satisfied, and then the balance should be credited on the assessments, in the order of their priority. No part of the taxes should be subordinate to assessments, although the lien of the latter may have attached before that of the former.

You do not call attention to any other incumbrance upon the property and I presume there are no questions presenting any such difficulty in these cases.

Section 2667 G. C., which authorizes the foreclosure of tax and assessment liens, provides that this shall be done "in the same way mortgage liens are enforced."

Clearly then, under this statute and on general propositions of equity, the purchaser takes the title free of the state's claim and is subrogated to its rights. There would seem to be no good reason why the common pleas court should not in its entry of confirmation direct the treasurer to clear his duplicate of any deficiency, as you suggest. But to save any possible claim of a personal nature, which might be asserted against any owner of the property at the time any assessment was levied, I would further advise that this entry not only contain the recital that the purchaser is subrogated to the rights of the state, but also that the orders, findings and judgments in such entry of confirmation are made without prejudice to the right of the treasurer to proceed against any party personally liable for any of these assessments.

Respectfully,
JOHN G. PRICE,
Attorney-General.

416.

JUVENILE COURT—FEMALE MINOR CHILD UNDER AGE OF TEN YEARS CANNOT LEGALLY BE COMMITTED TO GIRLS' INDUSTRIAL SCHOOL —SECTIONS 1652 AND 1352-5 G. C., PROVIDE HOW DISPOSITION IS TO BE MADE.

(1) *Because of the age limitation imposed by section* 1653-1 *G. C., a delinquent female minor child under the age of ten years cannot legally be committed to the Girls Industrial School by the probate court, in the exercise of its juvenile jurisdiction.*

(2) Disposition of such a child should be made in one of the ways provided by sections 1652 *and* 1352-5 *G. C.*

COLUMBUS, OHIO, June 20, 1919.

HON. FLOYD E. STINE, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—Acknowledgement is made of your letter of May 29th, reading as follows:

> "Will you kindly advise me whether or not a delinquent female minor child under the age of ten years, to-wit, nine years of age, can be sent by the probate court to the Girls' Industrial School, and if not, what disposition the court should make of her?
>
> Under the sections relative to the juvenile court, the court seems to have jurisdiction over delinquent children; the term delinquent child including any child under the age of eighteen years, there being no minimum age limit stated, although section 1653-1 provides that no child under ten years of age shall be committed to the Girls' Industrial Home."

Section 1642 G. C. provides, in substance, that a probate court, when the judge thereof has been designated under section 1639 G. C. to exercise the powers of a juvenile court, "shall have jurisdiction over and with respect to delinquent, neglected and dependent minors, under the age of eighteen years." As your letter states, no minimum age limit is prescribed, in so far as the jurisdiction of the juvenile court over a minor under eighteen years of age is concerned.

Section 1653-1 G. C., to which you refer, is the only section of the juvenile act which imposes a minimum age limit as to persons committed thereunder. This section reads as follows:

> "Section 1653-1. The provisions of section 1652 shall not apply to the girls' industrial school, or the boys' industrial school, so far as the same allows the commitment of a child under ten years or over eighteen years of age to such institution. In no case shall a child found to be a dependent or neglected child be committed to such institution, nor shall any child under ten years or over eighteen years of age, be committed to such schools except as provided in section 2111 of the General Code."

Section 2111 G. C., reads thus:

> "A girl under the age of eighteen years sentenced to imprisonment in the penitentiary, county jail or other penal institution, at any time after such sentence and before the expiration thereof, may be transferred to the girls' industrial school, on the written order of the Ohio board of administration, to serve the unexpired part of the sentence. Such transfer shall be

made, if it shall be made to appear that it will be conducive to her reformation, and not prejudicial to the school. The chief matron of the school shall receive such girl so transferred, and if she finds at any time that the best interest of the school requires a return of such girl to the penal institution from which she came, she may so recommend to the board, which is empowered to order the return of such girl."

The language of section 1653-1 G. C., is plain and unambiguous and clearly prohibits the commitment of a girl under ten years of age to the girls' industrial school.

Under the provisions of section 1652 G. C., disposition may be made of a delinquent child under ten years of age, in any of the following ways:

(1) The judge may continue the case and commit the child to the care or custody of a probation officer, allowing such child to remain at its own home subject to the visitation of the probation officer, or otherwise, as the court may direct; or

(2) The judge may place the child in a suitable family home, subject to the supervision of the probation officer and the further order of the judge; or

(3) The judge may authorize the child to be boarded in some suitable family home in case provision be made by voluntary contribution, or otherwise, for the payment of the board of such child until suitable provision be made for it in a home without such payment; or

(4) The judge may commit the child to any institution within the county that may care for delinquent children, or be provided by a city or county suitable for the care of such children; or

(5) The judge may commit the child to the care and custody of an association that will receive it, if such association is approved by the board of state charities as provided by law.

Attention is also directed to section 1352-5 G. C., which says:

"The board of state charities may when willing to do so, receive as its wards with all the powers given it by section 1352-3 of the General Code delinquent children committed to it by a juvenile court or from any institution to which such children may be committed by the juvenile court or assigned by the board of administration. Such children shall be placed by it in homes in accordance with the provisions of section 1352-3 of the General Code. Before making such commitment the court may make an order that the parent or parents of such child shall pay the board of state charities, periodically, reasonable sums for the maintenance of such child which orders upon the disobedience thereof, may be enforced by attachment as for contempt. The money so obtained shall be used for payment of such child's board and maintenance. If originally committed to such institution by the juvenile court, that court must first consent to the transfer of such child to the board of state charities. Said court may in such cases make an order that the parents or guardians pay for its maintenance in the same manner as if such child had been originally committed to said board.

Provided that if the board of state charties find it impracticable to so place such child, it shall at its discretion have the right to surrender such child to the court, institution, or board of administration from which it was received."

Replying directly to your question, I am of the opinion that a delinquent female minor child under the age of ten years can not legally be committed by the probate

court, in the exercise of its juvenile jurisdiction, to the girls' industrial school, and that disposition of such child should be made in one of the ways provided by sections 1652 and 1352-5 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

417.

STATE BOARD OF PHARMACY—OPINION NO. 398 AS TO APPOINTMENT OF MEMBERS TO SAID BOARD MODIFIED.

COLUMBUS, OHIO, June 20, 1919.

State Board of Pharmacy, Columbus, Ohio.

GENTLEMEN:—Referring to Opinion No. 398, bearing upon the question of the necessity for the confirmation by the senate of the annual appointments as members of the State Board of Pharmacy, permit me to acknowledge the receipt of your letter of this date, containing supplementary information and which letter is as follows:

"Supplementary to the facts stated in the recent request of the State Board of Pharmacy for your opinion as to the necessity of confirmation by the senate of annual appointment of members of such State Board of Pharmacy, I desire to furnish you with these additional facts:

1. Since the amendment in 1898 (93 O. L. 181), by which that part of the original section was changed by the omission of the specific provisions for senatorial confirmation of the annual appointments, the legislative practice has been that each annual appointment of members of the State Board of Pharmacy has been confirmed by the Senate.

2. On June 19, 1919, relative to the appointment of Mr. F. D. Christian as a member of the State Board of Pharmacy, the following proceedings were had, namely, that the senate standing committee on rules made the following report:

'The committee recommends that the senate do advise and consent to the following appointment: F. D. Christian, Shelby county, State Board of Pharmacy, for the term ending March 31, 1922.

F. E. WHITTEMORE,
M. B. ARCHER,
FRANK C. PARRETT.

Upon vote, the senate advised and consented to the appointment of the governor by a vote of twenty-four (24) to nine (9).

W. E. HALLEY,
Clerk.'

Believing that this information may be considered necessary to the proper solution of the question involved in that request, it is therefore submitted at this time."

Opinion No. 398 was based on the theory that section 1296 G. C. is ambiguous and that in order to ascertain its real meaning in relation to the point in controversy it was necessary to look to the history of the evolution of the law, and from that history it was gathered that it was the intention of the General Assembly to take from the senate the power of confirmation of the annual appointees of the Governor on the State Board of Pharmacy.

In searching for the intent and purpose of an ambiguous law, it is necessary to look not only to all laws relating to and bearing upon the one in question, but to the course pursued by officials charged with the construction and administration of the act itself.

The information contained in your supplementary letter shows that there has been impressed on section 1296 not only an administrative construction by one of the coordinate bodies which enacted it, but a long-continued acquiescence by the legislative and executive departments in the custom of senatorial confirmation of such appointments, as is evidenced by the uniform practice of confirming such appointees, notwithstanding the amendment of 1898 referred to in the opinion. The latest expression of such acquiescence and construction occurred yesterday in the action of the senate in confirming the appointment of F. D. Christian as a member of the State Board of Pharmacy for the term ending, as stated in your letter, March 31, 1922.

Therefore, in view of the supplementsl information furnished in your letter of this date, and in order that he work of your board may not be interfered with, it is the opinion of this office that the conclusion reached in Opinion No. 398 should be modified, and that unless a contrary holding is made by a court of proper jurisdiction in the meantime, the appointment of Mr. Frank Trentman should be regarded as incomplete until it is confirmed by the senate.

Respectfully,
JOHN G. PRICE,
Attorney-General.

418.

APPROVAL OF BOND ISSUE OF PERRY TOWNSHIP RURAL SCHOOL DISTRICT IN THE SUM OF $100,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 21, 1919.

419.

TEACHING OF GERMAN LANGUAGE IN SCHOOLS—CONSTRUCTION OF SENATE BILL No. 137—NO PROVISION PROHIBITING CATECHETICAL INSTRUCTION IN SUCH LANGUAGE IN SUNDAY SCHOOLS—SUMMER SCHOOL GOVERNED BY SAME LAWS AS SCHOOL WITH REGULAR TERM—GERMAN LANGUAGE SHALL NOT BE TAUGHT BELOW EIGHTH GRADE IN ANY SCHOOL.

1. *Sections* 7762-1 *and* 7762-2 *of the General Code, which become effective in September,* 1919, *contain no provisions which prohibit catechetical instructions in the German language in Sunday Schools conducted by religious denominations.*

2. *A summer school which is held when another term of school is not in session is governed by the same laws which govern the regular term or session of school.*

3. *The German language shall not be taught below the eighth grade in any of the elementary schools, private or parochial schools, or schools maintained in connection with benevolent or correctional institutions in this state.*

COLUMBUS, OHIO, June 23, 1919.

HON. VICTOR L. MANSFIELD, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion of the Attorney-General upon senate bill No. 137, known as the Ake bill, and which was signed by the governor June 5th and will be effective in approximately ninety days thereafter.

You ask that the following two questions be answered:

"1. Whether or not said bill prohibits the giving of catechetical instructions in Sunday School on Sunday in the German language?

2. Whether in summer school, which is held when other school is not in session, catechetical instruction may be given in the German language, and the German language taught together with the English language? All other subjects are taught in the English language."

The act in question (amended senate bill 137), reads as follows:

"AN ACT.

To supplement section 7762 of the General Code, by the addition of supplemental sections to be known as sections 7762-1, 7762-2, 7762-3 and 7762-4, and to repeal section 7729, concerning elementary, private and parochial schools and providing that instruction shall be in the English language.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 7762 be supplemented by sections 7762-1, 7762-2, 7762-3 and 7762-4 to read as follows:

Section 7762-1. That all subjects and branches taught in the elementary schools of the state of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all the branches named in section 7648 of the General Code. Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.

Section 7762-2. All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trustees or officers in control shall cause to be taught in them such branches of learning as prescribed in section 7648 of the General Code or such as the advancement of pupils may require, and the persons or officers in control direct; provided, that the German language shall not be taught below the eighth grade in any such schools within this state.

Section 7762-3. Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less

than twenty-five dollars nor more than one hundred dollars, and each separate day in which such act shall be violated shall constitute a separate offense."

This act repeals section 7729 of the General Code, which reads as follows:

"Boards of education may provide for the teaching in the German language in the elementary and high schools of the district over which they have control, but it shall only be taught in addition, and as auxiliary to, the English language. All the common branches in the public schools must be taught in the English language."

A careful reading of section 7762-1, 7762-2 and 7762-3 G. C., which sections constitute the important parts of the new law, indicates that the measure is for the government primarily of those schools within the state of Ohio below the 8th grade, and provides that all subjects and branches taught therein must be in the English language only, and further, that the German language shall not be taught below the eighth grade in any of the elementary schools of the state.

There is no reference made whatever to any instructions that may be given in Sunday Schools by any religious congregation on that day, for section 7762-2 provides that all private and parochial schools and all schools maintained in connection with benevolent and correctional institutions, shall be taught in the English language only and clearly a Sunday School would not come within the scope of section 7762-2 G. C.

The act in question is in a measure for the government of schools in which children receive instruction in the branches named in section 7648 G. C. and cannot be construed as having any reference to church or religious proceedings that are not directly connected with such private or parochial school mentioned in section 7762-2 G. C.

Bearing upon your second question, as to whether catechetical instruction may be given in the German language and the German language taught together with the English language in a summer school, it is advised that if such summer school is under the control of a board of education, then such summer schools must be conducted under the same laws as the regular so-called winter term of school and there can be no deviation because it is a summer school; and if such summer school were conducted as a private or parochial school, and had as its pupils those below the eighth grade, and who had not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of the state, such summer school shall be taught in the English language only and the branches shall be those mentioned in section 7648 of the General Code, or such as the advancement of the pupils may require, and the persons or officers in control may direct.

It is noted that both sections 7762-1 and 7762-2 end with the same sentence, providing that the German language shall not be taught below the eighth grade in any of the elementary schools, or private or parochial schools, of the state.

It is, therefore, the opinion of the Attorney-General that sections 7762-1 and 7762-2 of the General Code, which become effective in September, 1919, contain no provisions which prohibit catechetical instructions in the German language in Sunday Schools conducted by religious denominations; that a summer school which is held when another term of school is not in session is governed by the same laws which govern the regular term of session of school; and, that the German language shall not be taught below the eighth grade in any of the elementary schools, private or parochial schools, or schools maintained in connection with benevolent or correctional institutions in this state.

Respectfully,

JOHN G. PRICE,

Attorney-General.

420.

COURT HOUSE—BUILDING COMMISSION—HAS AUTHORITY UNDER SECTION 2335 G. C. TO EMPLOY NECESSARY CLERICAL HELP—LIMITATION OF SECTION 2339 G. C. AS TO EMPLOYEES DISCUSSED—COUNTY AUDITOR KEEPS RECORDS OF SAID COMMISSION—DEPUTY AUDITOR AND CLERK OF BUILDING COMMISSION NOT INCOMPATIBLE.

1. *The authority conferred upon the building commission by section* 2339 *G. C. to employ "other necessary employes" is limited to such employes as are necessary in and about the work of erecting the court house or other building under course of construction and does not include clerical and office help.*

2. *The building commission is warranted by section* 2335 *G. C. in employing clerical help necessary in conducting its correspondence. The amount of such help will depend upon the facts and circumstances of each particular case.*

3. *The duty of keeping the records of the proceedings of the building commission, and of preserving plans, drawings, representations, bills of material, specifications of work and estimates of costs pertaining to the building commission, is imposed upon the county auditor by section* 2342 *G. C., and not upon the building commission, and the auditor is authorized by section* 2563 *G. C. to appoint a deputy to aid him in the performance of such duty.*

4. *There is no incompatibility between the duties of a deputy auditor and of a correspondence clerk employed by the building commission under section* 2335 *G. C.*

COLUMBUS, OHIO, June 23, 1919.

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

GENTLEMEN:—Your letter of recent date making certain inquiries concerning the powers of a building commission created under authority of section 2333 et seq. G. C. for the purpose of erecting a court house or other county building, was duly received.

(1) The only clear express authority of the building commission to employ is conferred by section 2339 G. C. which provides that

> "the commission may employ architects, superintendents and other necessary employes during such construction and fix their compensation and bond."

The general words "other necessary employes," as used in the foregoing section, are restricted in meaning under the well known *ejusdem generis* rule of construction to such employes as may be engaged in or about the work of erecting the court house or other county building under course of construction, and do not include clerical and office help.

(2) Implied authority to employ clerical help necessary to enable the commission to conduct its correspondence, is conferred by section 2335 G. C., which provides that:

> "The necessary expenses for stationery, postage, *correspondence* and travel out of the county required in the discharge of the duties of the commission shall be paid from the county treasury on the order of the county commissioners and the warrant of the auditor."

The amount of such help will depend upon the facts and circumstances of each particular case.

(3) The duty of keeping full and accurate records of the proceedings of the commission is imposed upon the county auditor, and not upon the commission. See section 2342 G. C., which reads as follows:

> "Full and accurate records of all proceedings of the commission shall be kept by the county auditor upon the journal of the county commissioners. He shall carefully preserve in his office all plans, drawings, representations, bills of material, specifications of work and estimates of costs in detail and in the aggregate pertaining to the building."

In State vs. Edmondson, 12 N. P. (n. s.) 577, the Hamilton county common pleas court was called upon to construe certain sections of the building commission law, and also certain other statutes applicable to the county auditor and county commissioners, and one of the conclusions reached by the court was stated as follows:

> "The legislature therefore provided that the auditor should act as recording officer of the building commission. For these additional duties he can adequately provide by the appointment, if necessary, of a deputy under section 2563. The recording officer of the building commission is therefore the county auditor, or a deputy appointed by him for such purpose."

(4) There is no incompatibility between the duties of a deputy auditor, and of a correspondence clerk which the building commission is authorized to employ under section 2335 G. C., and there appears to be no objection to the same person holding both positions.

Respectfully,
JOHN G. PRICE,
Attorney-General.

421.

AGRICULTURE—LICENSE FEE FOR SEED DEALERS—NO AUTHORITY TO PRO-RATE FEE—SENATE BILL NO. 11. (108 O. L. 52.)

There is no authority in amended senate bill No. 11 (108 O. L. 52) for prorating the annual license fee therein provided.

COLUMBUS, OHIO, June 23, 1919.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for the opinion of this department as follows:

> "1. Section 13 of the amended senate bill No. 11, beginning sixth line, reads as follows: 'he or they shall pay each year a license fee to the secretary of agriculture of five dollars, and shall receive from said secretary of agriculture a certificate to sell agricultural seed until the first day of January next following.'
>
> 2. As it seems to be the intention to require a license fee of only $5.00 a year, we would be pleased to learn whether or not it would be necessary for us to collect from each seed dealer a fee of $5.00 covering the period from September 1st to January 1st, or can the amount be prorated?

3. We understand that the shipment of seeds during the fall of the year is negligible and for that reason we are desirous of learning if the $5.00 must be paid by each seed dealer of the state.

4. There is a seed testing course at the Ohio state university the early part of next week which will be attended by seed dealers of the state, and for their information we would like a ruling on the above within the next few days."

Amended senate bill No. 11, referred to in your inquiry, is an act to regulate the sale of agricultural seeds, as indicated in its title and was the subject of an opinion from this department rendered at your request May 10, 1919, No. 280.

Section 10 in part provides:

"The secretary of agriculture shall maintain a laboratory with necessary equipment and may appoint such analysts, inspectors and assistants as may be necessary for the enforcement of the provisions of this act."

As to the purpose for which the license fee is exacted, section 13 definitely states this purpose to be:

"For the purpose of defraying the costs of inspection and analyses of agricultural seeds under the provisions of this act * * * before any person * * * shall sell, offer for sale or expose for sale in this state, any of the agricultural seeds, except as provided in section 6 * * * of this act, he or they *shall pay each year* a license fee * * * and shall receive from said secretary of agriculture *a certificate to sell agricultural seeds until the first day of January next following.*"

It may be observed that the act itself does not contain any explicit provisions whereby the legislative intent may be directly ascertained as to the amount of the license to be charged from September 1, 1919 (when the law goes into effect), and December 31, 1919, other than the fixed fee "each year."

The purpose for which the liccense fee is exacted being definitely stated in the act itself, section 10, supra, becomes pertinent in considering the expense which may be created in the enforcement of this law. It is to be noted that the act provides for the maintenance of a laboratory with necessary equipment and the appointment of analysts, inspectors and assistants, all of which it may be suggested the legislature had in contemplation in not providing for a prorated license fee for the first year.

House Bill No. 536 (appropriations), enacted at the same session at which Senate Bill 11 was enacted, appropriates for such laboratory equipment, appointment of analysts and inspectors, approximately $7,300.00.

By personal conference with you, it is learned that your department estimates that approximately 1,500 of such licenses will be issued. At the rate fixed in section 13, this would amount to an annual income of $7,500,00.

Thus it would appear that the legislature had in mind the first expense of installing and equipping the necessary machinery for the enforcement of law and advisedly omitted any provision for prorating the first annual license fee.

Taking these facts into consideration, with the plain provision of that section that such dealers "shall pay each year" a license fee to the secretary of agriculture of $5.00, this department is unable to find any warrant in law for prorating such fee.

Respectfully,

JOHN G. PRICE,

Attorney-General.

422.

BOARD OF EDUCATION—AUTHORITY TO APPOINT TEACHERS GIVEN TO SUPERINTENDENT OF SCHOOLS—ASSIGNMENT OF TEACHERS ALSO IS VESTED WITH SUCH AUTHORITY.

Where a board of education has given the power of appointment of teachers to its superintendent of schools, the authority to assign such teachers follows such power of appointment vested in the superintendent of schools.

COLUMBUS, OHIO, June 23, 1919.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgement is made of your request for an opinion upon the following statement of facts submitted to your department by the superintendent of one of the city school districts of the state. Such statement of facts is as follows:

"The laws enumerating the powers of the board of education in city school districts are found in sections 4749, 5656, 5657, 7620, 7624, 7690, 7715 and 7722.

Section 7690 provides that 'each board of education shall fix the salaries of all teachers,' but does not provide for their assignment to duty.

Section 7703, regarding the powers and duties of a superintendent of a city school district and how the board of education may re-employ any teacher whom the superintendent refuses to appoint, does not provide for the assignment to duties of teachers by the board of education. This section makes mandatory as follows the duties and powers of the superintendent: 'Such superintendent shall visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils, and perform such other duties as the board determines.'

In September, 1918, there was organized a junior high school in the city school district in accordance with the law, the approval of the state superintendent of public instruction and adoption of recommendation of superintendent by the board of education of said district.

On September 14, 1918, a letter by the superintendent of the city school district to the state superintendent of public instruction, indicating the qualifications of junior high school teachers, was approved by him in a letter dated September 18, 1918.

Miss S——, a seventh grade teacher (1917-18) in the S—— city school district, was not appointed as a teacher in the junior high school.

Owing to the death of Miss G——, a vacancy existed in the junior high school in May, 1919, at the time when the appointments, according to the rule of the board of education were due. On May 8, 1919, when other appointments were made, a suitable, strong, efficient man teacher had not been secured. The superintendent of schools desires to place a man in this position.

The board of education at a regular meeting on May 22, 1919, after appointments of superintendent had been confirmed and salaries fixed by the board of education, another resolution was offered by Mr. B. and seconded by Mr. S., which reads on the minutes of the board as follows: 'On motion by Mr. B., seconded by Mr. S., Miss S. was assigned to the vacancy in the junior high school. On roll call votes stood, Ayes, three, Nays, two. Carried.'

The superintendent protested against such motion to assign Miss S. to the junior high school. * * * * * * * * * * *

The following questions are submitted by the superintendent of the S. city school district:

QUESTION OF POWER OF ASSIGNMENT.

1. In the absence of a statute giving the power of assignment or direction to teachers by the board of education, can any board of education in a city school district assign any teacher to specific duties at a specific school or building?

2. What is the interpretation of that portion of section 7703 which reads 'such superintendent shall visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils.'?

3. What is the interpretation of that portion of section 7703 which reads 'and perform such other duties as the board determines,'?"

The question here seems to be as to whether the superintendent of the city school district in question has the power to appoint and assign teachers or whether such power rests with the board of education. Attention is invited to section 7703 G. C., which reads as follows:

"Upon the acceptance of the appointment, such superintendent, subject to the approval and confirmation of the board, may appoint all the teachers, and for cause suspend any person thus appointed until the board or a committee thereof considers such suspension, but no one shall be dismissed by the board except as provided in section seventy-seven hundred and one. But any city board of education, upon a three fourths vote of its full membership, may re-employ any teacher whom the superintendent refuses to appoint. Such superintendent shall visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils, and perform such other duties as the board determines. He must report to the board annually, and oftener if required, as to all matters under his supervision, and may be required by it to attend any and all of its meetings. He may take part in its deliberations but shall not vote."

It is noted that this section confers upon the superintendent of schools, after he has been appointed, the power to appoint teachers, although the section reads "may appoint all teachers," which would indicate that if a board of education desired, they could limit his power to appoint all the teachers or a portion of them. It is found that the general rule in cities which have appointed a superintendent of schools, is to permit that official to appoint all the teachers, subject to the approval and confirmation of the board, largely on the basis that the superintendent comes nearer knowing the qualifications of the teachers as a whole than any one else connected with the school affairs in that particular district, because it is his duty to exercise supervision over them, visit the schools under his charge and direct and assist teachers in the performance of their duties. The fact of the matter is that he has been retained in most cases as superintendent for the very reason that he is presumed to have more or less executive experience in school affairs and is in that sense the representative of the school board in the management of the teachers.

The board of education, by section 7703 G. C., has the power to confirm or reject the names of the teachers whose names have been submitted to it for its confirmation and it can continue to reject any or all of the names submitted by the superintendent until means are reached which are satisfactory to the board.

The section further says that upon a three-fourths vote of its full membership, the board of education *may re-employ* any teacher whom the superintendent *refuses to appoint.* This language, following the beginning of section 7703 G. C., practically

—indicates that the superintendent is presumed to make the appointments or return the recommendations to the board of education, otherwise he would not "refuse to appoint," which is the language used in the section.

Bearing upon this particular case in hand, briefly the facts are that the superintendent desired to appoint a male teacher to fill a vacancy in a junior high school and before he was permitted to make such recommendation, the board of education, by motion, assigned a female teacher from one of the grade schools to a position as teacher in the junior high school, and the question is whether a board of education has power to assign teachers here and there as it sees fit, disregarding the rights of the superintendent of the schools of that district who has been employed to do certain things and who has certain rights granted to him under the statutes. It is true that the superintendent of schools in the district is the employe of the board of education of that district, but in a larger sense he is the employe of the people of that district and the school public has more to do with a superintendent of schools in a school district than it has with the board of education itself and the primary issue in every case of this kind is whether the public is being benefited or not.

In a proper discussion of the question at hand it is important to note that while section 7703 G. C. says that the superintendent may appoint all teachers many school boards throughout the state in their rules and regulations for their particular district have changed the word "may" appoint to "shall" appoint. Where a board of education has adopted a set of rules and regulations, and has had them printed for general distribution, such rules and regulations have all the force of law on school matters in that particular school district and the school board is expected to obey their own rules as well as all others concerned. A school board has the right to amend or change its rules and regulations at will by a majority vote but as long as such rules have not been changed by a board of education, all concerned should be governed by the rules and regulations of the board as they exist at that particular time. In the particular case at hand it is important to note that the board of education of the city school district of S. has in force a set of printed rules and regulations bearing upon the matters under its jurisdiction, and the pertinent parts are herewith quoted:

> "20. It shall be the duty of this committee to report to the board such recommendations regarding salaries of teachers as may be deemed advisable *when appointments are made by the superintendent of schools.* At the first meeting of the board in May of the school year in which their terms respectively, will expire, the committee shall recommend to the board suitable persons for appointment of superintendent of schools and truant officer and examiners of teachers."

The above question 20 refers to the committee on education and discipline which receives from the superintendent the list of names of teachers to be employed and such committee then recommends the salaries of such teachers to the board. This section indicates that the appointment of teachers is to be made by the superintendent of schools.

Quoting again from the rules and regulations of the board of education of the S. public school, section 24 reads:

> "A director of schools shall be elected by the board at its first regular meeting in Janauary * * *. He shall have the appointment, subject to the approval and confirmation of the board, of all employes except *teachers, assistant teachers, supervisors, principles,* superintendent of instruction, truant officer and clerk of the board of education. * * *"

The above section indicates that the board of education of the city district in

question has given out by its own rules and regulations the power to appoint all employes saving to itself only the power of confirmation on the list submitted by the director of schools and reserving certain other appointments itself which reservation however does not include teachers which are covered in another section.

The above quotations are from the rules of the board of education and the following quotation is from the rules and regulations of the S. public schools all of which are printed together in a manual for the government of the school officials in that particular city district. Under the head TEACHERS, section 14 of such rules and regulations reads:

> "14. The teachers shall be appointed by the superintendent at the first regular meeting of the board in May and at the second meeting in this month the board *shall confirm or reject these appointments and fix salaries.*"

This regulation, which has been approved and printed by the board of education itself, and using the word "shall" instead of the word "may," as in section 7703 G. C., leaves no doubt that the superintendent shall appoint the teachers and such regulation reserves to the board of education only the power to confirm or reject these appointments, and their salaries.

It might be said that the matter of appointment has little to do with the matter of assignment, but it is entirely apparent that if the superintendent shall be the appointing officer, he also should make the assignments which follow appointment, for the reason that assignments of teachers come more nearly under the duties of a superintendent in bringing about proper results than do the appointing of teachers.

In the case at hand the teacher was a female, teaching in the grade schools, which are absolutely distinct from the junior high school, and it would seem that the qualifications of a high school teacher would be different from those of a grade school and certainly the superintendent of schools could pass upon that point with more accuracy than the board of education, which has little direct contact with the teachers in their school work. So if a teacher who was employed in the grade schools was given a position in the high schools, it would be a new appointment, as a high school teacher, rather than a re-employment as a grade teacher, and since the superintendent of schools in the district in question has been given the power by the board of education to appoint all teachers by its own rules and regulations, a board of education which sought to make appointments, which power it had assigned to the superintendent, will be doing what its own rules and regulations forbid.

The superintendent of a school district, as indicated before, has been employed primarily as the executive officer of the board of education in its dealings with teachers, parents and pupils. In a great many matters he is the agent of the board of education and it is through him that complaints are received from the public. The appointment of teachers is an executive function and it follows that the assigning of teachers is also an executive function.

Relative to your second question, as to the interpretation of that portion of section 7703 which reads: "Such superintendent shall visit the schools under his charge, direct and assist teachers in the performance of their duties, classify and control the promotion of pupils," it is advised that the language therein cannot be improved upon, being very plain and has very little relation to the main question at issue herein.

Relative to question 3, which reads: "what is the interpretation of that portion of section 7703 which reads 'and perform such other duties as the board determines,' this means that the superintendent, as an employe of the board of education, shall perform any other duties that the board places upon him that are reasonable and within the scope of school affairs and which are not prohibited by statute.

It is therefore the opinion of the Attorney-General that where a board of educa-

tion has given the power of appointment of teachers to its superintendent of schools, the authority to assign such teachers follows such power of appointment vested in the superintendent of schools.

Respectfully,
JOHN G. PRICE,
Attorney-General.

423.

PLUMBING CODE—MUNICIPAL CORPORATIONS—POWER OF COUNCIL OR BOARD OF HEALTH TO REGULATE SAME—IN CASE OF CONFLICT WHICH GOVERNS.

In a city not having a building department or otherwise exercising the power to regulate the erection of buildings, boards of health are authorized and empowered to regulate the location, construction and repair of plumbing and drains within such city.

1. *Where such city, by an ordinance of its city council, has regulated the installation of plumbing without the consent or approval of the board of health, and such ordinance conflicts with a later regulation of the board of health of such city, relating to the same subject, legally adopted and published in compliance with section* 4228 *et seq. G. C. and*

2. *where such regulation is not arbitrary, unnecessary or unreasonable as against such ordinance, it will prevail, but must conform to sections* 1261-1 *et seq. and* 12600 *et seq. G. C.*

COLUMBUS, OHIO, June 23, 1919.

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

GENTLEMEN:—Acknowledgment is made of your request for an opinion of this department on the question stated in a communication from Mr. Curtis M. Shelter, City Solicitor of Alliance, Ohio, as follows:

> "On April 12, 1908, the council of the city of Alliance, Ohio, duly passed an ordinance as required by law, in which the state plumbing code was practically reenacted, to provide for plumbing rules and regulations governing installation of plumbing in the city of Alliance, Ohio.
>
> Some time in the year 1918, the board of health of the city of Alliance, acting under authority of section 4413 of the General Code, passed a resolution containing conflicting provisions in reference to the installation of plumbing, in this, to-wit: That all back venting should be eliminated and that in place thereof siphon traps might be installed; abolished the use of cast iron pipe for sewer drains in cellar basements permitting the installation of sewer pipe instead of cast iron pipe, and other provisions in conflict with the ordinance as passed by council in 1908.
>
> I desire to know whether or not the board of health of a municipality has the authority to pass rules and regulations in reference to the installation of plumbing, and, if so, if they have the power and authority to repeal existing ordinances passed by the city council."

Responding to the request of this department for additional information, you also have forwarded another letter from Mr. Shelter, as follows:

> "Answering your communication of June 10th, in reference to *future*

(further) information for the department of the Attorney-General, I desire to say that at the time of the passage of the city ordinance relating to plumbing the city of Alliance did not have a building department or in any way regulating the erection of buildings.

Answering your second inquiry I desire to say that the city did not have such building department or otherwise exercise power to regulate the erection of buildings at the time of the enactment of the board of health regulation. Further, the board of health did not approve the original ordinance."

It may be noted that the resolution of the board of health, above referred to, is later in point of time and the question presented is as to which of the conflicting provisions in the resolution of the board of health and the city ordinance should prevail,in the consideration of which, from the facts stated, it is assumed that the board of health resolution was legally adopted and properly published in the same manner as a city ordinance.

Sections 3616, 3646, 4413 and 4420 G. C. are pertinent. Section 3616 in part provides:

"All municipal corporations shall have the *general powers* mentioned in this chapter."

Section 3646 (in the same chapter), in part is:

"To provide for the public health."

Section 4413 in part is:

"The board of health of a municipality may make such orders and regulations as it deems necessary * * * for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. Orders and regulations * * * intended for the general public * * * shall be given, in all courts of the state, the same force and effect as is given such ordinances."

It is to be observed that the power given to the city, under section 3646, is, as described in section 3616, a general power, and it may be observed also that the terms of section 3646 are very general in their nature, whereas section 4413, in committing the matters therein described explicitly to the board of health, is, on the contrary, quite special in its nature.

Section 4414 makes it an offense, punishable by severe penalty, to disregard or disobey the regulations of the board of health by providing that such regulations shall have the same force and effect in all the courts of this state as city ordinances, and as said in Keyser vs. Walsh, 4 N. P. (n. s.) 509,

"It should be said here that the resolution of the board of health has the same effect as an ordinance, by virtue of section 1536-731 R. S. (4413 G. C.)."

Concerning the powers of a municipal board of health, in Walton vs. City of Toledo, 3 O. C. C. (n. s.) 300, the court observed:

"It is needless to say that the powers of the board of health are very large. If you read the whole statutes of the state of Ohio on the subject you will find that the powers that are given to the various board of health * * * are about as broad as language can make them."

As reflecting on what might be termed the specialness of the board of health statutes, the opinion of Judge Donahue, in Board of Health vs. Greenville, 86 O. S., 29, while not considering the exact question presented here, may be quoted:

> "The health of the inhabitants of the city is still a matter of concern to the state, and of such vital concern that the General Assembly has not thought proper to commit it exclusively to the control and discretion of men who may or may not have any particular ability or experience in sanitary affairs."

The controversy in that case was rather between the state board of health and the city of Greenville and the opinion above quoted dealt with the power of the state board in such matters when there was a conflict between it and the city council on a health or sanitary matter. But the language is particularly appropriate to the proposition that the state in enacting section 4413, supra, had not thought proper to comit the matters therein enumerated "exclusively to the control and discretion of men who may or may not have any particular ability or experience in sanitary affairs, viz., the city council.

For the reasons above given, it may be concluded, then, that section 3646, G. C., is general in its nature and that section 4413 is special in its nature.

The construction of conflicting, general and special statutes has been frequently before the courts of this state and the rule in such cases appears to be clearly settled.

In Commissioners vs. Board of Public Works, 39 O. S., 632, it was held:

> "Repeals by implication are not favored. So, particular and positive provisions of a prior act are not affected by a subsequent statute treating a subject in general terms and not expressly contradicting the provisions of the prior act, unless such intention is clear."

In this connection it may be observed that section 4413 was passed prior to that part of section 3646, which gives the municipal corporation general powers to provide for the public health.

In Cincinnati vs. Holmes, 56 O. S., 115, the court, in adopting the rule laid down in 19 Vt., 240, quotes from that decision with approval, the following:

> "I know of no rule of construction of statutes of more uniform application than that later or *more specific statutes* do, as a general rule, supersede former and more general statutes, as far as the new and specific provisions go."

And in Doll vs. Barr, 58 O. S., 120, it is held that under a familiar rule of construction the special must be regarded as in the nature of an exception to the more general provisions, and as controlling them in the special classes of cases.

And in Endlich, on Interpretation of Statutes, in section 216, the rule is stated to be that:

> "Where there are in one act specific provisions relating to a particular subject, they must govern in respect to that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular relate."

So that from these statutes it would appear that in the legislative mind boards

of health have been more closely associated with matters affecting the public health than the city council. This is so from the very nature of the former agency as well as from the plain terms of the statutes.

Whatever apparent conflict they may seem to indicate between the board of health and the city council with reference to plumbing regulations, is eliminated by section 4420, which in part provides:

> "The board of health * * * *except in cities having a building department, or otherwise exercising the power to regulate the erection of buildings* * * * may regulate the location, construction and repair of * * * plumbing and drains. In cities having such departments or exercising such power, the council by ordinance shall prescribe such rules and regulations *as are approved by the board of health*, and shall provide for their enforcement."

It is very clear that in cities referred to in the first part of this section, the plumbing regulations therein referred to are placed under the control of the board of health. In cities referred to in the latter part of the section, such regulations are to be prescribed by the council, subject to approval of the board of health.

Of vital importance to the application of section 4420 to your question is the information contained in the last letter from Mr. Shetler, from which it is definitely established that the city of Alliance, not having a "building department or in any way regulating the erection of buildings" as therein stated, is a city of the character described in the first part of section 4420.

From this it follows that in Alliance "the board of health * * * may regulate the location, construction and repair of * * * plumbing and drains."

What has been said heretofore concerning general and special statutes applies with equal force to the effect of this last quoted section, from which it appears that at the time of the passage of the Alliance city ordinance in 1908, section 4420, being in full force the power and authority to regulate the matter herein involved was lodged in the board of health of that city. It might be maintained that by its acquiescence in such ordinance the board of health has explicitly thereby approved it. This is not considered tenable as the statutory approval implies an affirmative act on the part of the board of health.

In consideration of the special manner in which the matters involved herein have been committed to the board of health, this department is of the opinion that the later plumbing regulations adopted and promulgated by the board of health must, as against the ordinance, prevail.

To avoid misunderstanding of this opinion, it is suggested (1) that the necessity and reasonableness of the regulation is not herein considered, nor (2) is the question of the legality of publication of the resolution involved considered, and (3) that this opinion is confined to the single question of conflict between ordinances and municipal board of health regulations, as stated in your letter, without consideration of or reference to the state building code contained in sections 12600 to 12600-282 and the state plumbing inspection law in sections 1261-1 to 1261-15 G. C., to which as a matter of precaution, the attention of the municipal board of health may be directed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

424.

MUNICIPAL COURT OF CITY OF COLUMBUS—EXECUTION—OF BAILIFF'S DUTY UNDER SECTION 1558-83 G. C.—COLLECTION OF JUDGMENTS ON EXECUTION—FEES FOR SERVING WRITS OF RESTITUTION BELONG TO CITY TREASURY.

1. *Under section* 1558-83 *G. C.* (106 *O. L.* 377) *the sole duty of the "execution bailiff" of the municipal court of the city of Columbus consists in the collection of judgments on execution, and he is without authority to serve writs of restitution in actions for forcible entry and detention.*

2. *Fees for the serving of such writs belong, under section* 1558-79 *G. C. to the treasury of the city of Columbus, and if received and retained by an "execution bailiff," a finding may be made for the recovery of same.*

COLUMBUS, OHIO, June 23, 1919.

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

GENTLEMEN:—Acknowledgment is made of your communication reading as follows:

> "We are enclosing herewith copy of blank form of writ of restitution of the city of Columbus and are calling your attention to section 1558-83 G. C. (105-106 O. L. 377) and respectfully request your written opinion upon the following matters:
>
> 1. May the execution bailiff receive and retain fees for serving writs of restitution in actions for forcible entry and detention?
>
> 2. Having received and retained said fees, if illegal, should findings for recovery be made in favor of the party paying the same, or in favor of the city of Columbus, or in favor of a trust fund to remain in the city treasury to be paid out on demand of the party making payment, and if not demanded to revert to the city treasury?"

In order to answer your questions, it becomes necessary here to quote in full section 1558-83 G. C. (106 O. L. 377), reading as follows:

> "Section 1558-83. The judges and clerk of the municipal court shall appoint a bailiff. The bailiff shall appoint not exceeding four deputy bailiffs, unless a larger number shall be authorized by the council of the city of Columbus. The bailiff and deputy bailiffs shall hold office during the pleasure of the appointing power, and shall perform for the municipal court services similar to those usually performed by the sheriff and his deputies for the court of common pleas and by constables for justices of the peace. They shall be governed by all laws pertaining to sheriffs and deputies, and shall serve all process of said court in the manner provided by this act, the laws relating to sheriffs and the rules of the court. The bailiff shall receive as compensation the sum of eighteen hundred dollars per annum, the deputy bailiffs each the sum of twelve hundred dollars per annum, which compensation of the bailiff and deputy bailiff shall be payable in monthly installments out of the treasury of the city of Columbus. Before entering upon the duties of their office, the bailiff and deputy bailiffs shall each give bond to the city of Columbus, the bailiff in the sum of two thousand dollars and the deputies each in the sum of one thousand dollars, with surety to the approval of the presiding judge, for the benefit of the city of Columbus and of any person

who shall suffer by reason of any default in any of the conditions of such bond. Whenever the bailiff or deputy baliffs shall give a surety or bonding company bond the premium thereon shall be paid out of the treasury of the city of Columbus.

In addition to the deputy bailiffs above provided for, there shall be two deputy bailiffs to be known as execution bailiffs, who shall be appointed and dismissed in the manner prescribed for deputy bailiffs and shall have the same powers and give the same bond as other deputy bailiffs; their sole duty shall be to collect judgments on execution. They shall receive as their sole compensation the fees and poundage on the judgments they collect. The same fees and poundage shall be charged for their work as constables now are, or hereafter may be, authorized by law to charge for like services.

Each deputy bailiff and execution bailiff hereinbefore provided for shall receive from the treasury of the city of Columbus, in addition to his compensation, not to exceed the sum of three hundred dollars per annum to cover necessary expenses in serving process of the court, payable monthly upon the order of the presiding judge."

You will notice that as regards the function and authority of "execution bailiffs," the section just quoted says that such bailiffs "shall have the same powers and give the same bond as other deputy bailiffs;" and further, that "their *sole* duty shall be to collect judgments on exceution." Unless the first statement be limited to mean that execution bailiffs shall have the same powers *in respect to collecting judgments on execution* as deputy bailiffs have, the two statements are inconsistent; for by the language of the first part of section 1558-83 G. C., deputy bailiffs are given powers more extensive than merely collecting judgements on execution. Notice these provisions:

"The bailiff and deputy bailiffs * * * shall perform for the municipal court services similar to those usually performed by the sheriff and his deputies for the court of common pleas and by constables for justices of the peace. They shall be governed by all laws pertaining to sheriffs and deputies and shall serve *all process* of said court in the manner provided by this act, the laws relating to sheriffs and the rules of the court."

By reason of section 1558-51 (8), the municipal court has jurisdiction in all actions in forcible entry and detention of real property. The form of this writ is prescribed by statute (Sec. 10460) and is as follows:

"Whereas, in a certain action for the forcible entry and detention (or the forcible detention, as the case may be), of the following described premises, to wit: _____, lately tried before me, wherein _____ was plaintiff, and _____ was defendant, _____ judgment was rendered on the _____ day of _____, A. D. _____, that the plaintiff have restitution of said premises; and also that he recover costs in the sum of _____ You therefore are hereby commanded to cause the defendant to be forthwith removed from said premises, and the said plaintiff to have restitution of the same; also that you levy of the goods and chattels of the said defendant, and make the costs aforesaid, and all accruing costs, and of this writ make legal service and due return."

Section 1558-85 G. C. authorizes fees to be taxed in connection with the service of such process.

In view of the fact that the writ in such case includes a judgment for costs and authorizes a levy on goods and chattels for the purpose of making said costs, it may be argued that said writ is a "judgment on execution" which section 1558-83 G. C. makes it the duty of the execution bailiff to collect.

The main purpose of the writ in question is, however, the restitution of certain premises, and the collection of costs is merely incidental. The "execution bailiff" described in section 1558-83 G. C. has no authority to effect the main purpose of such writ. The bailiff and deputy bailiffs *have* such authority, being authorized by the section just cited to serve all process of the municipal court. Is it to be supposed that the legislature intended that the services of two officers of the court should be necessary to serve this writ—the regular bailiff to effect restitution of premises and the execution bailiff to make the costs?

Again, suppose the writ were one authorizing a levy against personal property and also the arrest of the judicial debtor in the event that sufficient property subject to execution could not be found. In such case, the execution bailiff could be only partially efficient, since he has no power to arrest.

While the matter is not entirely free from doubt, I am of the opinion that the words "to collect judgment on execution," found in section 1558-83 G. C., apply to writs whose function is limited to *one* particular purpose, that purpose being the collection of money judgments.

With reference to your first question, you are therefore advised that the execution bailiff of the municipal court of the city of Columbus is without authority to serve writs of restitution in actions for forcibly entry and detention.

Where the eexecution bailiff in fact serves a writ of restitution and receives and retains fees therefor, should findings be made against him, and if so, in whose favor should the finding be made? This, in substance, is your second question.

It is noted that when the writ in question is served by the regular bailiff or his deputies, the fees in connection with such service are payable, not to such bailiffs, but to the treasury of the city of Columbus, the bailiff and his deputies being paid a specified compensation in lieu of fees. Sec. 1558-83 G. C. The disposition of such fees is provided for by section 1558-79 G. C., which says in part:

> "He shall pay over to the proper parties all moneys received by him as clerk; he shall receive and collect all costs, fees, fines and penalties, and shall pay the same monthly into the treasury of the city of Columbus, and take a receipt therfor, except as otherwise provided by law."

Our argument, then, brings us to this stage: That writs of restitution issued by the municipal court of Columbus should be served, not by the execution bailiff, but by the regular bailiff or his deputies, and that the fees connected with such service should be paid, through the clerk of said court, into the treasury of the city of Columbus. Such fees thus become public money within the purview of section 286 G. C.

It now remains to consider whether a finding in favor of the city of Columbus for the fees mentioned in your letter is legally possible. The only circumstance that raises any question as to such a finding is the fact that the fees are for a service which, as we have just seen, was not legally performed by any one.

In an action brought by the person required to pay such fees, to recover same, such a circumstance might be important; but as between the city of Columbus and the execution bailiff serving or attempting to serve the writ, it would seem that the fees in question may be regarded as public money for the recovery of which, in favor of said city, a finding may be made. We are influenced in this conclusion by the case

of State, ex rel., vs. Maharry, 97 O. S. 272, holding that sections 274, 284 and 286 et seq. G. C. are remedial statutes and require liberal construction.

Respectfully,
JOHN G. PRICE,
Attorney-General.

425.

SCHOOLS—COUNTY SCHOOL DISTRICT FALLS BELOW THIRTY TEACHERS—COUNTY BOARD MUST REDISTRICT—WHEN SAME BECOMES EFFECTIVE—SEPTEMBER FIRST—CONTRACT OF DISTRICT SUPERINTENDENT NULL AND VOID WHEN NEW DISTRICT GOES INTO EFFECT.

1. *Where a supervision district in a county school district falls below thirty teachers in number, caused by closing of schools or transfer of territory, the county board of education must re-district such county school district into new supervision districts containing not less than thirty teachers.*

2. *Under section 4738 G. C. such re-districting by the county board of education can be effective on no other date than September first.*

3. *The contract of a district superintendent, in a district which is changed and which contract runs beyond the date such re-districting is effective, is null and void when such new district goes into effect and an election of a district superintendent in such new district can be but for one year.*

COLUMBUS, OHIO, June 23, 1919.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following question:

> "The Miami county board redistricted the county, arranging, of course, the districts so that no district superintendent had less than thirty teachers. Suppose the closing up of schools or a transfer of territory to another county this spring should reduce one of these districts to less than thirty teachers, say twenty-five or twenty-six teachers as a total, would such a district automatically cease to exist? If so, would the county board be thereby compelled to redistrict the county, or would it be compelled to redistrict by petition? If the district superintendent is serving under a contract made last year and said contract will not expire until a year or two hence, would that alter the situation any, or would his contract become void when his district falls below thirty teachers?"

Attention is invited to section 4738 G. C., which says:

> "The county board of education shall divide the county school district, any year, to take effect the first day of the following September, into supervision districts, each to contain one or more village or rural school districts. The territory of such supervision districts shall be contiguous and compact. In the formation of the supervision districts consideration shall be given to the number of teachers employed, the amount of consolidation and centralization, the condition of the roads and general topography. The territory in the different districts shall be as nearly equal as practicable and the number of

teachers employed in any one supervision district shall not be less than thirty. The county board of education shall, upon application of three-fourths of the presidents of the village and rural district boards of the county, redistrict the county into supervision districts. The county board of education may at their discretion require the county superintendent to personally supervise not to exceed forty teachers of the village or rural schools of the county. This shall supersede the necessity of the district supervision of these schools."

It is noted that any redistricting of the county school district is not effective until the first day of the following September—that is, the beginning of the next school year—the idea of the school code being that conditions existing with the beginning of a school year, as regards supervision and territory, should be disturbed as little as possible during the school term. The county board of education under existing law can not form a new supervision district with less than the minimum of thirty teachers, and when such district is formed it is effective until the first of the following September, even though the minimum number of teachers should, through contingencies unforseen, fall to twenty-nine or twenty-five.

One of the good reasons for this is that frequent changes in supervision should not be encouraged, especially during the school year, and if a supervision district containing exactly thirty teachers, created under the law in regular form, should be reduced to twenty-nine teachers, because of transfer of one district to another county district or an exempted village district, or the closing of a district school from various causes, then would every school in the county be disturbed in its supervision by automatic redistricting forced during the school term. The law contemplates the school year, which begins on September first and ends on the following August thirty-first, as a unit to be used by boards of education in their educational and financial arrangements, for it has provided in section 4738 G. C., supra, that the supervision districts shall be changed as effective only with September first following.

Transfers of school territory are now made by the county board of education and it has official knowledge of the territory in each and every school district in the county, including supervision districts. When it makes a transfer of territory from a supervision district to an adjoining county school district or an exempted village district, it knows to what extent it is reducing the number of teachers in the supervision district from which such territory is transferred.

Having such official knowledge that one of the supervision districts in the county has fallen below thirty teachers in number, it is the duty of the county board of education to redistrict the county school district into new supervision districts which shall contain not less than thirty teachers in each such newly created district and to be effective on and with the first of September following as provided in section 4738 G. C. Being the clear duty of the county board to redistrict, no petition is necessary from three-fourths of the presidents of the village and district boards, though they are not prevented from filing the same. A county school board which entered upon a new school year beginning September first, with knowledge that any one of its supervision districts contained less than thirty teachers, would be violating section 4738 G. C.

You ask if a district superintendent's contract, having a year or two to run, would become void when his district falls below thirty teachers, through certain contingencies occurring during the school year, and you are advised that inasmuch as the district he is supervising must be superseded by a new district effective the following September first, his contract becomes null and void, for his district has passed out as of that date, for no new district can take effect on any date prior to September first, or once each year.

In Opinion No. 94, issued by the Attorney-General on March 9, 1917, and appearing at p. 211 of Vol. II, Opin. of Atty. Gen. for 1917, and holding that the district superintendent has no such vested right in a contract for more than one year as will

prevent a redistricting or compel a continuation of such contract, the Attorney-General said:

> "So that the term of the district superintendent being for at least one year, and the time designated for the division of the county school district into supervision districts being fixed at a particular time in the year, it is fair to presume, I think, that the legislature intended such districts and such supervision to extend over each school year without change, and that being true the contracts with your superintendents who were elected for the first year in any supervision district would not be affected by any change of the district lines during said year. But, suppose the district superintendents had been re-elected in the same supervision district and for a term of more than one year, but not to exceed three years, and suppose the district lines were changed during any one year, to take effect the first of the following September, and during the term not yet completed of a district superintendent, the question then is, how would such redistricting affect the position of the district superintendent?
>
> * * * * * * * * *
>
> I am of the opinion that the county board of education has power to divide the county school districts into supervision districts in any year, but the same must take effect on the first day of September in each year and that the district superintendents of such districts have no such vested right in a contract for more than one year that would defeat such redistricting legislation, or, in other words, that they cannot hold over."

Attention is invited also to Opinion No. 1252, issued June 3, 1918, and appearing at p. 767 of Vol. I, Opinions of Attorney-General, 1918, wherein the syllabus reads:

> "The county board of education of a county school district may redistrict such county school district into supervision districts any year.
>
> When the county board of education redistricts the county school district and changes the district lines of a supervision district which supervision district had employed a district superintendent for more than one year, such change in the supervision district will cause a termination of the contract of the district superintendent, which contract extended *beyond the school year in which the redistricting was made.*
>
> Where the county board of education has redistricted the county school district, and has changed the lines of any supervision district therein, the district superintendent of such newly created supervision district can be employed for but one year at the first election held in such newly created supervision district."

It is therefore the opinion of the Attorney-General that:

1. Where a supervision district in a county school district falls below thirty teachers in number, caused by closing of schools or transfer of territory, the county board of education must re-district such county school district into new supervision districts containing not less than thirty teachers.

2. Under section 4738 G. C. such re-districting by the county board of education can be effective on no other date than September first.

3. The contract of a district superintendent, in a district which is changed and which runs beyond the date such re-districting is effective, is null and void when such new district goes into effect and an election of a district superintendent in such new district can be but for one year.

Respectfully,
JOHN G. PRICE,
Attorney-General.

426.

APPROVAL OF BOND ISSUE OF CITY OF LAKEWOOD IN THE SUM OF $35,260.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 24, 1919.

427.

APPROVAL OF BOND ISSUE OF CITY OF LAKEWOOD IN THE SUM OF $29,180.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 24, 1919.

428.

APPROVAL OF BOND ISSUE OF THE CITY OF LAKEWOOD IN THE AMOUNT OF $6,207.50.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 24, 1919.

429.

APPROVAL OF BOND ISSUE OF CITY OF LAKEWOOD IN THE SUM OF $22,296.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 24, 1919.

430.

APPROVAL OF BOND ISSUE OF TRUMBULL COUNTY IN THE SUM OF $248,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 24, 1919.

431.

DISAPPROVAL OF BOND ISSUE FOR ROSEVILLE VILLAGE SCHOOL DISTRICT, MUSKINGUM COUNTY, OHIO — FOR FIRE INSURANCE, SCHOOL SUPPLIES, COAL, ETC.

COLUMBUS, OHIO, June 25, 1919.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

IN RE: Bonds of Roseville Village school district, Muskingum county, Ohio, in the amount of $7,500 to pay existing valid and binding obligations of said district, being *fifteen bonds of $500 each.*

I have examined the transcript of the proceedings of the board of education and other officers of Roseville village school district relating to the above bond issue, and am unable to approve the validity of said bonds for the reason that the transcript shows that a considerable portion of the indebtedness which the board of education seeks to refund by the issuance of bonds does not constitute valid and legal obligations of the district.

The certificate of the clerk reveals that a considerable portion of this indebtedness is for fire insurance, school supplies, coal and items other than salary and compensation for teachers, officers and school employes.

The bonds in question are issued under authority of section 5656 G. C. under authority of which a board of education may borrow money to change but not to increase its indebtedness.

Under section 5658 G. C. the indebtedness which may be refunded is limited to "existing valid and binding obligations."

Under section 5660 G. C. a board of education is not authorized to enter into "any contract, agreement or obligation involving the expenditure of money," etc., unless the clerk first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied, placed on the duplicate and in the process of collection, and not appropriated for any other purpose.

Section 5661 G. C. provides that all contracts, agreements or obligations entered into contrary to the provisions of section 5660 G. C. are void, excepting any contracts for the employment of teachers, officers and other school employes.

It therefore follows that the several items of indebtedness set forth in the clerk's certificate, excepting such as were incurred in paying teachers, officers and other school employes, are not valid and binding obligations of the school district within the meaning of the section of the General Code above referred to, and hence, cannot be refunded by the issuance of bonds under section 5656.

The board of education is authorized to issue bonds to refund any indebtedness for salaries and compensation of teachers, officers and other school employes whose services have been engaged by contracts authorized by other provisions of the General Code, and if the board will, by further proceedings, limit the amount of bonds to be issued to an amount sufficient to meet these legal obligations, the bonds will be approved.

Under the present proceedings, however, the amount of bonds which can legally be issued is not separable from those which the board is not authorized to issue.

I therefore advise you not to accept the bonds as now authorized.

Respectfully,

JOHN G. PRICE,

Attorney-General.

432

APPROVAL OF BOND ISSUE OF VILLAGE OF MT. STERLING IN THE SUM OF $8,000

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, June 25, 1919.

433.

APPROVAL OF ARTICLES OF INCORPORATION OF THE SUPREME LIFE AND CASUALTY COMPANY.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

COLUMBUS, OHIO, June 26, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The articles of incorporation of the Supreme Life and Casualty Company, which is being incorporated and organized under sections 9339 et seq. of the General Code, are herewith returned with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

434.

APPROVAL OF OIL AND GAS LEASE BETWEEN STATE AND THE OHIO CITIES GAS COMPANY.

COLUMBUS, OHIO, June 26, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent letter wherein the supplemental agreement between the state and the Ohio Cities Gas Company, relative to oil and gas lease for part of section 16, was transmitted to this department for its approval.

Section 3209-1 G. C., as amended in 105 O. L., page 6, provides in part:

> "The auditor of state is hereby authorized to lease for oil, gas, coal, or other minerals, any unsold portions of section sixteen * * * upon such terms * * * as will be for the best interest of the beneficiaries thereof."

This section vests the power of leasing such land in the state auditor and as to the terms and conditions upon which the lease shall be made is entrusted to the discretion of such state auditor.

Consideration of the terms of the original agreement, which as stated in your

letter did not contain any stipulation for rental or royalty to be paid to the state for the gas used, as proposed in the lease submitted, as well as the other facts stated in your letter, and further consideration of the provisions of section 3209-1, supra, convinces this department that the within lease is in conformity to law and as to the form thereof is hereby approved and returned herewith.

Respectfully,
JOHN G. PRICE,
Attorney-General.

435.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN MAHONING AND COLUMBIANA COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, June 26, 1919.

436.

WORKMEN'S COMPENSATION ACT—OFFICERS OF UNION CENTRAL LIFE INSURANCE COMPANY NOT WITHIN PROVISIONS OF THE ABOVE ACT—WHEN OFFICERS WHO ALSO ACT IN ADDITIONAL CAPACITY AS EMPLOYE ARE WITHIN ITS PROVISIONS—GENERAL AND SPECIAL AGENTS NOT WITHIN PROVISIONS OF ACT.

The officers of a private corporation are not, as such, its employes, within the meaning of the workmen's compensation act; but the fact that a person is an officer of such corporation does not preclude his acting for the company in some additional capacity which may make him an employe.

The general agents of the Union Central Life Insurance Company are not its employes within the meaning of the workmen's compensation act.

The special agents of such company are not its employes within the meaning of that act.

All these questions are questions of fact, to be answered ultimately by the industrial commission upon such evidence as may be available.

COLUMBUS, OHIO, June 28, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter requesting the opinion of this department upon certain questions submitted by the vice-president of the Union Central Life Insurance Company, has been very carefully considered in this department.

The questions so submitted are as follows: Are the persons standing in the following named relations to the Union Central Life Insuarnce Company "employes" of the said company under the workmen's compensation act (Sec. 1465-61 G. C.):

1. The general officers of the company.
2. Its general agents.
3. Its special agents.

No statement of facts has been submitted as to the exact character of the relation of the company's general officers to the company. It will be assumed, for the purposes of this opinion, that that relation is such as ordinarily exists between a corporation and its general officers.

The facts submitted respecting the relation of the company to its general and special agents, respectively, are, however, quite complete, forms of contracts entered into between the company and these classes of agents having been submitted for my examination.

All these questions arise under and involve the interpretation of the second paragraph of section 1465-61 G. C., as amended, 107 O. L. 159, which provides as follows:

> "The terms 'employe,' 'workman' and 'operative' as used in this act, shall be construed to mean:
>
> 1. * * *.
>
> 2. Every person in the service of any person, firm or private corporation, including any public service corporation employing five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens, and also including minors who are legally permitted to work for hire under the laws of the state, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer.
>
> 3. * * *."

The third paragraph of the section may also have some application to one of the questions submitted but the ultimate question to be resolved in any event, as to each of your inquiries, is the same under the third section as it would be under the second. For the purpose of clarifying the problem of statutory interpretation, which must be solved before the statute can be applied to specific cases, the following abstract of the above quoted section is submitted:

> "Every person *in the service* of any person * * * employing five or more workmen or operatives regularly in the same business, or in or about the same establishment *under any contract of hire*, express or implied, * * * but not including any person whose employment is but casual *and* not in the usual course of trade, business, profession or occupation of his employer."

This is a definition both by inclusion and by exclusion. It is clear, from even a cursory reading of it, that a person need not be a "workman" or an "operative" in the usual or ordinary sense, in order to be an "employe" within the meaning of the act. It is enough that two conditions concur:

(1) That the employer have in his or its employment five or more persons who are "workmen or operatives "

(2) That the person in question be in the service of such an employer under an express or implied contract of hire.

It may be objected that an assumption is involved in the statement last made, to the effect that the phrase "under any contract of hire" modifies adjectively the noun "service," or adverbially the word "is," understood. That is to say, the assumption is that the sentence paraphrased would read:

> "Every person who is, under any contract of hire, express or implied, oral or written, in the service of any person * * * employing five or more workmen or operatives regularly in the same business," etc.

It may be claimed, with some show of reason, that the position of the phrase "under any contract," etc., in the section, indicates that it modifies the participle "employing," so that the paraphrase of the section would read:

> Every person in the service of any person employing five or more workmen or operatives under any contract of hire, etc.

It is believed that it is not necessary to choose between these two possible meanings of the section. The word "service," the meaning of which will be presently considered at some length, necessarily involves the idea of a hiring. In fact the phrase "under any contract of hire, express or implied, oral or written" is believed to be mere surplusage. It can not *modify* either the word "service" (as a part of the idea predicated upon the understood verb), or the word "employing," because both of these words, when used alone, would involve a contract of hire, express or implied, oral or written. Therefore, the natural meaning of either one of these words is not changed by adding the clause in question.

For the same reason it makes for clearness to read into the word "service" the idea expressed by the phrase "under any contract of hire," etc., whether that phrase, as used in the statute, grammatically modifies that word or not.

We have it then, that by inclusion the statute extends to every person in the service of another.

The idea of exclusion in the statute, which must be read as an exception to the inclusive words, is found both in the last clause of it and in certain parts of the first clause. The first idea is one which relates to the employer, rather than the employe, and with it we have no greater concern than to point it out. It is that an employer who actually employs five or more workmen or operatives, but not (1) regularly (2) in the same business or (3) in or about the same establishment is not one the persons in whose service are to be regarded as employes within the meaning of the act.

The second idea of exclusion in the section is that fully expressed by the last clause, viz.: that an employe whose employment is (1) but casual *and* (2) not in the usual course of trade, business, profession or occupation of his employer, is not an employe within the meaning of the act, whether the other employes of his employer have that status or not. It is to be noted in this connection that there is a material difference in the form of expression used to exclude employers, from that used to exclude employes. Any of the conditions named in the first part of the section is sufficient to exclude an employer, and with him all of his employes, from the category defined by the law. That is, if the five or more workmen or operatives employed by an employer are not regularly employed by him, that is enough. None of his employes are within the law. So also, if his five or more workmen or operatives are not employed in the same business or in or about the same establishment, etc,

But when we come to the last clause of the section, we find that it is not enough that the employe, in order to be excluded, should have an employment which is but casual. It must also appear that such casual employment is not in the usual course of business, etc., of his employer. Both elements must concur. That is to say, a person casually employed in the usual course of business of his employer would be such an employe.

This much is established by the cases decided under the British workmen's compensation act, from which the form of expression, now found in our statute and placed there by amendment of 1917, was borrowed. Whether the converse of this proposition is true, and a regular employe, not in the usual course of business of his employer, such, for example, as a private chauffeur or a domestic servant, would be an employe within the meaning of the act, is not so clear and need not be considered for the purposes of this opinion.

These general observations clear the way for the consideration of the specific question submitted. They make it at once apparent that the general officers of a company, if they can be held to be persons in the service of the company, are "employes" within the meaning of the act, provided the company regularly employs five or more workmen or operatives in connection with the same business.

Is such an officer in the service of the corporation? I find that the commission has passed upon this question in a case entitled, In re Moseley, Jr., 2 Bull. Ohio Ind. Com. 19, and has there laid down the following principle which I quote from Bradbury's Workmen's Compensation, 3rd Ed., p. 239:

> "An officer of a corporation, as such, is not an employe, within the meaning of the Ohio Act. But where an officer of a corporation who, in addition to performing the duties imposed upon him as such officer, renders other service to the corporation and is paid an annual salary by it, such salary being paid for the rendition of such services rather than for performing duties devolving upon him as an officer, he is an employe within the meaning of the Ohio Act."

This statement is believed to be substantially correct. Some discrimination is necessary. On the one hand we may start from the proposition that an officer of a corporation, properly speaking, such as a member of its board of directors, which it must have under the laws of the state, or its president and secretary, which it probably will have by virtue of its regulations, are not in the service of the company. As heretofore pointed out, the word "service" necessarily implies a contractual relation—a hiring. Officers are, however, not hired or employed under contract, but elected or appointed. They can not complain of breach of contract as such, if they are supplanted or ousted before the expiration of their terms of office. Their objections to such procedure would have to be grounded upon an entirely different set of legal principles. This alone is sufficient to justify the first proposition laid down in the statement of the commission's decision which I have quoted.

On the other hand, it is equally clear, as intimated therein, that a person may actually be a servant or employe of a corporation and at the same time one of its officers. This is very frequently the case. The president may be the general manager and his position as general manager would be rather that of an employe than that of an officer. The president of a mercantile company might very well be its sales manager, and its secretary its buyer. They would be none the less employes or servants of the company because of their distinct relation to it as officers.

Again, officers of a corporation usually are stockholders in it, but this fact is immaterial. For such purposes the idea that a corporation is a distinct entity, apart from its stockholders, controls. See generally, Bradbury's Workmen's Compensation, Sec. 80.

Before disposing of this question, note must be taken of a contention to the effect that, though within the letter of paragraph 2 of section 1465-61 G. C., the general managers and superior employes of a corporation, who are also its officers, should not be regarded as within the scope of the act as an entirety, because they do not receive wages and because also the maximum weekly payment under the law, which is but twelve dollars, would be so ridiculously inadequate as compensation to them, in case of injury, that it could not have been the intention of the general assembly that they should be included within the scope of the law. This claim is equivalent to saying that a person who receives a salary instead of weekly wages can not be an employe; and that where the salary is high enough so as to produce an incongruous relation between it and the amount of the maximum weekly award, this result must follow. These considerations must be rejected, however.

It is the uniform holding, under workmen's compensation acts, that the method of payment in and of itself is immaterial as reflecting upon the character of the person as an "employe" for the purposes of such laws. If it were otherwise, only those paid by the day or week would be entitled to its benefits. Wages, in the strict sense, constitute but one method of compensation in common use for the payment of various kinds of service. Commissions, piece-payments, bonuses and salaries are all in common use for this purpose. The word "wage," when used in the law therefore, must to give it any reasonable scope and effect, be read in a generic, rather than in a specific sense.

The other argument is equally inadmissable. It is possible in these times for a skilled laborer, employed by the day, to receive compensation at a rate greatly in excess of twelve dollars per week. It would not do to deprive him of all benefits under the law, simply because the maximum compensation would not in his case be full compensation.

From another point of view, of course the answer to all such arguments is that the maximum compensation is fixed on the theory that those receiving wages, salaries, etc., at higher rates will be able to protect themselves by privately obtained insurance to the extent of such excess.

It is believed, therefore, that the commission has been acting on correct principles in deciding questions of this kind, and though the precise facts respecting the Union Central Life Insurance Company are not before this department, it is not necessary to call for them, but merely to advise the commission that it may proceed to the determination of such facts as may be brought to its attention respecting the officers of this company, upon the same principles that it has heretofore followed with respect to other companies and their officers, subject, however, to what may be hereinafter stated as to the character of relation that may constitute "service."

The second question submitted by the company can not so easily be disposed of It is raised by the following facts respecting the general agents of the company: Such agents are employed under contracts which contain among others the following provisions:

> "1. * * the party of the first part (the company) hereby appoints the party of the second part as its general agent to procure applications for life insurance, to deliver policies, to collect premiums when furnished with the policies or receipts; and to perform such other duties as may be required in connection therewith.
>
> 2. * * the parties to this contract have executed * * for the term of ten years.
>
> 3. * * the party of the first part assigns to the party of the second part the following territory in which to operate: (For example, the City of Columbus in Franklin county)————————————————but the party of the first part reserves the right after three years, to establish other independent agencies therein, or to withdraw such portions of said territory from the provisions of this contract as the party of the second part fails to organize and operate to the satisfaction of the said first party. * * *
>
> 4. * * the party of the first part will pay to the party of the second part, as compensation for services rendered, first year and renewal commissions in accordance with the following table of rates: (Here follows a table of first year commissions classified according to type of policy and a less complicated table of renewal commissions) * * *.
>
> * * all commissions shall be payable when the premiums are paid in cash and reports audited at the home office by the party of the first part. * *
>
> * * a lien is hereby reserved on all commissions of the party of the second part * * to secure commissions due sub-agents, and any in-

debtedness of the party of the second part * * to the party of the first part. The party of the second part shall at the end of each calendar year * * furnish a receipt showing that all commissions due sub-agents have been paid in full.

5. * * the party of the first part will furnish to the party of the second part * * such of its publications and stationery as may be necessary to transact the business.

* * * * * * * * * * * * *

THE PARTY OF THE SECOND PART AGREES AS FOLLOWS:

8. * * he will furnish and maintain with the party of the first part a good and acceptable bond * * *

9. * * *That he will act exclusively for the party of the first part, so far as to tender first to it, all applications of insurance obtained by him.* That he will pay any fees required by state and local laws for the authority to solicit insurance within his territory. That he will be governed by the rules and instructions contained in the Agents' Manual and Rate Book, as well as all other rules and instructions which he may receive from time to time from the party of the first part.

* * * * * * * * * * * * *

15. * * That this contract shall be null and void, at the election of the party of the first part * * if the party of the second part shall fail to perform any of his agreements as herein expressed, *or shall give his time or attention to any other business or employment*; * * *."

The letter of the vice-president of the company states that:

"The general agent receives his compensation from the company in the form of commissions on the insurance written through his agency, including that written by his special agents. The company does not compensate the special agents direct, but only through the amounts sent to the general agent. The company keeps no account of the amount of commissions due the special agents and has no way of telling how much of the compensation paid to the general agent is in turn paid by him to his special agents.

* * how would it be possible for this company to determine the compensation of any general agent? * * the fee to be paid the state fund by us is based upon the premium, which in turn is based upon the compensation paid. It would be obviously unfair to pay a fee upon the entire compensation paid to a general agent, as most of his compensation is again paid by the general agent to the sub-agent."

(The reference to a "fee" is due to the fact that the company does not contribute to the state insurance fund, but, availing itself of section 1465-69 G. C., is thereby required to pay only to the surplus of such fund in the manner provided by section 1465–54 G. C., as amended).

It therefore appears that the general agents of the company are required by the terms of their contracts to give their entire time to the business of the company. Their first loyalty is due to the company, in that they must offer all applications for insurance secured by them first to the company. On the other hand they are not required to work at any one place, to keep any particular hours, or to conduct their business in any particular way, except that they are to be guided by the manual of instructions. Their compensation is payable in the form of commissions, out of which they pay sub-agents or special agents. It is obvious that the chief object of their employment is the securing of applications for insurance policies. Such activities constitute the bringing of the company into contractual relation with third parties. Aside from the

collection and handling of moneys and the rendition of accounts, they perform nothing that might be characterized as "work," in the narrow sense, for the company.

On these facts, are the general agents in the "service" of the company?

An effort has been made to find out what the terms of the "Rules and Instructions contained in the agents' manual and rate book," etc., may be. While no manual bearing such a title has been seen, what are taken to be similar books issued by this company and several others have been examined, and it is felt that their context may be taken as a safe guide to indicate the general character of the limitations placed by the companies on the conduct of their agents in such form. Suffice it to say that such publications are found to contain mortality tables and the like with rates for each policy and each age, together with lists of prohibited and doubtful risks and instructions relative to terms, etc. None of these books purport to direct by rule or otherwise how the agent shall employ his time, nor do they relate to any other matter or thing than the extent of the agent's authority in making contracts on behalf of the company.

It appearing, therefore, that nothing in the agent's manual of rates and instructions in anywise alters the general scope of the contract as above quoted and analyzed, we may return to the principal question.

Having regard to the manifest spirit and underlying purpose of the workmen's compensation act, it would appear that the answer to the question now under consideration should depend upon whether or not the insurance company, as employer, sustains toward its general agents anything more than the mere relation of a principal, or, stated conversely, whether or not the general agents sustain toward the company any closer relation than that of a mere agent.

It is believed that the law came into existence as the expression of a protest against what were deemed to be the socially unjust results of the application of the ordinary rules of negligence to industrial accidents. Without going deeply into the situation, it is sufficient to state what is familiar to all, namely, that an industrial workman injured in the course of his employment and thus suffering direct loss of earnings, and indirect loss of earnings through impairment of earning power, and the dependents of a workman killed in the course of his employment and thereby deprived of the support accruing to them through his earnings and earning power, would find under the former law an insuperable barrier to the recovery of compensatory damages from any one on that behalf, unless he or they might be able to fasten fault of some kind upon some other person.

So in all cases of mere accident and in all cases where the injury resulted solely from the negligence of the injured party, the law was impotent to afford any relief, no matter how great the distress in the individual case might be. But even when such parties might be able to trace the causation of the injury to fault on the part of the employer or some other person, at least three technical barriers would lie in their way and have to be surmounted, before such damages could be recovered. These were:

1. The defense that though the injury resulted from the negligence of some one representing the employer, such person was a fellow servant of the injured employe.

2. That though fault might have contributed to the employer, the proximate or concurring cause of the injury was the negligence of the injured workman himself and

3, That though the employer might by the exercise of great care have prevented the condition out of which the injury arose, yet such condition was one of the risks inherent in the employment and appreciated by the workman when he entered it, so that he must be deemed to have assumed such risk and to have taken his chance of injury when so entering the employment.

Even where these difficulties did not exist or were successfully overcome, the amount of recovery was uncertain, being left to what might be, and perhaps often was, the caprice of a jury.

The point of view from which these rules of law and the resulting conditions were regarded as unjust, might be best expressed by the statement that the industry in which the workman was engaged was after all the cause of any injury that might happen to him in the course of his employment. This view casts aside all nice and technical rules and principles and even more plain and substantial ones by which particular culpability of definite persons or corporations is to be weighed and determined and on the fundamental principle of insurance, which is that of the general average, by which all losses happening in the course of a common undertaking are to be ratably apportioned among those interested in the enterprise, casts the burden of repairing the effects of industrial accidents upon the industry itself, thus to be ultimately borne by all who are engaged therein.

The workman's compensation act is fundamentally an expression of this point of view and an attempt to make it the law of the land in an effective way. It is therefore bottomed upon the idea that the workman is but a human cog in the great machinery of industry and subject to the play of forces generated by the industry. To regard him as such, however, we must premise such a relation between him and the industry as to make him actually subject to such forces. We can not do this unless his employment is of such character as to place him under outside control of some sort.

Of course any one who undertakes any business enterprise finds that if he would be successful therein his activities must be conditioned by the necessities of the enterprise. So any man who agrees in the course of his business to do something for another, finds himself under the necessity, if he would abide by his agreement, of so conducting himself as to render likely his success in the undertaking, though the time and the means may be left to him to determine. Such a circumscribing of the will is, however, too slight to afford ground for the application of the principles which have been discussed. A tailor from whom a customer orders a suit of clothes must do or procure to be done the necessary cutting and stitching; yet his relation to the customer is not such as to make whatever risk to him may be involved in the doing of the work one that pertains to the customer's business. It is a risk of his own business. He sustains toward the customer the relation which is known in law as that of an independent contractor. This is one extreme.

At the other end of the line lie the cases in which the person for whose benefit work is to be done by another person, so far controls the manner in which the work is to be done, the disposition during working hours of the time of the person who is to do the work and other factors in connection with the doing of the work, that it is clear that the workman is in substance and in fact a mere instrumentality of his employer for the doing of the work. In other words, the work is substantially done by the employer through the workman, whose relation to the former is somewhat aptly expressed by the colloquial term "hand." Here, the law declares the relation to be that of master and servant.

Now, it may be stated, without citing authorities, many of which are available, that the term "service" as used in the workmen's compensation acts imports the relation of master and servant and excludes that of independent contractors. In each case in which the question as to the relation of a person injured in the course of carrying on an enterprise arises, therefore, it must be determined whether the relation between the parties is essentially that of master and servant on the one hand, or essentially that of independent contractors on the other hand.

It is obvious that there will be border-line cases to be decided as questions of mixed law and fact. An examination of some of the decided cases will show the difficulty, if not the impossibility, of drawing a line upon any abstract or *a priori* principles.

In the case under consideration, there is an element not thus far taken into account in the foregoing analysis of the legal possibilities arising upon this phase of the workmen's compensation act. That is the fact that the relation of principal and agent

exists between the insurance company and its general agents. Before proceeding further, therefore, it is necessary to determine whether or not the existence of this relation in and of itself conclusively determines that the case lies on the one side or the other of the line of division to which reference has just been made. On the one hand it may be conceded that there is a legal distinction between an independent contractor and an agent. That is to say, one who is the agent of another can not be an independent contractor as to him for all purposes—perhaps for any purpose, in the exact sense.

Does it therefore follow that the fact of agency stamps the relation for present purposes as analogous at least to that of master and servant? This question must now be answered, for if it is answered affirmatively, we are at the end of our analysis, so far as the general agents of the company are concerned; and if it is answered negatively, we must look further into the relations of the parties, to see whether they present features, aside from that of mere agency, which bring the case within the principles of master and servant. For it is clear that there is no such legal contract between the relations of master and servant and principal and agent, as is presented when we compare either with that of independent contractors. In other words, a servant may be an agent, and an agent a servant; or, the relation between the parties may involve both an agency and a service.

For our purpose, therefore, the question is whether, the fact of agency being established, such fact is conclusive in favor of the existence of the relation of master and servant, is a material fact bearing upon the existence of that relation, or is a perfectly immaterial and irrelevant fact to be laid on one side in determining whether that relation exists.

Still forbearing to enter upon a discussion of the authorities, I venture the statement that agency as such consists of the representation, as it were, of the mind of one person by and through the mind of another; whereas, service is essentially a use of the body of a person, i. e., his physical powers, by the controlling mind of another.

There are available many learned dissertations bearing upon the distinction which has just been suggested. Reference may be made to:

> Mechem on Agency, 2nd Ed., Chap. I, and Labatt on Master and Servant, Chap. III, Secs. 65 to 67, inc., with notes.

for historical treatments of the subject. See particularly the articles on "Agency" by Mr. Justice Holmes, 4 Harv. Law Review, 354, 5 Id. 1, in which the learned author advances the thesis that historically "agency," as we now understand it, developed out of the primitive relation of master and servant. Indeed, this statement is accepted by all writers and must be true in the very nature of the case. All primitive law omits reference to any such legal concept as agency. The reasons for this are admirably set forth in Chap. I of Mechem, supra. It is therefore true, as stated in Sec. 11 of Mechem on Agency, supra, that:

> "The title agency, as the name of a distinct subject, belongs to a comparatively recent period in our law."

After his exhaustive historical review, Professor Mechem in the second chapter of his work advances the following definitions:

> "The word agency, when used in its broad meaning * * indicates the relation which exists when one person is employed to act for another. In this aspect, it has, in our modern law, three chief forms: 1. The relation of principal and agent; 2. The relation of master and servant; * *; 3. The relation of employer or proprietor and independent contractor. All of these have some points of similarity but, at the same time, many aspects of real distinction.

> Of the three forms here suggested, the one with which this work has chiefly to do, is the first, or the relation of principal and agent. At the same time the three relations, and particularly the first two, are so closely related, and the actor in these first two forms so frequently acts in both capacities or so largely combines them both in his own person, that it is convenient and often desirable to consider them side by side. * * *.
>
> The relation of principal and agent, or the relation of agency in the narrower sense * * is the legal relation which exists where one person, called the agent, is authorized—usually by the act of the parties, but occasionally * * by operation of law to represent and act for another, called the principal, in the contractual dealings of the latter with third persons. The distinguishing features of the agent may briefly be said to be his representative character and his derivative authority."

Somewhat happy examples of the difference between agency and service are afforded by the cases in which abnormal status imposes a relation of master and servant upon the parties by operation of law, such as the relations of husband and wife and parent and child. Even under our modern married women's act, the relation of master and servant to a limited degree exists as between husband and wife; and of course that relation has always existed as between parent and child. Yet no agency is inferable from these circumstances unless in exceptional cases, as in case of abandonment. In thees relations reciprocal duties exist, such as the duty of support. But a husband and father may by his will, express or implied from conduct, constitute the wife or the child as his agent. Here, then, is an instance in which the one relation is admitted to exist but does not necessarily prove the existence of the other. Logically, at least, the converse may well be true and the relation of agency, as defined in a narrower sense by Professor Mechem, be admitted to exist; and yet additional facts have to be shown in order to establish the other relation of master and servant between the parties.

The temptation is to quote copiously from authorities, but confusion might result from so doing, as well as the lengthening of this opinion; for it must be admitted that the courts have been far from discriminating in the use of terms and the attempted framing of definitions for one purpose or another. It is believed that enough has been said to show that the true relations are logically exclusive, so that proof of one, as subsisting between two parties, does not establish the other between the same parties. This is as far as it is necessary to go at the present time, for it follows from this that we must look at the facts of the present case to see whether the relation of master and servant—or some relation sufficiently analogous thereto, to satisfy the purposes of the workmen's compensation law—exists between the Union Central Life Insurance Company and its general agents; and in conducting this investigation we may lay on one side, as a fact of slight, if any, value, as tending to prove the affirmative of the question, the admitted relation of principal and agent which exists between these parties.

In the investigation upon which we now embark, we are looking for what might be termed "manual acts" to be performed by the agent on behalf of the company in such a way as to constitute the agent a physical instrumentality of the company. Looking first at the initial paragraph of the contract, we find that the powers and duties of the agent are specified as follows:

> "To procure applications for life insurance, to deliver policies, to collect premiums when furnished with the policies or receipts; and to perform such other duties as may be required in connection therewith."

The procuring of applications for life insurance is clearly not an act of the char-

acter last mentioned. It is an activity designed to bring the principal, or the company, into contractual relations with a third party, the applicant.

The collection of premiums, which, when collected, are to be (according to the eleventh paragraph of the contract) immediately deposited "in such bank as may be designated by the party of the first part to the credit of and without expense to the Union Central Life Insurance Company; to be subject only to the check of the party of the first part." is something that is more in the nature of a physical act. Indeed, it has been held that a collector is an employe within a workmen's compensation act, though he chooses his own time to make the collections and otherwise conducts his activities according to the dictates of his own will.

> Schooler vs. Greenberg, 1 Calif. Ind. Acc. Com. Dec. 146, cited in note to Powley vs. Vivian, 169 App. Div. (N. Y.) 170, as reported in 10 Neg. Comp. Cas. Ann. 835-841.

However, such a holding is not conclusive. No one will dispute the fact that a bill collector, employed, say, by the proprietor of a mercantile establishment, would sustain the relation of a servant to his employer. There would not be much difference between such a case and that of a messenger who might be employed to carry money from the safe of the proprietor to a bank for the purpose of depositing it. But here it is clear not only from the terms of the contract itself, but also from the well known usages of the business, that the phrase "to collect premiums," as used in the first paragraph, is not employed for the purpose of describing a duty, so much as for the purpose of creating a power or authority. Indeed, the function of the whole first paragraph of the contract seems to be of this character. The party of the second part is thereby appointed an agent to solicit, to deliver and to collect; that is, he is authorized to do these things, rather than commanded to do them, which would be the case if the intention were to make him a servant.

Consideration of the fundamental character of a life insurance policy re-enforces this view. Such a policy is a unilateral contract, binding on the insurer, but not on the insured. That is to say, under the terms of all policies now in use the policy is not to be delivered until the first premium is paid. See section 9412 G. C., prescribing the form of the Ohio standard life insurance policy.

There can not, therfore, be a duty to collect in the same sense that there is in the case of an ordinary bill collector, for the very simple reason that there is no duty on the part of the applicant or policy holder to pay.

These considerations also dispose of that language of the first paragraph of the contract which deals with the delivery of policies. The collection of first premiums and delivery of the policy being synchronous acts, the performance of which is dependent upon the will of the applicant, whatever manual act may be involved in the delivery or in the collections, for that matter, is merely incidental to the main purpose of the transaction, which is the formation of a contract. This much is rather conclusively demontrated by the celebrated case of Paul vs. Virginia, 8 Wall. 168, in which the supreme court of the United States held that the business of insurance does not constitute interstate commerce, though it consists of entering into contracts for the complete performance of which the delivery of a policy, requiring interstate transportation of it, may be involved. The transportation is merely incidental it does not inhere in the essence of the transaction.

So also with the physical acts that heve been discussed.

When to these considerations is added the obvious one that such physical acts as have been discussed are not performed by the general agent under the direct control of any officer of the company, the element of service, if any, in the relation which their performance involves, tends to disappear, if it does not completely disappear.

Another physical act referred to in the contract is that of keeping an accurate

record of all transactions on behalf of the company (paragraph 10). This is clearly a duty, being in the form of a promise made by the agent of the company. However, it is nothing more than might be stipulated for by any parties having contractural relations with each other, of whatsoever character. It may therefore be dismissed from consideration.

I come now to the one factor in the contract between the company and its general agents which most nearly savors of the relation of master and servant. I refer to that provision of paragraph 15 of the contract which stipulates that the contract shall be null and void, at the election of the company, "if the party of the second part (the general agent) * * * shall give his time or attention to any other business or employment."This is apparently a stipulation for full-time service, and as such it is a factor which is entitled to some weight on the side of holding that the resultant relation is that of service as well as that of agency.

In Labatt on Master and Servant, Vol. I, Sec. 66, the learned author draws the following conclusions from the authorities and cases discussing the distinction between agency and services:

> "* * * (1) That the element of control over the details of the work supplies a reasonably precise test by which to distinguish servants from independent contractors; (2) that this test fails when it becomes necessary to trace the line which separates agents from independent contractors; (3) that no criterion appropriate to all classes of cases has yet been suggested for the purpose of differentiating servants from agents. * * But for practical purposes the nature of the relationship created by a given contract of employment may be determined with reasonable precision by a consideration of the following elements:
>
> (1) The existence or absence of a right on the employer's part to control the employe as to the manner in which his functions are to be performed. This test is decisive, whatever may be the character of the work assigned to the employe.
>
> (2) The fact that the employe was engaged for a definite or indefinite period. * * *
>
> (3) The fact that the employe received his compensation, either in the form of fees and commissions or in the form of fixed wages or salary. With regard to these contrasted modes of compensation, the effect of the authorities, broadly speaking, may be said to be that, wherever the whole or a substantial part of the wages or salary of the employe consists of a specific sum payable at the end of certain stated periods, the appropriate inference ordinarily will be that he was a servant, even though the other evidential elements warrant the conclusion that the contract was one of agency. * * *. On the other hand, it is not necessary, in order to establish the existence of a contract of service, that the employe should have been paid by wages or salary. If he is shown to have been under the control of the employer in respect to the details of his work, he will be regarded as a servant, although his remuneration may have taken the form of a commission. But, having regard to the ordinary usages of commercial life, it is clear that the fact of the compensation having been paid in the form of commissions is an element which tends strongly to show that the employe was an agent, and not a servant.
>
> (4) The fact that, under his contract, the employe *was to devote his whole time to the alledged master*, or was at liberty to work for other employers as well. Proof that the former of these situations existed points strongly but not conclusively, to the inference that the employe was a servant; and if it is also shown that the employe was remunerated by fixed wages, or sal-

ary, service is perhaps inferable as a matter of law. On the other hand, the fact that he was doing work for other employers besides the alleged master will not of itself exclude the inference that his relation to the latter was that of a servant.

(5) The fact that the employe was or was not bound to furnish accounts. Evidence that the employe was subject to this obligation does not of itself prove that he was a servant rather than an agent."

The California Industrial Accident Commission seems to have regarded full time employment an evidence of service in several cases. See

Skidmore vs. Brown, 2 Calif. Ind. Acc. Com. 492.
Horgan vs. Kinney, Id. 932.
Rosenberg vs. Western Mercantile Co., Id. 665.

On the other hand, the Connecticut commission in Fineblum vs. Singer Sewing Machine Co., 1 Conn. Comp. Dec. 126, held a salesman and collector on a purely commission basis, who employed various persons to help him, to be an independent contractor and not an employe, the real basis of the decision, as stated by Bradbury in his work on Workmen's Compensation, p. 150, being:

"That the man was conducting an independent business, inasmuch as he employed other people from whose services he derived a profit."

It will be noted that in this case the general agent derives a profit from the activities of the special agents who are appointed by him.

But while it is undeniable that we would have to take account of the fact of full time service, if it were actually present in the case under consideration (though the fact itself would not be conclusive either way), it appears that the precise nature of the full time service, stipulated for in the paragraph of the contract which has been quoted, is not that which the authorities generally lay stress upon for such purpose; for the negative covenant set forth in the fifteenth paragraph is merely that the general agent shall not "give his time or attention to any other business or employment." The question naturally arises as to whether this means that he shall not devote time to the interests of any other enterprise or employment than the affairs of the Union Central Life Insurance Company, or merely that he shall not give any of his time to any other business or employment than the life insurance business.

As throwing light upon the solution of this question, reference may be had to paragraph 9 of the contract, in which the general agent promises

"That he will act exclusively for the party of the first part, so far as to tender first to it, all applications of insurance obtained by him."

This makes it clear that the idea of exclusion set forth in the fifteenth paragraph is not so strict as to require full time devoted to the interests of the employer's business, in the exact sense of the word.

Taking the tests laid down in the last quoted authority, the conclusion seems to follow pretty clearly that the general agents of the Union Central Life Insurance Company are not in its "service" in the sense under discussion. There is apparent no right on the part of the company to control the general agents as to the manner in which their functions are to be performed. While the appointment is for a term of ten years, it is clear that there is nothing in the contract which binds the general agents to the performance of specific services during that period. The method of compensation, which is by commissions, is that which is more appropriate to the relation of agency than that of service.

The general agent is at liberty, to some degree at least, to work for other companies than the Union Central Life Insurance Company, and his duty to furnish accounts is one which is necessary for the purpose of computing commissions, etc., and in nowise supports the view that service, instead of agency, was contemplated.

In short, it would be only in a remote and artificial sense, if at all, that one could regard the general agents of the company as its physical instrumentalities, performing work for it under the guidance of the minds of its officers. Primarily, and almost exclusively, these general agents exercise their functions for the benefit of the business of the company by way of bringing third parties into profitable contractual relations with it.

It is therefore the opinion of this department that the general agents of the Union Central Life Insurance Company are not its "employes" within the meaning of the workmen's compensation act.

What has been said with respect to the general agents applies even more clearly to the special agents, both in their relation to the company itself and in their relation to the general agents, whose appointees they are. Between such special agents and the general agents and the company, tripartite written contracts are made. I shall not quote these contracts, which are quite similar to those made between the company and its general agents, except that there is not even the remotest inference to be drawn from such special agent contracts that they are to devote all their time or indeed any specified part or a portion of their time to the business of the company. They can not be regarded as employes of an independent contractor, within the meaning of the third paragraph of section 1465-61 G. C. (107 O. L. 159), and commented upon in the previous opinion of this department under date of December 7, 1917, (No. 834, Vol. III, Opinions of the Attorney-General for 1917, p. 2246), which seems to have given rise to the present question, for the short and simple reason that they are not employes of any one.

Summarizing, the conclusions of this department are as follows:

The officers of a private corporation are not, as such, its employes, within the meaning of the workman's compensation act; but the fact that a person is an officer of such corporation does not preclude his acting for the company in some additional capacity which may make him an employe.

The general agents of the Union Central Life Insurance Company are not its employes within the meaning of the workman's compensation act.

The special agents of such company are not its employes within the meaning of that act.

All these questions are questions of fact, to be answered ultimately by the Industrial Commission upon such evidence as may be available. I have assumed, in dealing with the second and third of them, that all the relevant facts were before me.

Respectfully,
JOHN G. PRICE,
Attorney-General.

437.

HUSBAND AND WIFE—MARRIAGE OF WOMAN TO MAN HAVING WIFE LIVING AT THE TIME VOID *AB INITIO.*

1. *The marriage of a woman to a man having a wife living at the time is absolutely void ab initio.*

2. *While the Ohio statutes authorize the courts to grant a divorce on the ground that either party had a husband or wife living at the time of the marriage from which the divorce*

is sought, the purpose or office of such statutes is to secure a judicial determination and record of the fact that the second marriage was void ab initio, *and not to recognize the marriage for any other purpose as between parties. Such marriage, being absolutely void from the beginning, can confer no rights on either party, in the absence of distinct and positive legislation to that effect.*

COLUMBUS, OHIO, June 28, 1919.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Your letter of June 19, 1919, enclosing a letter received by you from Hon. Frank L. Polk, Acting Secretary of State, and requesting an opinion as to the effect of a decree entered in a divorce proceeding based upon the ground that the defendant had a wife living at the time of the marriage, was duly received.

The letter from the acting secretary of state, omitting formal parts, reads as follows:

> "This department has received an application for passport from one Anna Paulson of Dayton, Ohio, a native of Sweden, who states that she obtained American citizenship by marrying Theodore L. Lockamy, who at the time of their marriage appears to have been a resident of Montgomery county, Ohio. Subsequent to the marriage it was discovered that Mr. Lockamy had been formerly married, and that his wife was still living and that he had not been divorced at the time of his marriage to Miss Paulson. Miss Paulson then sued Mr. Lockamy for divorce and a certified copy of the order granting same has been supplied to this department, and a copy is enclosed herewith.
>
> The question of the citizenship of Miss Paulson now before the department seems to depend upon whether the 'marriage' of Miss Paulson and Mr. Lockamy was such a marriage as to confer citizenship upon her under the provisions of section 1994 of the Revised Statutes of the United States:
>
> 'Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.'
>
> Since the effect of the divorce decree is a matter to be determined by the state law of Ohio, this department respectfully requests your opinion as to whether the divorce decree completely annuls the marriage and leaves the parties as though it had not taken place, or whether it simply dissolves the marriage relationship from and after the date of the decree."

The question whether or not a bigamous marriage is void or voidable is the subject of an extended note in 1916 C, L. R. A. pages 711 et seq. The American and English cases are collected and reviewed, and the authorities summed up as follows:

> "At common law and in the absence of statutory provision having a modifying effect, a civil disability, such as having a lawful living husband or wife by a former marriage, renders a subsequent marriage absolutely void ab initio, in consequence of which it is good for no legal purpose, no decree of nullity is necessary to the existence of the original rights of the parties, and its invalidity can be maintained in any proceeding either before or after the death of the parties and irrespective of whether the question arises directly or collaterally.
>
> And in many jurisdictions a bigamous marriage is expressly declared by legislative enactment to be illegal and void from the beginning. And the effect of such a statute is not altered by the fact that it also provides for actions to annul such marriages.
>
> And even where the statutes merely declare persons legally married 'incapable' of contracting another marriage under penalty, the subsequent

marriage of one of the parties is an absolute nullity. So, under a statutory provision that no subsequent or second marriage shall be contracted by any person during the lifetime of any former husband or wife undivorced, a marriage by a woman or man having another husband or wife living and undivorced is void and of no effect, and not merely voidable, so that no decree of nullity is necessary. And in fact it seems that express legislation is necessary in order to render a bigamous marriage voidable only. Thus, it has been held that the fact that the legislature has authorized proceedings to obtain divorce where either of the parties had a former husband or wife living at the time of the solemnizing of the second marriage does not constructively render such second marriage voidable only, but rather simply permits the parties to have the subject judicially investigated and determined, and that to render such a marriage valid or voidable only would require distinct and positive legislation.

But notwithstanding the fact that a bigamous marriage is absolutely void, and that no judicial sentence of nullity is necessary, the courts will entertain a suit to so declare it, this right being granted in some jurisdictions by express statutory provision, and in others by making the second marriage a ground for divorce. It has been said that the reason for this lies in the importance to society of having such questions judicially determined, and not left to depend upon proof of material facts at a time when it might be difficult to make such proof, and also in the quiet and relief to the parties obtained thereby.

* * * * * * * * * * * * *

In a number of cases the courts, without expressly stating whether the marriage of a person having a husband or wife living by a former marriage was void or merely voidable, have annulled the second marriage in direct proceedings instituted for that purpose. And without expressly deciding whether the marriage of a person having a former husband or wife living was void or voidable under a statute providing that such a marriage may be declared null on the application of either party during the life of the other, it has been held that such a marriage should upon proper application be set aside."

It is also said in the same note that, in the absence of statutory provision to the contrary, the conclusion that a bigamous marriage is void cannot be altered or affected by the good faith of the contracting parties or want of knowledge. The effect of a marriage where a former wife or husband has been absent for such length of time as to raise a presumption that he or she is dead is also discussed, but that question does not seem to be involved in the present inquiry, and I express no opinion concerning it.

The exact question was presented to and decided by the supreme court of Ohio in Smith vs. Smith, 5 O. S., 32. In that case Ruth Dennis, while her husband was living, married David Smith. During this latter coverture Smith was seized of an estate of inheritance in certain lands, and upon his death Ruth commenced an action to secure dower in the premises. Her claim was resisted on the ground that her marriage to Smith was void.

In the opinion the court, speaking through Judge Swan, said:

"It seems to be conceded by the counsel for the complainant, Ruth Smith, that if her marriage to Smith was absolutely void, she is not entitled to dower in his estate. Such is undoubtedly the law; and it is equally well settled, that a second marriage, as in this case, while the first husband was living, is absolutely void, unless the legislation of this state has rendered such second marriage voidable only.

It is said that the statute which authorizes proceedings to obtain a divorce, 'where either of the parties had a former husband or wife living at the time of solemnizing the second marriage' (Swan's Stat. 325, section 1), does, constructively, render such second marriage voidable only. The fact of a prior marriage may be one of doubt; and hence this provision permits parties to have the subject judicially investigated and determined. Another object of this provision was, probably, to give alimony to the second wife of a man who had a former wife living. Besides, to render such second marriage valid, or voidable only, until decree of divorce, would require distinct and positive legislation."

In Wright vs. Lore, 12 O. S., 619, the court protected the innocent children of a bigamous marriage in the enjoyment of certain rights secured to them by a statute specially applicable to such cases, "although," as the court said, "the marriage must be deemed in law a nullity."

In Kennedy vs. Cowle, 4 N. P. 105, it appears that the complainant had innocently married a man who had a wife living at the time. The court, following Smith vs. Smith, supra, held the marriage absolutely void.

In the opinion, at page 108, the court said:

"In this case the plaintiff was in no way to blame for the unlawful union, she entered into it in good faith, and had a lawful right to contract the marriage relation. She was the innocent victim of deceit and fraud. But if we read this opinion of the supreme court aright, to render this marriage voidable merely would require distinct and positive legislation, and until we have such legislation such marriage is absolutely void. * * *

The supreme court says in substance that the reason for making this unlawful marriage a ground for divorce, was to permit either party to have the subject judicially investigated and determined. And that another reason 'was probably to give alimony to the second wife of a man who had a former wife living.' In short, to settle the question as to the validity of the marriage, and to give the wronged woman, if he were guilty, compensation and damages out of his property.

A man can have but one lawful wife living. For the sake of convenience we sometimes speak of a man as having two wives, or wife number one and wife number two and of wife number three, but legally a man can have but one wife living. No matter how innocent a second woman may be of any wrong-doing, no matter how much she may be deceived in entering into the marriage relation, if the man has at the time of his marriage with her, a wife living, she cannot be his lawful wife."

In State vs. Moore, 1 O. D. (Reprint) 171, it was held that

"The marriage of a person having a former husband or wife living, is void *ab initio*, and not merely voidable, by the common law."

In Fultz vs. Fultz, 21 O. D., 159, a married woman believing her husband to be dead, married another man. In an action against the latter for divorce on the grounds of gross neglect of duty and cruelty, her application for temporary alimony was denied, for the reason that

"The second marriage was absolutely void and the plaintiff is not, and never was the wife of defendant."

An examination of the Ohio statutes fails to disclose any distinct and positive

legislation making the second or bigamous marriage valid or voidable only (as required by Smith vs. Smith, supra), so as to take the case out of the common law rule declaring such marriages to be absolutely void. The furthest the legislature of this state has gone in that direction has been to permit illegitimate children to inherit and transmit inheritance to and from their mother, etc. (section 8590 G. C.); to declare children born of parents whose marriage is null in law, to be legitimate (section 8591 G. C.); to authorize courts to grant a divorce on the ground that either party had a husband or wife at the time of the marriage, and to pronounce the marriage contract dissolved, etc. (section 11979, 11986 G. C.); to provide that the granting of a divorce shall not affect the legitimacy of the children (section 11987 G. C.). To which also may be added that relief may be obtained in equity as to property accumulated by the joint efforts of the parties. See Fultz vs. Fultz, supra.

It would seem that if a second marriage is absolutely void *ab initio*, the purpose or office of the Ohio statutes authorizing the courts to grant a divorce on the ground that either party had a husband or wife living at the time of the second marriage is to secure a judicial determination and record of that fact, and not to recognize the marriage for any other purpose as between the parties, and that such marriage can confer no rights upon either party, in the absence of distinct and positive legislation to that effect.

Whether or not such a marriage will support a claim of citizenship is a federal question, upon which I express no opinion.

Respectfully,
JOHN G. PRICE,
Attorney-General.

438.

DEPUTY SUPERVISOR OF ELECTIONS—DAYS OF REGISTRATION IN QUADRENNIAL REGISTRATION CITIES—HAVE AUTHORITY TO PAY FOR ACTUAL WORK OF REGISTRARS—FOUR DAYS MAXIMUM—SUBMISSION OF CONSTITUTONAL AMENDMENT OR REFERENDUM IN MUNICIPAL ELECTION; DOES NOT MAKE STATE ELECTION UNDER SECTION 4900 G. C.

1. *In quadrennial registration cities the days of registration in uneven years are Friday and Saturday of the third week prior to the November election and payments made to registrars for registration on other days is illegal.*

2. *Boards of deputy state supervisors of elections in quadrennial registration cities have authority to pay registrars for actual work performed by such registrars under the statutes, outside of the two registration days in uneven years and, considering the nature of the duties put upon such registrars outside of registration days, an allowance of four days' pay in all, at four dollars per day in quadrennial registration cities in uneven years, would be fair and not excessive.*

3. *Registrars are entitled to compensation for making alphabetical lists of electors, transferring electors, and calling for supplies, the amount to be set by the board of deputy state supervisors.*

4. *The submission of a constitutional amendment or referendum in a municipal election does not make such election a state election under section* 4900 *G. C.*

COLUMBUS, OHIO, June 28, 1919.

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

GENTLEMEN:—Acknowledgement is made of your letter requesting an opinion upon the following statement of facts:

"Covering the registration for election of November 6, 1917, the city of Portsmouth, Ohio, made up a pay-roll for two registrars for each precinct of the city, and for your guidance we are copying pay-roll of one precinct as follows:

Precinct A 1st Ward Names	Days of service. Oct.	Nov.	No. of Days	Per day	Total due.
Fred Brodbeck	4—11—19—20	5	5	$4	$20.00
Frank Duplain	4—11—19—20	5	5	$4	$20.00

We also have a letter from State Examiner Heck under date of November 2, 1918, as follows:

'I again enclose you voucher No. 206, representing the pay-roll of registrars for the election of November 6, 1917. Under date of November 11, 1918, you state that we should make findings for recovery jointly against the persons drawing the excess, the board of elections authorizing, and the city auditor paying. You further state that the city of Portsmouth, being a city in which general registration is required at presidential elections only, the law as found in section 4900 G. C. would govern and that the registrars should have been paid for *two* days instead of five.

For this reason I submit the proposition for your further consideration and ask you to read in connection with section 4900 G. C. the provisions of section 4894, which seem to be in conflict.

You will note that section 4894 stipulates that the days for registration of electors in cities that have quadrennial general registration and yearly registration of new electors where general registration is required only in presidential years, shall be Thursday in the fifth week, Thursday in the fourth week, and Friday and Saturday in the third week next before the day of general election in November of each year.

The part underscored applies to cities where there is general registration only in presidential years, and hence applies to Portsmouth and all other cities of the state having a population of less than 100,000.

It would seem from section 4894, that four days were stipulated for registration.

Now we turn to section 4900—which stipulates that in all except annual registration cities, the registration of new voters or electors, for other than presidential and state elections, shall take place on Friday and Saturday in the third week before any such election, or but two days set apart for such reggistration.

Question—How do you reconcile the apparent conflict in these two sections? If the conflict exists, which of the two sections govern? I wish you would fully consider this as the question will be raised if a finding is returned.

Again, I refer you to section 4901, which requires the registrars, after registration is over, to make a thorough canvas for the purpose of ascertaining

whether any of the electors registered have removed or died and to make a report to the board of elections.

Question—Under this section may the board of elections allow the registrars' time outside the regular registration days?

Again, under section 4916, the registrars on Monday in the week preceding the November election are required to prepare an alphabetical list of all electors registered in their precincts. Said list to be furnished the board of elections for the purpose of having three copies printed, two of which shall be posted at the polling places.

Question—Can the board of elections allow the registrars pay for the Monday on which they are required to prepare these lists?

Lastly—I refer you to section 4944 which states:

'The registrars of each election precinct in such cities (meaning all cities less than 100,000) shall be allowed and paid for their services as registrars four dollars per day and no more for not more than six days at any one election.'

Now I wish you would fully consider these sections to which I have called your attention, and after consideration give me your opinion as to whether the board of elections were legally warranted in authorizing the registrars to be paid for five days for the November, 1917, election. I hope that you will find that they were not so warranted, as it looks to me like a useless expense.

Since writing you I wrote several of the city auditors of the state to ascertain what the board of elections was doing in their cities as to registration on other than state elections. The replies indicate the following information:

REGISTRARS FOR ELECTION, NOV. 6, 1917.

City	No. of days.	Amount paid Registrars.
Canton	2	$1,792.00
East Liverpool	3	420.00
Sandusky	4	980.00
Steubenville	6	776.00
Springfield	3	1,556.00
Lorain	4	672.00
Zanesville	5	1,400.00
Lima	4	1,216.00
Newark	4	946.00

You will note that of the nine cities only one had but two days registration for the November election of 1917, and that the city of Canton.

Please let me hear from you at your very earliest convenience and return enclosed voucher.

Yours very truly,
WILL E. HECK.'

We should like your written opinion in answer to these questions. Mr. Heck's preceding letter asked the question whether more than two days of registration could be paid for."

Bearing upon the same matter in a subsequent communication you say:

"In connection with our request for opinion relative to election and registration charges in the city of Portsmouth, Ohio, in which request we embodied in detail copy of letter received from State Examiner Will E. Heck,

under date of November 23, 1918, we desire to call your attention to one point as follows:

In the election of November 6, 1917, which was a municipal election, a vote was taken at the same time covering a constitutional amendment prohibiting the sale of intoxicating liquors.

We are desirous of furnishing you this information, as we are not satisfied in our own minds whether this will have any bearing or not, upon the questions involved."

Fom the above statement of facts, it would seem that the deputy state supervisors of elections of Scioto county conducted a registration in the respective precincts for four days prior to the municipal election of 1917, such days being October 4, October 11, October 19 and October 20, or in other words, the Thursday in the 5th week, the Thursday in the 4th week and Friday and Saturday in the third week next before the day of the general election in November, 1917.

In the proper analysis of the sections of the statutes which bear upon registration in cities, matter that is pertinent to the inquiry herein is found in sections 4871, 4872, 4879, 4893, 4894, 4900, 4901, 4903, 4916, 4917, 4918, 4919, 4921 and 4944, all of which treat in more or less degree on the duties of the registrars and the times and manner in which they are to perform their work.

Section 4872 reads:

"In cities which now or hereafter may have a population of eleven thousand eight hundred and less than one hundred thousand, when so ascertained, a general registration of all the electors therein shall only be had quadrennially at each and every presidential election, at the time and upon the days hereinafter specified. At all other state or public elections those electors only of such cities shall be required to register as may be new electors or who have moved into any precinct of such city since such general registration."

Section 4879 reads:

"On or before the first day of September each year, the board of deputy state supervisors shall appoint for each election precinct in such city two electors of the city to act as registrars of the electors and also as judges of election in such precinct, On or before the first day of October each year, the board shall appoint two additional judges of elections and two clerks of elections for each precinct of such city."

It is noted that you call attention to the presumed conflict which seems to exist between section 4894 and section 4900, and it is advised that section 4894 refers to the registration of electors which takes place in those years in which a state election is held, that is, in the even years. The section which governs the days of registration, in the uneven years, in cities which have quadrennial general registration, and in which class the city of Portsmouth belongs, is section 4900 G. C., which reads as follows:

"In cities in which a general registration of electors is required at presidential elections only, at all other state or other public elections, those electors who have been duly registered at such general registration and have not removed from the precinct in which they then registered at such general registration in such city shall not be required to register. But at such state or other public elections, at the times hereinbefore provided for reg-

istration days, only those electors of such city shall be required to register as may be new electors or who have moved into a precinct of such city since a general registration and have not been registered therein, *except that at such public election, other than presidential and state,* such restristration shall take place on Friday and Saturday in the third week before any such election. * * *"

From the above section it is apparent that for the actual work of registration in uneven years the days of such registration shall be Friday and Saturday in the third week before any election, unless the year in question is one in which there is a state or presidential election, when such days named in section 4900 G. C. do not apply. It is entirely proper, however, to call attention to the fact that the two days provided for in section 4900 G. C., for the registration in precincts of new electors in other years than the state election years, is not the only work which devolves upon the registrars who have been appointed by the deputy state supervisors of elections. Thus one of the first duties which such registrars have to perform, even before the two days set aside for registration of new electors in the several precincts, is set forth in section 4893 G. C., which reads as follows:

"On Wednesday in the fifth week before the November election, *each year,* the registrars of each precinct in such city shall apply for such lists and such registers and the map of their precinct, and such printed instruction for the discharge of their duties as the board of deputy state supervisors may lawfully prescribe."

Again, in section 4916 G. C., it is noted:

"On the day following each registration day, unless such day be Sunday or a registration day, in which event on the next succeeding day, each year, the registrars of each election precinct shall make and deliver to the board of deputy state supervisors at its office in such city a true list of the names of all electors registered by them in their respective precincts on the preceding day or days, arranged in the alphabetical order of their surnames, followed by their full Christian names and residences, and having the registry number of each prefixed. * * *"

It will be seen from the above section that on the day following each registration day, unless such day be Sunday or registration day, it is mandatory upon the registrars to prepare a true list of the electors whom they have registered in the precincts during the registration days, which, as before shown, were Friday and Saturday, and as section 4916 provides that this shall not be done on Sunday, the preparation of this list is contemplated as being made on Monday following the Friday and Saturday stated as the two registration days in cities of this class. The preparation of this list of electors for the board of state supervisors is a matter of great importance, as indicated in sections 4916 and 4917, and must be made alphabetically so the same can be printed for posting at the polling place of such precinct within five days after such boards receive such list from the registrars, and in addition there shall be delivered to the controlling committee of each political party or authorized committee of each set of candidates nominated by petition, a printed list which shall include all the names registered in such precinct. It is further provided that upon the completion of such registration the board of deputy state supervisors in such county containing a registration city, shall cause at least fifty additional copies of such list to be printed and bound in pamphlet form for immediate distribution, such being the language of section 4917 G. C. Registrars should be allowed credit for the proper

preparation of such precinct list for the board of deputy state supervisor and should be given ample opportunity.

It will be seen from the above section that on the day following each registration day, unless such day be Sunday or registration day, it is mandatory upon the registrars to prepare a true list of the electors whom they have registered in the precincts during the registration days, which, as before shown, were Friday and Saturday, and as section 4916 provides that this shall not be done on Sunday, the preparation of this list is contemplated as being made on Monday following the Friday and Saturday stated as the two registration days in cities of this class. The preparation of this list of electors for the board of state supervisors is a matter of great importance, as indicated in sections 4916 and 4917, and must be made alphabetically so the same can be printed for posting at the polling place of such precinct within five days after such boards receive such list from the registrars, and in addition there shall be delivered to the controlling committee of each political party or authorized committee of each set of candidates nominated by petition, a printed list which shall include all the names registered in such precinct. It is further provided that upon the completion of such registration the board of deputy state supervisors in such county containing a registration city, shall cause at least fifty additional copies of such list to be printed and bound in pamphlet form for immediate distribution, such being the language of section 4917 G. C. Registrars should be allowed credit for the proper preparation of such precinct list for the board of deputy state supervisors and should be given ample opportunity to do it correctly, for aside from the use to be made of such lists, as contemplated in the statute, the voters in the precinct are entitled to know the names of any who are illegally registered that they may be challenged in the election, and such printed duplicate lists might be later used as an exhibit in a court proceeding wherein a recount may have been demanded on some particular office or issue.

As to the further duty of the registrars, aside from the two days of actual registering of voters in uneven years, attention is invited to section 4919, which reads:

> "On Monday, the day preceding the November election in each year, the registrars of each election precinct shall meet at two-thirty o'clock afternoon at the polling place appointed for holding elections therein, and there remain in session until five-thirty o'clock afternoon central standard time. At this meeting, they shall receive and act upon any application for either granting or receiving certificates of removal or correction of mistakes, as herein provided for. * * *."

Section 4921, bearing upon the same Monday as indicated in section 4919, also reads:

> "On Monday, the day preceding the November election in each year, the registrars, as judges of election and the other two judges of election in each precinct shall meet at the polling place appointed for holding the election therein at seven o'clock afternoon, punctually, and then and there organize as a board by electing one of their number by ballot as chairman. * * *."

From these two sections it is noted that on the day preceding the Tuesday on which elections are held in Ohio, the registrars are mandatorily told to meet in their respective precincts and remain in session until 5:30 o'clock for the purpose of granting or receiving certificates of removal and that a short time after, at 7 o'clock, they are to meet punctually with the other two judges of elections and the two clerks, who are to be on duty on the following day, and organize as a board for the election of the following day.

Section 4944 G. C. reads as follows:

"The registrars of each election precinct in such cities shall be allowed and paid for their services as registrars four dollars per day and no more for not more than six days at any one election. * * * No registrar, judge or clerk shall be entitled to the compensation so fixed except upon the allowance and order of the board of deputy state supervisors made at a joint session, certifying that each has fully performed his duty according to law as such, and stating the number of days' service actually performed by each. Such allowance and order shall be certified by the chief deputy and clerk of the board to the city or county auditor."

This section provides the maximum pay that can be allowed by a board of deputy state supervisors in any registration city to the registrars for all duties performed prior to such election day and such pay is limited to six days and actual duty must be shown on each and every one of the days in question for which pay is demanded.

From a reading of the sections quoted herein, bearing upon registration times, duties and pay, it will be noted briefly that there are actually five days prior to the election in such municipality having quadrennial registration in which the registrars are required to perform some duty pertaining to the city registration. These days are, first, on Wednesday in the 5th week before the November election; second, the registration days on Friday and Saturday in the third week before such election; third, the Monday following such registration period of two days for the making of registration lists; fourth, the Monday immediately preceding the November election on which afternoon the registrars shall meet in their precincts to grant or receive certificates of removal, etc.

Bearing upon the question of the number of days for which registrars may be paid prior to any election, attention is invited to Opinion No. 1985, issued by the Attorney-General on October 18, 1916, Vol. 2, page 1692, wherein it was held that

"Registrars of electors in registration cities are entitled to compensation for one day for applying to the deputy state supervisors of elections for lists, registers and maps and making and delivering the alphabetical lists of registered electors where such compensation is allowed, and ordered by the deputy state supervisors of elections according to the provisions of section 4944 G. C., and the total number of days for which compensation is so allowed does not exceed six."

This opinion was rendered by the Attorney-General to the secretary of state upon a question which came from the city of Youngstown as to the number of days for which registrars could be paid. Quoting from such opinion:

"From the language of the foregoing provision (4916 G. C.) it is clearly not contemplated that it shall be the duty of the registrars to make the alphabetical lists of registered electors therein required on the registration days named in section 4894 G. C., supra. On the contrary, these lists are required to be made on a succeeding day with the exceptions mentioned."

Again the opinion says:

"I am led to conclude that it was intended that there should be conferred upon the deputy state supervisors of elections authority to allow to registrars compensation, if not in excess of one day, for or in lieu of their services in making application for supplies and in making the alphabetical list of registered electors. So that in the *even numbered years* the aggregate number of

days of service, making an allowance of one day for making application for supplies on the Wednesday in the fifth week before election, and in making the aphabetical list of electors, will be six.

While the board of deputy state supervisors of elections may in the exercise of its discretion allow compensation to registrars for six days * * * this opinion may not be construed to hold that the provisions of section 4944 G. C. impose upon the deputy state supervisors of elections any duty to allow compensation for the maximum number of days therein prescribed."

Your attention is also invited to an opinion of the Attorney-General, dated April 19, 1910, and addressed to Hon. Horace L. Small, City Solicitor, Portsmouth, Ohio, found on page 974 of the Annual Report of the Attorney-General for 1910-1911, and the question therein raised is pertinent to the one herein as to whether registrars could be paid for Thursday in the fifth week preceding the day of election, as was done in 1917, in the case before us. Such opinion says:

"In the fall of 1909, the deputy state supervisors of elections for Scioto county, under mistake of law, undertook to hold a registration of new voters, etc., on Thursday in the fifth week preceding the day of election. The mistake of law was discovered and no further registration of electors was had until Friday and Saturday in the third week preceding the election. Said deputy supervisors have now drawn vouchers for the compensation of registrars and clerks and for the other expenses of such registration, including that of the first day above referred to, and the same have been presented to the city auditor for allowance. Shall the city auditor allow the same, particularly such portion thereof as relates to the expenses incurred and compensation alleged to be payable on account of said first day's registration?"

Commenting upon such registration held in Portsmouth prior to the Friday and Saturday in the third week preceding the election and held on Thursday in the fifth week preceding the day of the November election in 1909, and corresponding to the facts herein stated as regards the November election of 1917, the Attorney-General said:

"In my opinion the auditor should not issue his warrant for any expenses incurred or compensation alleged to be payable on account of said first day's registration. It is conceded, of course, that there is no authority for holding such registration on the day named in the odd numbered years in quadrennial registration cities; this is clear under former section 2926h Revised Statutes."

It is pertinent to remark here that the section construed, 2926h Revised Statutes, was placed in the General Code as it now appears in section 4894 G. C. without any change whatever as regards the days mentioned therein. That is to say, the days occurring in the General Code under section 4894 G. C. are the specific days which occurred in section 2926h R. S., upon which this opinion regarding the Portsmouth election officials, was issued. Concluding, the Attorney-General said:

"I am, therefore, of the opinion that the board of state supervisors of elections being without authority to order registration to be had on the day in question, none of the expenses and compensation could be lawfully charged against the public funds. * * * Public officers may be paid from the public treasury compensation for such services only as are expressly required to be performed by law."

Your table of Ohio cities which have quadrennial registration shows considerable variation as to the number of day's pay allowed to registrars in such cities, such table showing that the payments have been made all the way from two days in Canton to six days in Steubenville for the year 1917. It may be said, however, that as regards Canton, the statement that payment was made for two days is error, as the clerk of the board of elections of Stark County advises that they have uniformly allowed four day's pay for municipal election year. You also say in your later communication that at such municipal election a vote was taken at the same time on a constitutional amendment prohibiting the sale of intoxicating liquors and indicate that such vote on the amendment in question might have something to do with the registration payments as to whether the election in question was a state election or a municipal election. On this point you are advised that the mere fact that the constitutional amendment was submitted at the time of the municipal election and constituted a separate ballot at such election does not take the election of November 6, 1917, out of its class as a municipal election held in an uneven year.

The law contemplates that local boards of elections shall pay for not to exceed six days to each registering officer "for services as registrar" (section 4944), but such six days' pay could be granted in quadrennial registration cities only in even years when state elections are held, for in those years section 4894 G. C. establishes four registration days, while section 4900 G. C. limits the actual registration days to the Friday and Saturday in the third week before any election in quadrennial registration cities where such election is "other than presidential and state," that is, a municipal election in uneven years. As heretofore shown, the work of the registrars is not all done on the two days of actual registration, for supplies must be called for, a half day for transfers is provided, as well as the preparation of duplicate alphabetical registration lists. But in taking care of any single one of these items it can hardly be shown that such duty takes an entire day; thus, the duty on the Wednesday in the fifth week prior to election is a mere calling for the supplies at the board of elections and takes only a fraction of a day; the preparation of the alphabetical duplicate lists on the day following registration would hardly take a full day's time of two registrars working undisturbed, for in practice in many registration cities, the registrars use their spare minutes between callers and their two hours off between two and four o'clock in the afternoon, for bringing the lists near completion, and then remain after nine o'clock in the evening when registration closes to complete the work and deliver the alphabetical lists to the deputy state supervisors of elections. In other words, they have performed by extra labor what the law says can be done by them the following Monday in quadrennial registration cities, and surely they should be compensated therefor. Similarly, there is another fractional day beginning at two-thirty in the afternoon of the Monday preceding the Tuesday election, when transfers are granted till five-thirty P. M. At seven P. M. the two registrars meet with the other two judges of election and organize for the following day's work, but this is part of the election judges' work and registration in precincts ends at 5:30 P. M. The registration day is a long day's work for it begins at eight A. M. and ends at nine P. M., with two hours off from two to four P. M., or eleven hours of actual questioning the persons desiring to register. For this period four dollars is allowed for each day and if this is a day's work then the mere calling for the supplies is not a day's work, nor is the three hours on Monday afternoon prior to election a full day's work, but the combining of all the service in calling for supplies, preparing the alphabetical duplicate lists and making the transfers could very logically be called an additional two days' work, if the board of deputy state supervisors decided that services are rendered by the registrars.

Seemingly, then, the rule should be in quadrennial registration cities that since there are two days less of actual registration in uneven years than in even years when

state elections are held, the pay of registrars in uneven years should be two days less than in even years. So if the maximum of six days was allowed in a state or presidential election year, it follows that not to exceed four days could be allowed in an uneven year when registration days are reduced in quadrennial registration cities from four to two in number. It is for the board of deputy supervisors to decide if the extra work mandatorily placed on registrars outside of registration days is sufficient to allow full compensation for the two days above indicated, parts of which days are used (1) in preparing alphabetical lists, (2) transfers on the Monday prior to election, giving consideration also to the first call for supplies, but such compensation would hardly exceed four days in all for all registration services in a quadrennial registration city in an uneven year, and such compensation is first, for two days' registration on the Friday and Saturday in the third week prior to election; second, for the additional work placed on the registrar in sections 4916 and 4919 G. C. Your survey of Ohio quadrennial registration cities shows that in Springfield and East Liverpool the deputy state supervisors allowed but one day for this additional work or three days in all in 1917, but conditions are not necessarily the same in all precincts or cities in making lists or transfers, and four days' compensation could be granted under the law in uneven years, if services commensurate were performed; under section 4944 G. C. the board must act on such compensation in joint session and certify the same to the city auditor by its chief deputy and clerk.

It is therefore the opinion of the Attorney-General that:

1. In quadrennial registration cities the days of registration in uneven years are Friday and Saturday of the third week prior to the November election and payments made to registrars for registration on other days is illegal.

2. Boards of deputy state supervisors of elections in quadrennial registration cities have authority to pay registrars for actual work performed by such registrars under the statutes, outside of the two registration days in uneven years and, considering the nature of the duties put upon such registrars outside of registration days, an allowance of four days' pay in all, at four dollars per day in quadrennial registration cities in uneven years, would be fair and not excessive.

3. Registrars are entitled to compensation for making alphabetical lists of electors, transferring electors, and calling for supplies, the amount to be set by the board of deputy state supervisors.

4. The submission of a constitutional amendment or referendum in a municipal election does not make such election a state election under section 4900 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

439.

ROADS AND HIGHWAYS—NO AUTHORITY FOR USE OF "MAINTENANCE AND REPAIR" FUND IN HIGHWAY WORK.

HELD, under the facts as stated in the opinion, that there is no authority for the use of "Maintenance and Repair" fund in highway work. Opinion of August 17, 1917, adhered to.

COLUMBUS, OHIO, June 28, 1919.

HON. CLINTON COWEN, *State Highway Department, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date, reading as follows:

> "The much mooted question as to latitude and limits of the use of repair funds in reconstructing and repairing highways has given this department a good deal of worry and uncertainty as to just how far we may go in the use of such funds. A general opinion was rendered by your predecessor on the use of such funds, but more or less uncertainty arises when we attempt to construe this opinion in application to so many specific cases. A few days ago a request came to the department for aid in Geauga county and on two roads in Huron county, on the initiative of the commissioners in each case, asking for the repair of:
>
> 1st.—*Geauga County, Section "D" I. C. H. No.* 15. By widening and adding a reinforced concrete top to an original concrete road, the surface of which was not reinforced in the beginning. You will note in this case the particular deviation from the original plan is widening. The basis of cost of this proposed improvement is 25 per cent. county and 75 per cent. state.
>
> 2nd.—*Huron County, Section "C," I. C. H. No.* 455. By widening and adding bituminous macadam top course, the original surface of the road being waterbound macadam. In this case the departure from the original improvement is both in character of the paved roadway and the widening of the pavement. The ratio of cost for this improvement is $16,500.00 state funds and $11,000.00 county funds.
>
> 3rd—*Huron County, Section "N," I. C. H. No.* 290. By constructing a monolithic brick surface on a surface originally constructed of concrete, and widening the traveled or paved portion of the roadway from 12 to 16 ft. the entire new surface to be of monolithic brick. The departure here from the original improvement is a change in the character of pavement and width of pavement. The basis of co-operation in the cost is $22,000.00 state and $22,000.00 county.
>
> "I have been directed to request an opinion as to whether or not this department may co-operate with the counties in the use of maintenance money as above indicated."

Doubtless the opinion to which you refer is that dated August 17, 1917, appearing in Opinions of Attorney-General for 1917, Vol. II, page 1553, wherein the department reached the conclusion, as shown by the head note:

> "Where an improvement changes the width of the improved part of a highway from ten feet to fourteen feet, that part of the cost of such improvement to be borne by the state cannot be taken from the 'Maintenance and Repair' fund of the state."

An opinion along similar lines had also been rendered by this department under date of March 12, 1917, Opinions of Attorney-General for 1917, Vol. I, page 231, the head note reading as follows:

> "The funds derived from the registration of automobiles creating what is known as the 'maintenance and repair' fund can be used only for the upkeep of the intercounty and main market roads of the state and not for the reconstruction and rebuilding of the same."

It is realized that instances arise wherein there is difficulty in distinguishing between an "improvement" and a "repair," since after all a "repair," speaking generally, is an "improvement." This subject is dealt with in some detail in the two opinions above referred to. The following is quoted from said opinion of August 17, 1917:

> "In the improvement under contemplation the width of the highway is to be increased from ten feet to fourteen feet, thus making practically a new and different improvement from that which was originally made.
>
> It does not seem to me that such a change could be brought under the term 'maintenance and repair,' and thus be paid for out of the fund which is particularly set aside for maintaining and repairing improved highways of the state.
>
> My predecessor, Hon. Edward C. Turner, in Vol. I, of the Opinions of the Attorney-General for the year 1915, at page 990, called attention to this fact in an opinion rendered by him. On page 991, Mr. Turner uses the following language:
>
> '* * * Some substantial part of the original improvement must remain, and in order to constitute a repair the proposed operation must contemplate the use of that part of the old improvement still remaining and must further contemplate a completed work that will be substantially like the original. It will not, however, rob a contemplated operation of its character as a repair merely because it is proposed to so conduct the operation that the highway when repaired will possess certain improvements as compared with the original work. In the specific instance referred to by you, it is my opinion that the fact that some slight alterations are to be made in the grade of some parts of the road, that the margins are to be straightened up and that the roadway is to be widened in places will not change the character of the proposed operation as a repair. The present cuts and fills will be utilized, substantially the present grade will be followed and the old macadam not worn away will be used as a base. * * *'
>
> It is my opinion that the rule laid down by Mr. Turner in the above opinion should not be extended at all beyond the language used therein and the facts to which it was applied."

It is quite clear that the three specific cases described in your letter come within the scope of the opinion of August 17, 1917, rather than within the purview of the opinion of 1915; for it is noted that in the three cases you mention, widening is proposed.

Inasmuch as the statutes in point are still effective in the same form as existed on August 17, 1917, it is concluded in conformity with the opinion of that date, that there is no authority for the use of the "Maintenance and Repair" fund in the three instances stated in your letter.

Respectfully,

JOHN G. PRICE,

Attorney-General.

440.

BANKS AND BANKING—MONEY PAID TO BANK FOR LIBERTY BOND IS A SPECIAL DEPOSIT AND TRUST FUND—RIGHTS OF SUBSCRIBER IN CASE OF FAILURE OF BANK—PREFERRED CLAIM.

1. *Money paid to a bank by a subscriber for a liberty loan bond, to be transmitted to the United States government for such bond, is a special deposit and a trust fund in the hands of such bank.*

2. *In the event of the failure of the bank, without delivery of such bond to the subscriber, the latter is entitled to have a trust impressed for his benefit upon any property or assets coming into the hands of the liquidating agent, into which he can trace and identify such payment, either in its original or substituted form. As to other property or assets, his claim is only that of a general creditor.*

3. *The rights of such subscribers inter se or in funds actually transmitted by said bank to the United States government not considered.*

COLUMBUS, OHIO, June 28, 1919.

HON. PHILIP C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You advise me that an insolvent bank in process of liquidation by your department had accepted subscriptions (and payments thereon), to the various liberty loans and also to the fifth or Victory loan, and that only a portion of the earlier bonds and none of the Victory loan issue have been delivered to the respective subscribers.

You inquire whether claims filed for the amounts so paid on such subscriptions are to be considered as general or preferred, and have furnished me with forms of applications for bonds for signature by subscribers, used by the bank in the transactions. From these it appears that the bank was the subscibers' agent, whose duty it was to transmit their funds to the United States government in payment for the bonds.

Clearly, the deposit of the money with the bank was for a specific purpose and did not give rise to the relation of debtor and creditor between the parties. On the contrary, the amount thus paid became a trust fund in the bank's hands.

Ryan vs. Phillips, 44 Pac. 909.
Boone County Nat. Bank vs. Latimer, 67 Fed. 27.
Met. Nat. Bank vs. Campbell Commission Co., 77 Fed. 705.

The claims of these subscribers are therefore prior to those of general creditors, providing the facts are such as to bring them within the rule relating to the tracing of trust funds, which I shall now discuss. I assume that the subscibers made their payments to some officer of the bank who was acting within his authority in accepting them, so that there is no doubt as to the bank's liability in some form.

The first inquiry is, does the mere fact that the bank received this money give the subscribers who paid it a lien on its assets generally? Or, stating the question in another form, is it enough to impress a trust upon the property in your hands to show that the bank's assets were at one time increased by the addition of these funds? The answer must be in the negative. A few older cases are found, particularly in Wisconsin, which would support an affirmative conclusion, but they have all been overruled.

A very fair general statement of the proposition applicable is found in the syllabus of Metropolitan National Bank vs. Campbell Commission Co., supra:

"The rule permitting the owner of a fund, which has been misappropriated by one who held it in trust or for a specific purpose, to follow the trust property in the hands of the trustees, or of a receiver, in case of insolvency, does not extend beyond permitting such owner to pursue the fund in kind, or in specific property into which it has been converted, or, if the fund has been mingled with the trustee's other property, to establish a charge on the mass of such property for the amount of such fund, and it does not give to the owner of such fund any rights, in preference to other creditors of the trustee, in property into which the trust fund has in no way entered. Bank vs. Latimer, 67 Fed. 27, reaffirmed."

In Smith, et al., Trustees, vs. Fuller, et al., Assignees, 86 O. S. 57, the court, after finding that a certain deposit in an insolvent bank was special, said in the syllabus (fifth branch):

"Where, in such case, the bank fails and makes as assignment for the benefit of creditors before such fund is withdrawn, and it appears that the bank, upon receiving such deposit, had mingled the trust money with its own funds, money paid out from such fund for its own purposes will be presumed to have been paid from its own money, and not from the trust fund. And if it be shown that at all times from the making of the deposit to the time of the assignment by the bank, there was in its vaults money of amount and value equal to the amount so deposited, a court of equity may engraft a trust upon such money, and the trustee will become a preferred creditor to the amount of such deposit."

A leading case, decided by the United States circuit court of appeals for this circuit, is Board of Commissioners of Crawford County vs. Strawn, Receiver, 157 Fed. 49; 15 L. R. A. (N. S.) 1100. There a county treasurer had illegally deposited county funds in a bank which afterward failed. The law of the case is well stated in the third, fourth and fifth branches of the syllabus appearing in the L. R. A. report, as follows:

"3. The extent to which trust funds blended with general moneys of a bank have been dissipated, or can be identified, when the cash in the bank has sunk below the amount of the trust fund, is to be determined, not by the cash balance when the bank closes its doors in insolvency, but by the lowest cash balance after the trust fund deposits are made, to which are to be added the subsequent trust fund deposits.

4. Trust funds blended with general moneys of an insolvent bank cannot be identified in the shifting balances carried in reserve or in correspondent banks, made up of collections and proceeds of rediscounts, and sometimes of funds remitted by the insolvent bank, where the trust fund is not traced to any of the rediscounts or collections; the presumption as to the funds remitted being that they were not trust moneys.

5. The fact that some of an insolvent bank's commercial paper, consisting of many separate instruments acquired at different times, may have been purchased with the general funds of the bank with which trust moneys have been mingled, is insufficient to fasten a trust upon it, or upon the proceeds of a part of it."

See also Macy vs. Roedenbeck, L. R. A. 1916C, p. 12, and the annotation on the subject of "Identifying misapplied trust funds to follow and recover them." The subject is elaborately discussed in 39 Cyc. 528, et seq.

Similar questions have arisen and been considered by the courts of practically

all of the American states and by a number of English tribunals, and the rule may be safely announced in the language of 39 Cyc. 529:

> "It is well settled that in order that a trust fund or trust property which has been misapplied or wrongfully dissipated may be followed in equity and the trust enforced as against the trustee or one who has acquired the property with knowledge of its character, it is necessary that it shall be clearly traced and identified, either in its original or a substituted form."

The statement of this proposition would constitute an answer to your inquiry, but I desire to call your attention to certain other rules and presumptions which may become important in the practical liquidation of this bank. If the fund can be traced into the general mass of property in the possession of the liquidating agent, it is not necessary that its exact identity should have been preserved; in other words, the identical pieces of coin or articles of property need not be found. The money received may have gone into the assets on hand, and if so, a trust may be impressed on the subsituted property.

When it has been shown that these funds were placed with the bank's assets, subsequent disbursements will be deemed to have been made from money belonging to the bank, upon the presumption that the latter used its own money first. If the payment made can be traced into and identified as part of the assets on hand, it is not fatal to the claimant's right that he can not segregate it from the general mass. On the contrary, the whole mixed fund or property becomes subject to his lien. But the burden is upon him to trace and identify his money or property in its original or substituted form and if it appears that it could not have gone into any of the assets taken over by the liquidating agent, or was never placed in the bank by the officer receiving it, no trust can be asserted. The mere fact that it has been expended or dissipated by the bank's officers or even used to pay expenses, debts or salaries, would not be sufficient, nor could a trust be impressed on moneys in the bank's vaults at the time of its discontinuance of business, if subsequent to the date of the payment by the subcriber its funds had been entirely depleted. To illustrate: If the bank had received from the subscribers, in the manner indicated in your inquiry, ten thousand dollars, and thereafter the amount of its funds had fallen to one thousand dollars, and had risen again to ten thousand dollars, only the smaller sum would be subjeet to the trust.

The situation may become further involved by the fact that these subscribers made their deposits with the bank at different times, or that a portion of the amounts paid by them may have been turned over to the government. These questions will not be considered now, but can be disposed of if they arise.

Respectfully,
JOHN G. PRICE,
Attorney-General.

441.

BOARD OF EDUCATION—LANDS OWNED BY SUCH A BOARD ARE NOT SUBJECT TO ASSESSMENT FOR ROAD IMPROVEMENT.

Under existing statutes, lands owned by a board of education are not subject to assessment for road improvement.

COLUMBUS, OHIO, June 28, 1919.

HON. V. W. FILIATRAUT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—You have submitted for opinion the following:

> "A road is improved in the usual manner and the half mile assessment

plan is agreed upon. Property owned by a board of education is within the half mile zone of the new improvement.

Question: Is the school board of the township under section 5349 or section 4759 or any other section exempt from the payment of this paving assessment?"

As was pointed out in an opinion of this department of date April 13, 1916, Opinions of Attorney-General for 1916, page 663, our Supreme Court has held in Lima vs. Cemetery Association, 42 O. S. 128, that there is a well recognized distinction between an assessment and a tax, and that a statute exempting lands from taxation does not of itself mean that such lands are also exempt from local assessments. Inasmuch as there was considered in said former opinion, the question of assessment against school property in connection with the improvement of a municipal street, the following quotation from said opinion is not out of place here:

"In the case of the city of Toledo vs. Board of Education, 48 O. S., 83, the court evidently had in mind its interpretation of the above provision of section 3571 R. S. in the case of Lima vs. Cemetery Association, supra, and, in holding that school property is not liable to assessment for a street improvement, it is manifest that the court based its decision on the above provision of section 4759 G. C., that 'real or personal property vested in any board of education shall be exempt * * * from sale on execution or other writ or order in the nature of an execution,' applying said provision of said statute the same as it applied the similar provision of section 3571, R. S.

It was further held by the court, however, that a judgement could not be rendered against the board of education for the payment of said assessment out of its contingent fund to be raised under provision of section 3598 of the Revised Statutes as then in force, and that the amount of said assessment should be paid out of the general fund of the city."

The concluding paragraph of said opinion is as follows:

"In view of the foregoing provisions of the statutes and the authorities cited I am of the opinion that no part of the cost of the improvement in question can be assessed against the school property referred to in your inquiry and that the board of education of Wauseon village school district is neither required nor authorized to pay any part of the cost of said improvement out of its contingent fund or to levy a tax for said purpose."

In view of the broad provisions of section 4759, which exempt real and personal property vested in any board of education, not only from taxation but also from sale on execution or other like writ or order, it would seem that the conclusion reached in the opinion referred to is applicable to the situation stated by you, unless the legislature has indicated in clear and positive terms that an exception is to be made from the general rule, and that authority is conferred for the making of assessment against public school property for road improvement. You do not indicate the particular plan of road improvement involved; but an examination of the statutes relating to improvement of roads under the supervision of the state, county or township authorities fails to disclose any reference to the matter of assessing school property.

You are therefore advised that under existing statutes, lands owned by a board of education are not subject to assessment for road improvement.

Respectfully,

JOHN G. PRICE,

Attorney-General.

442.

ROADS AND HIGHWAYS—SECTION 1208 G. C. CONSTRUED—SURETYSHIP ON HIGHWAY BOND—NO CLAIM AGAINST STATE UPON STATEMENT OF FACTS SUBMITTED.

1. *Under facts appearing in opinion,* held, *that no claim has accrued against the state, and that the state is not to proceed against surety.*

2. *Section* 1208 *G. C. considered.*

COLUMBUS, OHIO, June 28, 1919.

HON. CLINTON COWAN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—The receipt is acknowledged of your request in connection with section E, I. C. H. No. 61, Miami county (Dayton-Troy road), for opinion upon a matter which as appearing from your communication, supplemented by personal conferences at your department, may be stated as follows:

On April 28, 1916, one W. made to the state in the form prescribed by its highway department a proposal to do certain highway improvement work, which proposal was accompanied by a "Proposal and Contract Bond" containing the following condition

> "Now, therefore, the condition of this obligation is such, that if the said proposal be accepted and said principal shall, within ten (10) days after receiving notice thereof, enter into proper contract with said state of Ohio, for the construction and completion of said improvement, and shall well, truly and faithfully comply with and perform each and all of the terms, covenants and conditions of such contract, on his (its) part to be kept and performed, according to the tenor thereof; and will perform the work embraced therein, upon the terms proposed and with (in) the time prescribed, and in accordance with the plans and specifications furnished therefor, and to which reference is here made and the same are made a part hereof; as if fully incorporated herein; and shall fully pay all direct or indirect damages that may be suffered during the construction of such improvement by reason of the negligence of the contractor in the construction thereof, and until the same is finally accepted; and shall pay all claims of sub-contractors, material men and laborers arising from the construction of said improvement; and shall save the state of Ohio and the county of Miami free and harmless from the payment of any claim or claims of sub-contractors, material men or laborers on account of the construction of said improvement; then this obligation shall be null and void, otherwise to be and remain in full force and virtue in law."

The contract was awarded to said W. and he entered upon its execution. In the course of his work, and beginning on June 18, 1917, one B. furnished him labor and equipment. W. thereafter defaulted on his contract with the state as well as upon his contract with B. to pay the latter a stipulated sum for such labor and equipment. B. then on June 2, 1918, filed with the highway department a verified statement of the amount due on his claim. He is now insisting that inasmuch as he is unable to recover the amount of his claim from W. because of the latter's insolvency, the state should endeavor to collect the amount from the surety. The state has no funds in its hands due the principal contractor on the contract in question,—the cost of the work to the state having exceeded the contract price.

The question is, what course should the highway department pursue.

Your inquiry involves a reference to section 1208 G. C., which as it became effective on the first Monday of September, 1915, and as it stood at the time of the giving of the above mentioned bond, read as follows, (106 O. L. 634):

"The state highway commissioner may reject all bids. Before entering into a contract the commissioner shall require a bond with sufficient sureties, conditioned that the contractor will perform the work upon the terms proposed within the time prescribed, and in accordance with the plans and specifications thereof, and that the contractor will indemnify the state, county or township against any damage that may result by reason of the negligence of the contractor in making said improvement. Such bond shall also be conditioned for the payment of all material and labor furnished for or used in the construction of the road for which such contract is made, and which is furnished to the original contractor or sub-contractor, agent or superintendent of either engaged in said work The bond may be enforced against the person, persons or company executing such bond by any claimant for labor or material, and suit may be brought on such bond in the name of the state of Ohio on relation of any claimant within one year from the date of delivering or furnishing such labor or material, and such bonds or sureties thereon shall not be released by the execution of any additional surety, note or other instrument on account of such claim or for any reason whatsoever, except the full payment of such claim for such labor or material. In no case shall the state be liable for damages sustained in the construction of any improvement under this chapter."

Quite plainly, the fact that B. furnished labor and equipment to the principal contractor does not, by reason of the conditions of the bond or the provisions of the statute, give rise to any contractual relation between B. and the state. It follows that your department cannot treat B.'s claim as an obligation against the state. It certainly follows, also, that the state is under no duty, and in fact is not in position to proceed against the surety on behalf of B. The statute quoted is quite plainly to the effect that any action on the bond for labor and material furnished is to be brought by the claimant in the name of the state. So far as concerns the filing of the verified statement, it must be noted that at the time the bond was given, there was no provision, such as was inserted in section 1208 by amendment, 107 O. L. 126, that the terms of sections 8324 et seq. G. C. (mechanics' lien statutes) should be applicable to contracts of the state highway department. Hence, it is difficult to perceive any theory upon which the state might hold the surety for the amount named in the verified statement.

In the presentation of B.'s claim to your department, reference has been made to the cases of Surety Company vs. Raeder, 15 C. C. 47, affirmed 61 O. S., 661, and Roofing Company vs. Gaspard, 89 O. S., 185.

The views above expressed make unnecessary a discussion of these cases; but it is worthy of note that in both of these cases the action was brought by the claimants themselves and not by the obligee of the bond.

You are therefore advised you are without authority to recognize B.'s claim as an obligation of the state or as furnishing the basis for an action by the state against the surety.

Respectfully,
JOHN G. PRICE,
Attorney-General.

443.

BOARD OF AGRICULTURE—LINSEED OIL—SECTION 12791 G. C. PROHIBITS SALE OF BOILED LINSEED OIL WITH MINERAL OIL—SALE OF RAW LINSEED OIL REGULATED BY SECTIONS 12790, 12791 AND 12793 G. C.

1. *Sections* 12791 *et seq. G. C. specifically prohibits the sale of boiled linseed oil mixed with mineral oil.*

2. *Raw linseed oil, if so mixed with mineral oil or other substances, must conform to the standards fixed in section* 12790 *and section* 12791 *and be labeled and stamped as required by section* 12791 *and section* 12793 *G. C. and unless of such standard and so stamped and labeled, its sale in such mixture is unlawful.*

COLUMBUS, OHIO, June 28, 1919.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion of this department as follows:

> "Will you please advise me if linseed oil mixed with mineral oil or other substances can be legally sold if labeled 'adulterated linseed oil' and containing no statement of percentage of pure linseed oil or the extent of adulteration maintained in compound."

By personal conference with Mr. Gault, it is learned that the sale of linseed oil, to which your inquiry relates, is that under section 12790 et seq. G. C., the pertinent parts of which are:

> "Section 12790: Whoever * * * offers or exposes for sale raw * * * linseed oil, unless it is wholly obtained from the seeds of the flax plant and fulfills all the requirements recognized by the eighth decennial revision of the United States pharmacopoeia, shall be fined not less than fifty dollars nor more than five hundred dollars or imprisoned not less than thirty days nor more than ninety days, or both."

Section 12791 makes it a misdemeanor for any one to offer or expose for sale.

> "boiled linseed oil unless it has been prepared by heating pure raw linseed oil to a temperature of 225 degrees Fahrenheit and incorporating not to exceed four per cent by weight of drier. * * * Such boiled linseed oil must also conform to the following requirements: 1st. Its specific gravity at 60 degrees Fahrenheit must be not less than 0.935 and not greater than 0.945. 2nd. Its saponification value (Koettstorfer figure) must not be less than 186. 3rd. Its iodine number must not be less than 160. 4th. Its acid value must not exceed 10. 5th. The volatile matter expelled at 212 degrees Fahrenheit must not exceed one-half of one per cent. 6th. *No mineral oil shall be present* and the amount of unsaponifiable matter as determined by standard methods shall not exceed 2.5 per cent. 7th. The film left after flowing the oil over glass and allowing it to drain in a vertical position must be free from tackiness in not to exceed twenty hours, at a temperature of about 70 degrees Fahrenheit."

Section 12792 G. C. makes it a misdeameanor to sell, expose or offer for sale linseed oil.

"unless it is done under its true name, and each tank-car * * * or other vessel containing such oil has distinctly and durably painted, stamped, stenciled or marked in ordinary bold-faced capital letters * * * the words 'pure linseed oil—raw,' or 'pure linseed oil—boiled' and the name and address of the manufacturer thereof."

Section 12793 also makes it an offense for falsely stamping or labeling vessels containing such oil or knowingly permitting it to be done.

Section 12794, as amended in 107 O. L., 494, makes it the duty of the secretary of agriculture to enforce the provisions of those sections.

Your letter does not inquire particularly as to boiled linseed oil or raw oil, but the same general considerations affect either kind of oil, except as hereinafter noted.

This department is not aware of or aided by any judicial construction of these statutes in the solution of your question, which must be solved by consideration of the purpose of this act and the examination of these several statutes.

It must be observed that the purpose of the act is to prevent deception and fraud in the sale of an inferior or an adulterated oil, as section 12790 fixes an inflexible standard for raw oil below which no raw linseed oil may be legally sold.

Section 12791 likewise fixes such a standard for boiled linseed oil and makes it an offense to sell such oil below that standard.

Under section 12792 it is an offense to sell such oil unless sold under the true name thereof and each vessel containing such oil must be distinctly labeled in the manner provided in that section, while under section 12793 it is an offense to falsely stamp or label any such oil vessel or permit the same to be done.

Do these sections prohibit the sale of linseed oil which is mixed with any other oil?

Giving these sections the construction properly required of criminal statutes, it must be concluded that the sale of linseed oil in a mixture and as an adulterated oil, is not of itself explicitly prohibited.

On the other hand, it is also to be noted that sections 12790 and 12791, supra, absolutely prohibit the sale of such oil of standards lower than those therein fixed, and indirectly prohibit such sale if the mixing of such oil lowers the standard thus fixed, and that section 12791 provides that "no mineral oil shall be present" in boiled linseed oil. It would go without saying that the oil which is mixed must, of course, be of that standard.

It occurs to this department that the result of mixing such oil with another oil or substance, as affecting the identity and standard of the linseed oil, would be a question in chemistry and your letter not indicating particularly the mineral oil with which the linseed oil is therein supposed to be mixed, or the chemical result of such mixing, your question is answered in this general way.

Consistent with the above considerations, it is concluded that the sale of linseed oil mixed with other oil or substance, except as above noted, is not, of itself, explicitly prohibited by law, but the sale of boiled linseed oil, containing any mineral oil, is unlawful and neither boiled nor raw linseed oil can lawfully be sold in any mixture unless it be of the respective standards and stamped and labeled as required by these sections.

Respectfully,

JOHN G. PRICE,

Attorney-General.

444.

OHIO AGRICULTURAL EXPERIMENT STATION—SALARIES OF OFFICERS AND EMPLOYES—WHETHER PAYMENT SHOULD BE MADE FROM STATE OR FEDERAL FUNDS.

1. *Money appropriated to the state under authority of the act of congress, approved March 16, 1906, commonly called the Adams act, may be applied to the payment of the salaries and compensation, in whole or in part, of officers and employes of the Ohio agricultural experiment station for the portion of their time occupied in conducting such original researches and experiments as have been approved by the federal department of agriculaure. But officers or employes who devote none of their time in connection with the conduct of original researches or experiments, such as the bursar and other purely administrative officers of the station, are not entitled to be paid any part of their salary or wages from the fund referred to.*

2. *Where the same officer or employe divides his time between researches and experiments, under the Adams act, and other work connected with the station, a fair and equitable division of his salary or wages between the two classes of work should be made, and the Adams fund only charged with the fair and reasonable value of their research and experiment work.*

3. *The salaries of the bursar and other purely administrative officers of the station may be augmented from the annual appropriations made under authority of the act of congress approved March 2, 1887, commonly called the Hatch act.*

4. *Before any part of the annual appropriations made to the state under authority of the Hatch and Adams acts are applied to the payment of salaries or wages of officials or employes of the state, the safer and proper course will be to submit to the United States secretary of agriculture for his approval the names of the officers and employes and the salaries or wages poid to them by the state, together with a statement of the amounts proposed to be paid to each from the respective funds.*

COLUMBUS, OHIO, June 30, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter of April 3, 1919, in which you propound certain questions relating to the payment of salaries of officers and employes of the Ohio agricultural experiment station from the appropriations authorized by congress under the act of congress approved March 16, 1906, was duly received, and reads as follows:

> "We desire to call your attention to the act of congress approved March 16, 1906, 34 Statute at Large, 63 (being the same act referred to in your opinion No. 101 rendered to this department), which act authorizes and provides for annual appropriations of $30,000.00 to each state and territory 'to be applied only to paying the necessary expenses of conducting original researches or experiments bearing directly on the agricultural industry of the United States.' The money received by the state from the United States is placed in what is known as the Adams and Hatch fund and is under the direction and control of the Ohio agricultural experiment station.
>
> The legislature of Ohio, in its biennial appropriation bills, appropriates certain moneys under the designation of "Personal Service" for salaries of the various employes of said experiment station, and we find that in addition to such moneys so appropriated by the legislature of Ohio the experiment station augments the salaries set forth herein by moneys drawn from the Adams and Hatch fund referred to. For example, the legislature of Ohio in 1917 appropriated for the year beginning July 1, 1918, to June 30, 1919, the

sum of $2,200.00 for 'Bursar' and the sum of $780.00 for 'Photographer' (107 O. L. 285). In addition to such salaries so fixed the agricultural experiment station pays out of the Adams and Hatch fund to the Bursar the sum of $650.00 per annum and to Photographer the sum of $420.00.

Question 1. Is the payment of additional salaries hereinbefore referred to within the purview of the purposes of the appropriation made by the United States government under the act of congress herein referred to?

Question 2. If the appropriations made by the United States government are so available can the funds received from the United States government be used to augment the salaries fixed by the legislature of Ohio for the purposes herein referred to?"

The history and scope of the acts of congress approved March 2, 1887, and March 16, 1906, commonly called the Hatch and Adams acts, and of the laws of Ohio relating to the Ohio agricultural experiment station, were considered in my former opinion No. 101, dated March 8, 1919, wherein, among other things, it was said:

> "It will thus be seen that the annual appropriations made to Ohio under the acts of March 2, 1887, and March 16, 1906, were made by congress and accepted by the state to be applied to the purposes authorized by the grants, namely, under the first act 'to experiments at stations,' and under the latter act to paying necessary expenses of 'conducting original researches or experiments.' * * *
>
> Money received by the state under both acts are trust funds, and their application to purposes other than those therein expressly authorized would be a misapplication and a breach of trust, which, under the act of March 16, 1906, would subject the state to the loss of future appropriations. The state was expressly required by congress to give its assent to the purposes for which the grants of money were made, as a condition precedent to its right to receive the same, and, having done so, it has thereby entered into a solemn compact with congress to apply the funds in the manner authorized by the acts of Congress, and to no others. * * *
>
> Congress, being a voluntary donor, can make its appropriation to the state on such terms and conditions it may see fit to impose, and having specified the purpose to which agricultural experiment station funds appropriated by it can be applied, and having required and received the assent of the state thereto, it is not within the power of the state to authorize the board of control to apply the fund to any other purpose."

(1) The question now for determination is, can the Adams fund be used to augment or supplement the salaries fixed and paid by the state to the officers and employes of the experiment station who are engaged in conducting original researches or experiments?

The appropriation made by congress under authority of the Adams act is, by the express provision of the act,

> "to be applied only to paying the necessary expenses of conducting original researches or experiments bearing directly on the agricultural industry of the United States."

In a letter from Mr. Charles E. Thorne, director of the experiment station, dated April 14, 1919, it is said:

"The great majority of the experiment stations are connected with agricultural colleges and from the earliest history of such stations most of the station workers have been engaged a part of their time in teaching and their salaries have been paid in part from the so-called Hatch and Adams funds and in part from other funds. The national government has been cognizant of this practice from the first, and has only interfered to prevent the payment of too large a proportion from the research funds. This cannot happen at the Ohio station, *because all the members of its staff give their entire time to research.* * * *

For more than thirty years the payment of salaries, both in full and in part, from these national funds has been approved by the secretary of agriculture, and has not been disapproved by congress. * * *

That the appropriations made by the legislature for the salaries at this station were made with the understanding and expectation that they would be supplemented from other funds, is shown by the following extract from the reports of the budget commissioner for 1917, page 17, on which report the appropriations for 1917-18 and 1918–19 were based. 'The reductions in salary herein recommended are made because the experiment station has available various federal moneys with which a part of the salaries are already being paid and I am recommending only that part which should be paid from state funds.' "

In a letter from Hon. A. C. True, director of the states relations service of the United States department of agriculture, dated May 15, 1915, and addressed to Mr. Thorne, it was stated or ruled that there was no objection to paying from the congressional appropriations the difference between a reasonable salary and the statutory salary provided and paid by the state, and the ruling was made to apply to heads of departments and to their associates and assistants.

Under date of April 15, 1919, I addressed a letter to the United States secretary of agriculture calling attention to the provisions of the act of congress of March 16, 1906, supra, and requested to be advised as to what construction that department had placed upon the act of congresss referred to, with respect to the payment of salaries, either in full or in part, from the annual appropriation; and also whether the federal authorities considered that salaries and compensations were included within the expression "necessary expenses of conducting original researches or experiments bearing directly on the agricultural industry of the United States."

In answer to this inquiry the secretary of agriculture, by letter dated April 24, 1919, replied:

"It has been , and still is, the view of this department that the above stated appropriation is available for salaries and compensation of persons engaged exclusively in conducting original researches and experiments at the agricultural experiment stations bearing directly on the agricultural industry of the United States."

Under the act of congress of March 2, 1887, commonly called the Hatch act, whereby appropriations were authorized to be applied to experiments of the station, the department of agriculture ruled that:

"In case the same persons are employed in both the experiment station and the other departments of the college with which the station is connected a fair and equitable division of salaries or wages should be made, and in case of any other expenditures for the joint benefit of the experiment sta-

tion and the other departments of the college the aforesaid funds should be charged with only a fair share of such expenditures."

See—Pamphlet issued by U. S. Dept. of Agriculture, Aug. 25, 1916, p. 36.

And in a circular letter of the director of the United States office of experiment stations, dated March 1, 1911, (see p. 38 of pamphlet, supra,) it was said:

"The principle which should guide is that all expenditures from the Hatch fund must be for experimental work and publication, and all expenditures from the Adams fund for the projects agreed upon in advance with the office of experiment stations.

In adjusting the salaries of station employes only such portion of their time as is occupied in connection with experimental work * * * should be charged to the federal funds of the station. * * *

The Adams fund expenditures for salaries, labor * * * should be strictly confined to those necessitated by the projects on file which have been approved by this office."

It appears, therefore, that the construction placed on the act by the secretary of agriculture who is charged with seeing that the law is properly observed, and whose special duty it is to ascertain and certify to the secretary of the treasury whether the station is complying with the provisions of the act and to report to congress on the receipts, expenditures and work of the station, etc., is to the effect that the Adams fund may be applied to the payment of the salaries and compensation, in whole or in part, of officers and employes for that portion of their time occupied in conducting such original researches and experiments at stations as have been approved by the federal department.

In 36 Cyc. p. 1140, it is said that:

"The construction placed upon a statute by the officer whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous."

And in 26 Am. & Eng. Ency. of Law, p. 635, the law is stated as follows:

"The contemporaneous and long continued practice of officers required to execute or take special cognizance of a statute is strong evidence of its true meaning and should not be disregarded except for cogent reasons."

In U. S. vs. Finnell, 185 U. S. 236, the court at page 244, says:

"Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge * * * but if there simply be doubt as to the soundness of the construction * * * the action during many years of the department charged with the execution of the statute should be respected and not overruled except for cogert reasons."

Where the same officer or employe divides his time between researches and experiments, and other work connected with the station, a fair and equitable division

of his salary or wages between the two classes of work should be made, and the Congressional fund only charged with the fair and reasonable value of the research and and experiment work. The safe and proper course to be followed would be for the station officials to present the matter to the U. S. secretary of agriculture for adjustment. Of course, an officer or employe of the station who devotes none of his time in connection with the conduct of original researches or experiments, is not entitled to be paid any part of his salary or wages from the fund referred to.

(2) The foregoing portion of this opinion was submitted to the United States secretary of agriculture for examination, and under date of May 29, 1919, he advised that the opinion interpreted the Adams act " as it has been understood by the United States department of agriculture since its passage." The secretary also advised that the Adams fund was not available to pay the salary of the bursar and other purely administrative officers of the station, but that such officers could be paid from the appropriations made by congress to carry out the Hatch act.

(3) In a subsequent letter from the acting secretary of agriculture, dated June 19, 1919, and in response to an inquiry as to the amount of money annually appropriated by congress and paid to Ohio for the Ohio Agricultural Experiment Station, the following information and advice was given:

> "The Ohio Agricultural Experiment Station receives $15,000 a year under the Hatch Act of March 2, 1887. The station also receives $15,000 a year under the Adams Act of March 16, 1906.
>
> Out of the $15,000 paid annually to the Ohio station under the Hatch Act the station may legally pay administrative expenses. As you have been heretofore advised, the department has always ruled that the payment of such expenses from this fund is authorized.
>
> No part of the $15,000 paid to the station under the Adams Act is available for administrative expenses, but solely for the payment of salaries and expenses of persons conducting original researches and experiments as set forth at the top of page 37 of the pamphlet entitled 'Federal Legislation, Regulations, and Rulings Affecting Agricultural Colleges and Experiment Stations,' copy of which was sent you with my former letter."

Respectfully,
JOHN G. PRICE,
Attorney-General.

445.

MUNICIPAL CORPORATIONS—EXPENSES OF ELECTION TO ADOPT COMMISSION-MANAGER FORM OF GOVERNMENT—HOW PAID.

Expenses of a special election by a city for the purpose of voting upon the proposition of a home rule charter commission, as well as the expenses of a special election held upon the adoption of a charter submitted by such a commission, are to be paid by the county, and the same are not to be charged back by the county against the municipality to be retained from the funds due said municipality at the next semi-annual distribution of taxes.

COLUMBUS, OHIO, June 30, 1919.

HON. JOHN L. CABLE, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—Acknowledgement is made of your request of recent date for an opinion of this department on the question as to whether the county or the city bears the expense of elections brought about by an attempt to adopt the commission-manager form of government in a city of the county in question.

Attention is invited to a very exhaustive opinion upon this same question, with numerous citations, rendered by the Attorney-General in 1916, and appearing at page 703, Vol. 1, of that year. In such opinion the Attorney-General held:

> "Expenses of a special election by a city for the purpose of voting upon the proposition of a home rule charter commission, as well as the expenses of a special election held upon the adoption of a charter submitted by such a commission, are to be paid by the county, and the same are not to be charged back by the county against the municipality to be retained from the funds due said municipality at the next semi-annual distribution of taxes."

You are advised that there has been no legislation adopted since such opinion was rendered that would in any wise change the manner or method of placing such expense and such view expressed in the opinion in question, in 1916, is the opinion of the Attorney-General upon this question at this time.

Respectfully,
JOHN G. PRICE,
Attorney-General.

446.

SUSPENSION OF SENTENCE—POWER INHERENT IN COURTS DURING TERM AT WHICH JUDGMENT ENTERED—SUCH POWER NOT ATTRIBUTE OF COURTS OF LIMITED JURISDICTION NOT HAVING TERMS—MAY NOT BE EXERCISED BY SUCH COURTS EXCEPT AT TIME OF PRONOUNCING JUDGMENTS.

The power to suspend or modify judgments and sentences in criminal cases is recognized as inherent in courts during the terms at which the judgment is entered and may be exercised notwithstanding the sentence has gone into execution, but such power is not an attribute of courts of limited jurisdiction not having terms and may not be exercised by such courts except at the time of pronouncing the judgment.

COLUMBUS, OHIO, June 30, 1919.

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

GENTLEMEN:—You recently requested my written opinion upon the authority of certain of the lower courts in the matter of suspension of sentences, your inquiry being as follows:

> "After a prisoner has been sentenced and committed to the work house by a mayor, police judge or judge of a municipal court, has such mayor, police judge or municipal court judge authority to order such prisoner paroled or released without a re-hearing?"

You later submitted in connection with the same question citation of a number of cases from the various justice courts, police courts and municipal courts of the state wherein the practice of suspension and remission of sentences has been indulged by the courts, and the memoranda which you have furnished me indicate a very probable tendency to abuse of the practice on the part of such courts.

In a recent opinion directed to Hon. Charles R. Sargent, Prosecuting Attorney, Jefferson, Ohio, and being Opinion No. 251, dated May 2nd, 1919, I considered the

general question of authority of courts to suspend sentence at some length and am enclosing you herewith a copy of said opinion.

In that opinion I was considering primarily the authority of a justice of the peace to suspend sentence after the same had been placed in execution, and my conclusion was as follows:

> "The general power to suspend the execution of sentence, or modify judgments during the term at which they are entered, is not an attribute of the courts of limited and special jurisdiction and without terms, such as justices of the peace * * *."

The court of appeals of Mahoning county in the case of Antonio vs. Milliken, as sheriff, in a decision reported in the Ohio Law Reporter of February 10, 1919 (29 O. C. A. 305), considered the power of the municipal court of Youngstown to suspend sentence after the same had been placed in execution. The municipal court upon conviction for misdemeanor sentenced the defendamt to pay a fine of $25.00 and costs and be imprisoned for thirty days.

Later and upon payment of the fine and costs, and two days after the defendant had been committed to the county jail, the municipal court issued an order to the sheriff directing the release of the prisoner, which order the sheriff declined to honor upon the theory that the municipal court had lost jurisdiction.

Habeas corpus was thereupon prosecuted and the question adjudicated in the court of appeals, the syllabus being as follows:

> "In misdemeanor cases the trial court has power under favor of section 13711 G. C. to suspend, in whole or in part, the execution of a sentence at any time during the term at which sentence was passed, even though the defendant had entered upon the imprisonment ordered by the sentence."

A reading of the opinion discloses that the court's conclusion was based upon the doctrine that courts have control of their judgments *during the term* at which rendered, citing Lord Coke and several other decisions wherein that doctrine was applied. The conclusion of the court was expressed as follows:

> "Therefore, for the reasons given and upon the theory that a court has control over its judgments and orders during the term at which they are made, the judge of the municipal court had a right in the case at bar to direct the release of the prisoner."

It was pointed out that the municipal court of Youngstown, by statute "shall have four terms of court each year" and further that the action of suspension of sentence was taken at the same term at which it was rendered.

And, further, that the reason of the rule lies in the necessity or propriety of a correction or amendment of the judgment, within a reasonable time, when for good cause shown such correction or amendment is found proper.

But the court made the following observation:

> "The 'time limit' has been held to be the term at which judgment is entered and this for the chief reason that after term time a record is presumed to have been made of all orders and judgments of the preceding term; and that such record is complete, and the term having been adjourned formally or by operation of law, the record imports absolute verity, and is unalterable except as specifically provided by law."

This case obviously proceeds upon the doctrine of the inherent power of the court at common law to control its judgments during the term at which they are rendered, which doctrine was also recognized in the case of Weber vs. State, 58 O. S., 616, where the syllabus is as follows:

> "In a criminal case the court has the power to suspend the execution of the sentence, in whole or in part, unless otherwise provided by statute; and has power to set aside such suspension at any time during the term of court at which sentence was passed. Whether such suspension can be set aside at a subsequent term is not decided."

In the opinion the court said the power to stay the execution of a sentence, in whole or in part, in a criminal case, is inherent in the court unless otherwise provided by statute.

In opinion No. 251, above referred to, the inherent power of courts to control their judgments and records during the term at which entered was recognized but I reached the conclusion that such power is not an attribute of courts of special jurisdiction only which have no terms, which of course would be applicable to justice courts, mayors courts and such other inferior courts as fall within the rule.

Obviously the power to suspend or modify the sentence could not be unlimited in point of time and since the limitation recognized in the judicial decisions has been the *term* of the court at which the judgment is rendered, there would be no limitation applicable to the inferior courts and the recognition of the power to suspend without limitation as to time would be a recognition of a power much in excess of that exercised by courts of general jurisdiction which is not maintainable either upon reason or authority.

To summarize then briefly, I advise that the power to suspend or modify judgments and sentences is recognized as inherent in courts having terms, during the term at which the judgment is entered, but such power is not an attribute of courts of limited jurisdiction not having terms and may not be exercised by such courts except at the time of entering the judgment.

Respectfully,
JOHN G. PRICE,
Attorney-General.

447.

TOWNSHIP DITCH SUPERVISOR—WHEN PROVISION OF SECTION 3386 G. C. FOR ELECTION OF SUCH OFFICER MANDATORY.

The provision of section 3386 for the election of a township ditch supervisor in a township in which county or township ditches have been located and established is to be taken as mandatory.

COLUMBUS, OHIO, June 30, 1919.

HON. HAVETH E. MAU, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—In a communication from your office signed by Mr. William K. Marshall, assistant prosecuting attorney, the following questions have been submitted to this department for opinion.

> "First. Is section 3386 of the General Code to be construed as man-

datory in requiring the election of a ditch supervisor in townships in which have been located and established township ditches?

Second. If not, or if no ditch supervisor has been elected in such a township, what powers have the trustees to compel the property owners through which township ditches pass to clean the same?"

It is unnecessary to cite any great number of authorities for the proposition that statutory provisions, directory upon their face, are in certain instances to be construed as mandatory. In the early Ohio case of Swaney vs. Blackman, 8 Ohio ,1, the court say at p. 18:

" 'May' means 'must' in all those cases where the public are interested, or where a matter of public policy, and not merely of private right, is involved."

Again, in State ex rel. Ferris vs. Bish, 12 O. N. P. (N. S.) 369, it is said at p. 384 of the opinion:

"Where power is given to public officers by act of the legislature, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory and permits of no discretion."

See also:

State vs. Budd, 65 O. S. 1, wherein the court say at p. 5 of the opinion:

"Counsel for the defendant, however, insist that in these provisions of the statute 'may' should be read 'shall.' The cases in which it is held that these words should be regarded as convertible are numerous, and they contain much learning. The sum of it, however, is that the natural meaning of these words is not always conclusive as to the construction of statutes in which they are employed, and that one should be regarded as having the usual meaning of the other when that is required to give effect to other language of the statute or to carry out the purpose of the legislature as that purpose may appear from a general view of the statute under construction."

An examination into the history of statutes relating to cleaning out of township ditches discloses the following:

As the law stood on April 13, 1900, there was no provision for a township ditch supervisor. However, as appears from Bates' Revised Statutes, 2nd Ed. (1899), there were provisions in section 4553 and 4554, under the chapter headed "Township Ditches," making it the duty of township trustees to examine township ditches every two years, and, if necessary, order the same cleaned out, assessing the cost against owners of lands which had been assessed for original construction.

There was a further provision by section 4555, R. S., requiring each person, through whose lands a ditch was constructed, to keep open the part of such ditch on his land; otherwise to be charged with the cost of removing obstructions as such cost might be determined by the doing of the work by one of the trustees after sworn complaint filed with the trustees.

Provisions similar to those just noted existed at the same time as to county ditches (see sections 4497, et seq., Bates' 2nd Ed.; also Sec. 4496, same volume), excepting, however, that the county authorities, rather than the township trustees, were authorized to act.

A further series of statutes, known as sections 4584-1 et seq., R. S. (Bates' 2nd Ed.), authorized the commissioners to clean out county ditches on the plan of an acreage tax, as distinguished from the assessment plan.

These two distinct phases of ditch maintenance, namely, (a) cleaning out by public authorities, and (b) keeping open through his premises by each owner, had been a part of our legislation through many years prior to the year 1900.

We then come to the act of April 13, 1900, 94 O. L. 142. This act specifically repeals above noted sections 4496, 4497, 4553 and 4584-1 and related sections. The first two sections of the new act were almost identical with what are now sections 3386 and 3387 G. C., and for the purpose of comparison said sections 1 and 2 are here quoted in full (94 O. L. 142):

> "Section 1. That in any township in which there have been located and established county or township ditches, or in which county or township ditches may hereafter be located and established, there may at the time and in the manner provided by law for the election of township officers, be elected a township ditch supervisor, who shall serve for a term of three years, and until his successor is elected and qualified. In case a vacancy occurs in this office, by resignation or otherwise, the township trustees shall fill said vacancy by appointment, until the next annual election.
>
> Section 2. Before entering upon the duties of his office the township ditch supervisor shall take an oath of office, and shall give bond, with sureties approved by the trustees, in such sum as they determine, payable to them, and conditioned for the faithful performance of his duties as such ditch supervisor, and said bond shall be recorded by the township clerk, and filed with him, and be carefully preserved."

Further provisions of the act defined the duties of the township ditch supervisor, among these duties being the division of both county and township ditches into "working sections," and to notify interested land owners to clean out sections assigned them. Section 12 of the act retained the principle previously embodied in sections 4555 and 4496 R. S., to-wit: Each land owner to keep the ditch free of obstruction so far as his own premises was concerned.

The general purpose of this act of 1900 seems to have been to vest in a township ditch supervisor, both as to county and township ditches, the duties theretofore falling on county and township authorities in the manner of cleaning ditches.

We next come to the act of April 15, 1902. The title to this act recites the repeal not only of the act passed two years previously (April 13, 1900), but also of the sections of the Revised Statutes which had been repealed by the last mentioned act. However, the repealing clause of the act of April 15, 1902, makes no mention of any repeal save the repeal of said act of April 13, 1900.

This act of 1902 does not provide for a township ditch supervisor. No further mention need be made of it here than to say that it provides for both phases of ditch maintenance as above mentioned, namely, (a) keeping open by the land owners as to the section of ditch on his own premises, and (b) cleaning out by the county commissioners, if a county ditch, and by township trustees, if a township ditch.

By act of April 2, 1906 (98 O. L. 280) the act of April 15, 1902, was repealed, and the general plan of the act of April 13, 1900, was re-incorporated into the statutes, not only in substance but in form. A township ditch supervisor was provided for in language almost identical with that above quoted as sections 1 and 2 of the act of 1900.

While there have been some further amendments, we may say, speaking generally, that the act of 1906 is the basis of the law as it exists today. However, we must note that the act of 1906, as amended in some particulars, was, when carried into the General Code divided into two parts, the first part becoming sections 3386 et seq., G. C., the subject of your present inquiry, and the last part becoming sections 6691 et seq., G. C.

Sections 3386 et seq., G. C., appear now under the head "Ditch Supervisor," in the division of the code relating to townships, Sections 3386 and 3387 read as follows:

> "Section 3386. In any township in which county or township ditches have been located and established, at the time and in the manner provided by law for the election of township officers, there may be elected a township ditch supervisor, who shall serve for a term of four years. The township trustees shall fill any vacancy which occurs in such office, by resignation or otherwise, by appointment, until the next proper election, when a successor shall be chosen for the unexpired term.
>
> Section 3387. Before entering upon the duties of his office the township ditch supervisor shall take an oath of office and shall give bond, with sureties approved by the trustees, in such sum as they determine, payable to them, and conditioned for the faithful performance of his duties as such supervisor. Such bond shall be recorded by the township clerk, filed with him, and be carefully preserved."

On the other hand, sections 6691 et seq. appear under the head "Cleaning and Repair of Drains and Water Courses," under the title of the code relating to drainage.

In an opinion of this department as to said sections 6691 et seq. of date February 4, 1913, Reports of the Attorney-General for 1913, Volume I, page 273 et seq., there is brought clearly into view the legislative policy of making provision on one hand for a general cleaning of ditches by the public authorities, and on the other hand for compelling a land owner to keep free from obstruction that part of the ditch on his land,—a policy retained by the enactment of sections 6691 et seq. as the successors of the last part of the acts of 1900 and 1906.

Nothing in our statutes other than sections 6691 et seq. has been found which offers a method of carrying out this long-existing policy of our legislature. In view of the fact that as neither the general cleaning nor the individual duty of the landowners may be enforced without the intervention of the services of the supervisor, and as his authority and duties are so intimately interwoven with the proceedings in both cases, it would seem entirely clear that as consistent with legislative intent and applying the rules of construction laid down by our courts as stated above, the answer to your question must be in the affirmative,—a conclusion which is reached not only from considering the context of the statute, but is fortified by reference to the history of legislation as above outlined.

Additional force is lent to this conclusion by the fact that the statutes relating to ditches make no provision for the determination by any board or official of the question whether or not there shall be a township ditch supervisor.

The views expressed make unnecessary the answering of your second question.

Respectfully,

JOHN G. PRICE,

Attorney-General.

448.

MUNICIPAL CORPORATION—BOARD OF CONTROL WITHOUT AUTHORITY TO BIND CITY TO PAY EXCESS PRICE FOR MATERIAL ALREADY CONTRACTED FOR BUT NOT DELIVERED.

Where a city has entered into a contract for the purchase of a quantity of material to be paid for at a given price per unit and delivered in installments, the board of control

is without authority to bind the city to pay as to the portion of such material not yet delivered, a price in excess of that specified in the original contract.

COLUMBUS, OHIO, June 30, 1919.

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

GENTLEMEN:—The receipt is acknowledged of a letter from your bureau, submitting the following statement of facts and inquiry:

> "The city of Akron on the 8th day of June, 1916, made a contract with the General Chemical Company for sulphate of alumina, f. o. b. cars at contractor's works at East St. Louis, Ill., at $1.10 per 100 lbs. The contract further provided for the furnishing of such supplies from July 2, 1916, to July 1, 1919, not less than 600 nor more than 720 net tons per annum except at seller's option. Later under a resolution of the board of control of October 22, 1917, a change was made from 720 tons per year to 850 tons per year and the price modified from $1.10 to $1.25 per hundred, and payment has been made in keeping with such resolution. We are respectfully requesting your written opinion as follows:
>
> Question: Are such changes made by the resolution of the board of control and such increased payments legally made?"

With your letter is enclosed a copy of the resolution referred to as having been adopted by the board of control on October 22, 1917, which resolution, as shown by such copy, reads as follows:

> "Whereas, it has been shown to the satisfaction of the board of control of the city of Akron, Ohio, that the great war in which the United States has become involved, has and will interfere materially with the output of sulphuric acid and with the supply of other raw materials from which sulphate of alumina is produced; and whereas, the government of the United States is making demands upon General Chemical Company for these materials far in excess of what said company had anticipated, making it necessary for said company to purchase raw material at a cost much in excess of what they had anticipated to fill contracts which thay have with parties other than the government of the United States, and that these conditions are likely to interfere materially with the delivery to said city of Akron of the alumina necessary for its use, and that the contract with the city of Akron by the General Chemical Company by which said company is to furnish said city specified quantities of alumina during the life of said contract is unjust to said chemical company on account of said war conditions; and whereas said General Chemical Company agrees to extend a maximum quantity of alumina to be furnished to the city of Akron from 720 tons per year as stated in the contract to 850 tons per year.
>
> Therefore, be it resolved by the board of control of the city of Akron, that the said contract price be changed and that said city pay to said chemical company the sum of and the price of $1.25 per one hundred pounds for alumina furnished under said contract, for and during the remainder of said contract time; this price to cover the annual requirements of the city of Akron up to and including 850 tons, unless it shall appear to the satisfaction of said board that the reasons for said increased price shall have been removed; it being expressly understood and agreed that the action of said board in increasing said price and said maximum quantity to be delivered does not in any way change, modify or annul said contract above referred to in any other respect whatever.

Be It Further Resolved, that a certified copy of this resolution be forwarded to the General Chemical Company and their acknowledgment and assent thereto be obtained in writing."

Sections 4328 and 4371 of the General Code, relating respectively to the making of contracts on behalf of a city by the director of public service and director of public safety, read as follows:

"Sec. 4328. The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city.

Sec. 4371. The director of public safety may make all contracts and expenditures of money for acquiring lands for the erection or repairing of station houses, police stations, fire department buildings, fire stations, cisterns, and plugs, that may be required and for the purchase of engines, apparatus, and all other supplies necessary for the police and fire departments, and for other undertakings and departments under his supervision, but no obligation involving an expenditure of more than five hundred dollars shall be created unless first authorized and directed by ordinance of council. In making, altering, or modifying such contracts, the director of public safety shall be governed by the provisions of the preceding chapter relating to public contracts, except that all bids shall be filed with and opened by him. He shall make no sale or disposition of any property belonging to the city without first being authorized by resolution or ordinance of council."

These statutes, so far as they concern contracts involving an expenditure of more than five hundred dollars, are to be read in connection with sections 4402 and 4403, which read as follows:

"Sec. 4402. The mayor, director of public service and director of public safety shall constitute the board of control. The mayor shall be ex-officio president. The board shall keep a record of its proceedings. All votes shall be by yeas and nays and entered on the record, and the vote of a majority at all the members of the board shall be necessary to adopt any question, motion or order.

Sec. 4403. No contract in the department of public service or the department of public safety in excess of five hundred dollars shall be awarded except on the approval of the board of control, which shall direct the director of the appropriate department to enter into the contract. The members of the board shall prepare estimates of the revenue and expenditures of their respective department to be submitted to the council by the mayor, as provided by law."

Under the law, well settled in Ohio, that the powers of municipal officers are such only as are given by statute, expressly or by necessary implication, the several sections quoted must be looked to as the source of power, rather than as a limitation upon powers. With this principle in mind, we are at once led to the conclusion that

as to those contracts required to be let on competitive bidding, the contract passes beyond the power of the director of service, the director of safety and the board of control, in the matter of a change in the terms of the contract, once the contract is entered into, unless another statute is found which gives power to make such change; for of what avail in the public interest is competitive bidding if a contract entered into on that plan may be changed as to price or other requirements by the action of such officers or of a municipal board? And as to those contracts which may be entered into without competitive bidding, it is certainly to be presumed that the officer acting for the city will perform his sworn duty and make the best contract he can in the city's interest; from which it follows that when the transaction is closed, there is to be no change in the terms of the contract unless there is statutory authority to make such change.

These observations bring us to the point of inquiring whether there is any statute which authorizes a change in a municipal contract. Section 4331 reads as follows:

> "When it becomes necessary in the opinion of the director of public service, in the prosecution of any work or improvement under contract, to make alterations or modifications in such contract, such alterations or modifications shall only be made upon the order of such director, but such order shall be of no effect until the price to be paid for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor and the director on behalf of the corporation, and approved by the board of control, as provided by law."

The form of the resolution adopted by the board of control in the instant case indicates that section 4331 was believed to furnish authority for the resolution. But does said section go to that extent? Upon its face it applies only to those contracts involving work or improvement. Furthermore, its necessity in that connection is readily perceived; for it is well known that cities often enter into contracts calling for complicated construction, the details of which may require change as ascertained during the progress of the work, thus from a practical standpoint requiring a method of authorizing a change. However, from what has been said above as to the powers of municipal officers, and in view of the fact that the public interest demands strict adherence to the terms of a contract on the part of those who deal with municipalities, whether the contract be made after competitive bids, or not, said section 4331 is certainly not to be given any broader meaning than is justfied by its plain terms. While the resolution now being considered purports on its face to call for a modification only of the original contract, it certainly in practical effect would seem to call for an entirely new contract; and of course power is not lodged in the board of control for the making of a contract. But if we treat the resolution as involving a modification only, there is ample reason for saying that the modification is not such a one as is contemplated either by the letter or spirit of section 4331.

No other statutory provision having been found which permits of a change or modification, it is concluded that the modification purporting to have been made by the resolution of October 22, 1917, is without legal effect, and that consequently any increased payments made under supposed authority of such resolution are illegal.

Respectfully,

JOHN G. PRICE,

Attorney-General.

449.

BOARD OF EDUCATION—WHEN APPLICATIONS SHALL BE FILED FOR STATE AID FOR WEAK SCHOOL DISTRICTS—WHEN SCHOOL DISTRICT NOT ENTITLED TO STATE AID—SECTION 7595-1 G. C. GOVERNS DISBURSEMENT OF TUITION FUND FOR JOINT HIGH SCHOOL OPERATED BY TWO OR MORE SCHOOL DISTRICTS.

1. *Applications for state aid for weak school districts shall be filed with the state auditor between the first day of September and the first day of October, 1919, for the school year beginning September 1, 1919, and such applications must be governed by the provisions of House Bill No. 406 (Freeman Law), appearing in 108 Ohio Laws.*

2. *A school district which pays its teachers either more or less than the scale of salaries set out in amended section 7595-1 G. C., shall not be entitled to state aid.*

3. *The high school committee in charge of a joint high school, operated by two or more school districts, must be governed in its disbursement of moneys from the tuition fund by the limitations set forth in section 7595-1 G. C.*

COLUMBUS, OHIO, June 30, 1919.

HON. D. H. PEOPLES, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

> "A rural school district and a village school district have united for high school purposes.
>
> Suppose they pay their teachers the following salaries: $130.00, $110.00, and $100.00 per month.
>
> The rural district pays $.6948 of this expense, or an average of $78.74 per teacher per month.
>
> Under these circumstances would the rural district which is not able to meet this expense with money received by taxation, be entitled to receive aid from the state according to section 7595 of the Ohio school laws?"

In reply to such query it is advised that state aid to weak school districts will be governed for the coming school year by the provisions of the new Freeman law on state aid (House Bill 406), which is in effect on and after August 17, 1919.

Section 7595-2 G. C., as it will appear in 108 O. L., reads:

> "The application to the state auditor for state aid shall be filed between the first day of September and the first day of October for the then current school year, and upon demand of the state auditor the books or any records of the school district shall be transmitted to the auditor of state. The application shall be accompanied by the copy of the distribution of the county auditor made on the preceding August settlement, and an estimate of the county auditor showing the probable yield and distribution of the taxes, state common school fund and interest on the commoon school fund to be distributed to such district on the February settlement next following, together with a copy of his balance sheet as the same appears on his school fund distribution record for the school year for which such application is made."

Section 7595-1 provides that a school district may make application for state aid to cover deficiencies in its tuition fund by filing with the auditor of state an applica-

tion therefor *in such form as the auditor of state shall prescribe*, and by first complying and showing compliance with the following conditions:

"A school district may make application for state aid to cover deficiencies in its tuition fund by filing with the auditor of state an application therefor in such form as the auditor of state shall prescribe, and by first complying and showing compliance with the following conditions:

1. It shall place in the tuition fund at least two-thirds of the proceeds of the levy as adjusted by the budget commission pursuant to section 7594-1.

2. It shall place in the tuition fund the whole sum of the state common school fund and interest on the common school fund received by the district.

3. It shall pay its teachers neither more nor less than the following salaries: In elementary schools, teachers without having less than one year's professional training or less than three years' teaching experience in the state, sixty dollars per month; teachers having at least one year professional training or three years' teaching experience in the state, sixty-five dollars a month; teachers having completed the full two years' course in any normal school teachers' college or university approved by the superintendent of public instruction, or who have had five years' teaching experience in the state, seventy-five dollars a month. In high schools, inclusive of joint high school districts, an average of ninety dollars a month in each high school. Such salaries shall be for full time and in high schools if any teacher be not employed full time, then, in computing the average, the salary for each hour of service paid such part time shall, for the purposes of the calculation, be multiplied by the number of full time hours in each month, and the sum so ascertained shall be assumed to be the salary paid such part time teacher. In no case shall a teacher be employed at less than sixty dollars per month for full time, or at the rate of sixty dollars per month for part time.

4. It shall maintain its schools for eight months in each year.

5. It shall not transfer or cause to be transferred to any other fund any moneys that may be in the tuition fund. Nor shall it expend any moneys that may be in the tuition fund except for the following purposes:

(a) Payment of salaries of teachers.

(b) Payment of expenses for attending institute.

(c) Payment of temporary loans incurred to meet current expenses in anticipation of revenue which would accrue to the tuition fund.

(d) That part of tuition payable to other school districts which represents the expense of teachers' salaries as computed pursuant to section 7736.

(e) Salaries of principals or superintendents, or additional salaries paid teachers as compensation for duties performed as principals or superintendents. Provided, however, that if additional salaries are paid as compensation for duties performed by teachers as principals or superintendents, the state superintendent of public instruction shall first certify that such additional duties are required and performed.

6. The county auditor in making his deductions pursuant to section 4744-3 of the General Code shall deduct two-thirds of the total sum from the two-thirds yield of the tax levy which is distributable to the tuition fund pursuant to this section, and the remaining one-third from the remaining part of the yield of such tax levy."

It is noted that one of the provisions in order to secure state aid for a weak school district is that it shall have a scale of salaries for teachers which is set by state law and the section further provides that such teachers shall be paid nothing more nor less than the amounts given in the section for the particular kind of teaching. Having

in mind the joint high school, as you indicate, the section provides that the salary in high schools, *inclusive of joint high school districts,* shall be an average of ninety dollars per month in each high school for each teacher.

Your attention is also invited to section 7595-4, which reads as follows:

> "Whenever two or more school districts have joined pursuant to section 7669 to establish a joint high school, and one or more of such school districts makes application for such state aid to cover a probable deficiency in the tuition fund, then a condition precedent to the determination and rendering of such state aid the high school committee shall place in the tuition fund that part of tuition received from other districts which represents the expense for salaries of teachers as computed pursuant to section 7736. And the school district applying for such aid shall, in placing in a separate fund its contribution to the high school committee pursuant to section 7671, pay out of its tuition fund only that part of the total contribution which represents the needs of the high school committee for salaries of the high school teachers. *And such high school committee in its disbursements of moneys from the tuition fund shall be governed by the limitations of section* 7595-1 *of the General Code."*

It will be noted that this section, which speaks specifically of a case where two or more school districts have joined under section 7669 G. C. to establish a joint high school, provides that such high school committee, which has charge of the joint high school in its disbursements of money from the tuition fund, shall be governed by the limitations of section 7595-1 of the General Code, which limitations are given above, and one of which is that the average salary for a high school teacher shall be ninety dollars per month.

You say that the teachers in question might receive $130.00, $110.00 and $100.00 per month as their salaries for services as teachers in such joint high school, all and any of which is in excess of the ninety dollars per month provided for in section 7595-1 G. C., supra, which says that in order to receive state aid the salaries must be neither more nor less than the indicated scale mentioned in such section.

The fact that the rural district pays a fractional amount of the salary of the high school teacher, which fractional amount would average $78.74, as the par t due from the rural district, seemingly would not enter into the question, in view of the language used in section 7595 G. C., supra, which says that such high school committee, in its disbursement of money, shall be governed by the limitations of section 7595-1 G. C., one of which is the scale of wages indicated. So in view of this section, providing specifically the case of where school districts unite for high school purposes, and indicating that the salaries in such joint high school shall be governed by the same scale as in a high school that is not a joint high school, it would seem that where the rural district in question permits its high school committee, on which it has representation, to pay salaries for teaching that are in excess of ninety dollars per month, as provided in section 7595-1, the district would not be entitled to state aid, and if such salaries were paid in order to secure competent teachers and the districts in question could not take care of the same under the taxation laws, then such teachers' salaries would become a valid, existing and binding obligation, which could be cared for in an emergency, under section 5656 G. C.

It is suggested that you request the secretary of state to furnish you with a copy of house bill 406, covering state aid to weak school districts, and also a copy of the new tax law which permits school districts to increase their limit of taxation in order to take care of existing circumstances, both of which acts are at this time in the hands of the printer.

It is, therefore, the opinion of the Attorney-General that:

"1. Applications for state aid for weak school districts shall be filed with the state auditor between the first day of September and the first day of October, 1919, for the school year beginning September 1, 1919, and such applications must be governed by the provisions of house bill No. 406 (Freeman Law), appearing in 108 Ohio laws.

2. A school district which pays its teachers either more or less than the scale of salaries set out in amended section 7595-1 G. C., shall not be entitled to state aid.

3. The high school committee in charge of a joint high school, operated by two or more school districts, must be governed in its disbursement of moneys from the tuition fund by the limitations set forth in section 7595-1 G. C."

Respectfully,
JOHN G. PRICE,
Attorney-General.

450.

BOARD OF EDUCATION—SCHOOL DISTRICT TRANSFERRED TO AN EXEMPTED VILLAGE SCHOOL DISTRICT—TAXES THEN AND THEREAFTER SPREAD OVER WHOLE OF SUCH ENLARGED DISTRICT—ALSO TAKE FUNDS AND ASSUME INDEBTEDNESS OF ADDED DISTRICT EXISTING AT THAT TIME—SEE SECTION 4696 G. C.

Where a school district, as a whole, is transferred and added to an exempted village school district, such territory becomes an integral part of such enlarged district and then and thereafter taxes in such enlarged district must be spread uniformly over the whole of such enlarged district, and at the time of transfer, under section 4696, *the board of education of such enlarged exempted village district shall take the funds and assume the indebtedness of the added district existing at that time.*

COLUMBUS, OHIO, June 30, 1919.

HON. CHESTER A. MECK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion upon the following statement of facts:

"Jackson township, Crawford county, contains two school districts. Jackson township school district and Crestline exempted village school district, the former has practically no indebtedness and the latter has a bonded indebtedness and a much higher tax rate.

There are fifty per cent. or more of the electors of the former that want to file a petition with the county board of education asking to transfer their district to the Crestline exempted village school district, but they do not like the idea of having their tax rate raised, which would be the case if they had to help pay the bonded indebtedness of the Crestline exempted village school district.

Section 4696 of the General Code of Ohio covers a procedure of this kind and speaks about an equitable division of funds and indebtedness that is to be decided upon by the board of education acting in the transfer.

Does that refer to a case of this kind and is there any way by which the

people residing in the Jackson township school district could avoid having their tax rate raised or avoid helping to pay this bonded indebtedness of the Crestline exempted village school district, in case the transfer was made?".

It is understood that Crestline is an exempted village school district and hence any transfer to the Crestline village school district would fall within section 4696 G. C., which reads as follows:

> "A county board of education may transfer a part or all of a school district of the county school district to an adjoining exempted village school district or city school district, or to another county school district, provided at least fifty per centum of the electors of the territory to be transferred petition for such transfer. Provided, however, that if at least seventy-five per cent. of the electors of the territory petition for such transfer, the county board of education shall make such transfer. No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer; also a map shall be filed with the auditor or auditors of the county or counties affected by such transfer."

It is noted that one of the requisites of making such transfer legal is that two boards of education must each pass resolutions by a majority vote of their full membership, which in this case would be the board of education of the Crestline exempted village school district and the county board of education of Crawford county, from which county school district such transfer of territory was to be made.

You ask if there is any way in which the people residing in Jackson township school district, who desire to be transferred to the Crestline exempted village school district, could avoid having their taxes raised or avoid helping to pay this bonded indebtedness of the Crestline exempted village school district.

In reply to such query, it is advised that where territory is transferred in regular and legal manner to another school district, it then and thereafter becomes an integral part of the district to which it is transferred and school taxes in such enlarged district must thereafter be spread uniformly over the whole of such enlarged district. There is nothing unreasonable in this, because persons in the territory to have transferred are more than likely seeking transfer to such exempted village or city school district, as the case may be, in order to be better educational advantages in the way of better teachers, better buildings and accommodations, all of which have been provided by the village school district at considerable expense to itself, following which there might be an unpaid debt or an increased tax rate. If those who seek to join a school district that has more than the usual advantages, with the view that they may partake likewise of such advantages, then it is only fair they should pay their equal share of the cost of such added advantages, for that, in the final analysis, is usually the reason that transfer to an exempted village school district has been sought.

In an opinion rendered under date of December 31, 1915, and found in volume 3, Opinions of the Attorney-General for 1915, at page 2458, the second branch of the syllabus reads:

> "If the electors of a school district vote in favor of a bond issue under authority of section 7625 G. C., and for the purposes therein mentioned, and thereafter the county board of education transfers a part or all of another school district to such district, and upon said transfer being effected, said territory thus transferred will become a part of said district for all school

purposes and will, therefore, be liable for its share of the bonded indebtedness so created."

It is therefore the opinion of the Attorney-General that where a school district, as a whole, is transferred and added to an exempted village school district, such territory becomes an integral part of such enlarged district and then and thereafter taxes in such enlarged district must be spread uniformly over the whole of such enlarged district, and at the time of transfer, under section 4696, the board of education of such enlarged exempted village district shall take the funds and assume the indebtedness of the added district existing at that time.

Respectfully,
JOHN G. PRICE,
Attorney-General.

451.

SOLDIERS' BURIAL COMMITTEE—CONTRACT OF SAID COMMITTEE GOVERNS REGARDLESS OF FACT SAID SOLDIER DIES IN COUNTY INFIRMARY—COUNTY COMMISSIONERS NOT AUTHORIZED TO BURY INMATES FROM SUCH INFIRMARY FOR LESS SUM OF MONEY WHERE INMATE HONORABLY DISCHARGED SOLDIER.

Where an honorably discharged soldier has been buried by an undertaker, in compliance with a contract entered into between such undertaker and the township soldiers' burial committee, the county commissioners are not authorized to change such contract and pay the undertaker less than the amount agreed upon, notwithstanding that such soldier dies while an inmate of the county infirmary and the commissioners had a contract with such undertaker to bury inmates from such infirmary for a less sum of money.

COLUMBUS, OHIO, June 30, 1919.

HON. WAYNE STILLWELL, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for the opinion of this department as follows:

"The county commissioners and Mr. W. F. Cary, an undertaker of this place, have requested me to ask for a ruling in the following matters:

An old soldier, at his own request, was admitted to the county infirmary and his pension money applied to his board, lodging and other expenses while in that institution. At his death the soldiers burial committee made an allowance of $75.00 for his burial under section 2950. The county commissioners, having a contract with Mr. Cary for the burial of inmates at the rate of $25.00, feel that they should allow only the latter amount, which Mr. Cary considers insufficient under the circumstances. I do not know the specifications for the several funerals and the above statement is as given to me by Mr. Cary, but assuming the above statement to be correct and all formalities to have been complied with, I request your opnion as to whether or not the auditor should issue a warrant for the larger amount.

Your opinion No. 281, of May 10, 1919, says that 'such committee is authorized to contract for and bind the county up to the maximum of $75.00, in the matter of such burial, and in the absence of fraud or collusion, the commissioners are not authorized to review their decision or to modify their contract in such matters.'

> Does the fact that the soldier was an inmate of the infirmary and that the commissioners had a contract, change or make an exception in this case?"

Your quotation from opinion No. 281, dated May 10, 1919, rendered by this department to Hon. C. A. Weldon, prosecuting attorney, Circleville, Ohio, indicates that you have and are familiar with that opinion, which held that in the absence of fraud or collusion the county commissioners are not authorized to modify the contract between the undertaker and the soldiers' burial committee, for the burial of an honorably discharged soldier.

The further question presented in your inquiry is, as stated in your letter,

> "does the fact that the soldier was an inmate of the infirmary and that the commissioners had a contract change or make an exception in this case?"

The contract referred to, as is fairly inferable from your letter, is a contract by and between the county commissioners and the undertaker for the burial of paupers, and provides for compensation to the undertaker of twenty-five dollars for each of such burials. A distinction must be drawn between the purposes of the law on the one hand, authorizing the burial of paupers from the county infirmary, and the burial, on the other hand, of an honorably discharged soldier.

Without discussing this at length—for the reason that the distinction is apparent—the underlying purpose of the law, authorizing the payment for the burial of an honorably discharged soldier, may be quoted from an opinion of the Attorney-General, found in Annual Report of the Attorney-General, 1911-1912, Vol. 2, page 1471. The question asked in that case was, "may the county commissioners limit the amount for which a township or ward soldiers' burial committee may contract to a sum less than $75.00 in each case," and was answered in the negative.

Opinion No. 281, above referred to, rendered by the present Attorney General, concurs with that opinion of the former Attorney-General.

Section 2950, by the former Attorney-General, in the opinion above quoted, is thus characterized:

> "The statute certainly is one to be construed liberally in favor of the soldier. It is the last tribute in the way of anything of financial value that the people of a grateful republic can pay to its heroic defenders, and, too, when the legislature fixed the maximum at $75.00, prices were much lower than they are now, and this sum seems not only to be within the field of economy, but pretty well toward the center of boundary of stinginess."

As indicated in the above quoted opinion, the purpose of this statute is that to the extent of $75.00, as a mark of gratitude, and as "the last tribute in the way of anything of financial value" the state has provided for the interment of the body "of any honorably discharged soldier."

As pointed out in opinion 281, supra, the county commissioners are not vested with any discretion or authority, in the absence of fraud or collusion, to modify the statutory contract provided by sections 2950 et seq. G. C., and the fact that the soldier was also indigent and an inmate of the infirmary, and but for the provisions of these statutes would otherwise be buried in a pauper's grave, clearly emphasizes to this department that it is peculiarly such a case as these laws were intended to cover, and in conclusion you are advised that this department is of the opinion that in such a case the county commissioners have no authority, in the absence of fraud, to change the agreement between the soldiers' burial committee and the undertaker.

Your letter stated that it is assumed that "all formalities have been complied with," and from this it is inferred and assumed that the statutory provisions for enter-

ing into the contract approved by the soldiers' burial committee have been strictly complied with and this opinion is rendered upon that state of facts.

It is deemed advisable to call your attention to house bill No. 8 (108 O. L. 34), signed by the governor March 19, 1919, by which the maximum amount to be charged for such burials was increased from seventy-five to one hundred dollars, as finally amended.

Respectfully,
JOHN G. PRICE,
Attorney-General.

452.

APPROVAL OF LEASES OF CANAL LANDS IN AKRON, MASSILLON, LAKEVIEW AND BARBERTON, OHIO.

COLUMBUS, OHIO, June 30, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of June 28, 1919, enclosing for my approval leases (in triplicate) for canal lands, as follows:

	Valuation.
To the Diamond Realty Company, Akron, Ohio, Ohio canal land between State St. and Buchtel Ave. in Akron, Ohio	$58,000 00
To W. S. Bloomberg, Ohio canal land at Massillon, Ohio	5,100 00
To B. F. Swartz and James Miller, Lakeview, Ohio, reservoir embankment	1,666 66
To Isaac B. Shepard, outer slope of the Ohio canal at Barberton, Ohio	500 00

I have carefully examined said leases, find them correct in form and legal, and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

453.

APPROVAL OF CONTRACT BETWEEN BOARD OF TRUSTEES OF MIAMI UNIVERSITY AND THE BALL ENGINE CO. OF ERIE, PA.

COLUMBUS, OHIO, June 30, 1919.

HON. R. M. HUGHES, *President Miami University, Oxford, Ohio.*

DEAR SIR:—On behalf of the board of trustees of Miami University you have submitted for my approval, as per section 2319 G. C. (107 O. L. 455), the contract between said board of trustees and The Ball Engine Co. of Erie, Pa., for a 16 x 16 inch, simple valve, side crank engine, at 257 R. P. M., including foundations and accessories, installed in the power plant, Miami University, Oxford, Ohio, as described in Ball Engine Company specification of June 15, 1919, calling for payment of $4,386.00. You have also submitted the bond covering said contract.

It appears that the above named company was the lowest bidder for the engine in

question and that your board has let a contract to said company at its bid. I have examined the published notices calling for bids and found same in accordance with law.

You have furnished me with the certificate of the secretary of state to the effect that The Ball Engine Company of Erie, Pa., has filed statements under sections 178 and 183 G. C. and is authorized to do business in the state of Ohio; also affidavit showing that said company will not employ five or more persons in the performance of said contract.

Having before me the certificate of the auditor of state that there are funds in the appropriations heretofore made, for the purposes set forth in said contract, sufficient to cover the amounts payable thereunder, and being satisfied that said contract and bond are in all respects according to law, I am this day certifying my approval thereon.

I have this day filed in the office of the auditor of state the contract, bond and other papers necessary for filing in said office. Herewith enclosed I return all other papers not necessary to be so filed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

454.

APPROVAL OF CONTRACT BETWEEN BOARD OF TRUSTEES OF MIAMI UNIVERSITY AND THE GENERAL ELECTRIC COMPANY OF SCHENECTADY, NEW YORK.

COLUMBUS, OHIO, June 30, 1919.

HON. R. M. HUGHES, *President Miami University, Oxford, Ohio.*

DEAR SIR:—On behalf of the board of trustees of Miami University you have submitted for my approval, as per section 2319 G. C. (107 O. L. 455), the contract between said board of trustees and The General Electric Company of Schenectady, New York, for generator, exciter, etc., calling for payment of $2,430. You have also submitted the bond covering said contract.

It appears that the above named company was the lowest bidder for the machinery in question and that your board has let a contract to said company at its bid. I have examined the published notices calling for bids and found same in accordance with law.

You have furnished me with the certificate of the secretary of state to the effect that The General Electric Company of New York has filed statements under sections 178 and 183 G. C. and is authorized to do business in the state of Ohio; also certificate from the Industrial Commission of Ohio showing compliance by said company with the workmen's compensation law of Ohio.

Having before me the certificate of the auditor of state that there are funds in the appropriations heretofore made, for the purposes set forth in said contract, sufficient to cover the amounts payable thereunder, and being satisfied that said contract and bond are in all respects according to law, I am this day certifiying my approval thereon.

I have this day filed in the office of the auditor of state the contract, bond and other papers necessary for filing in said office. Herewith enclosed I return all other papers not necessary to be so filed.

Respectfully.
JOHN G. PRICE,
Attorney-General.

455.

APPROVAL OF CONTRACT BETWEEN BOARD OF TRUSTEES OF BOWLING GREEN STATE NORMAL COLLEGE AND CORL, SCHWAB AND ENGLAND OF BOWLING GREEN, OHIO, FOR SILO.

COLUMBUS, OHIO, June 30, 1919.

HON. H. B. WILLIAMS, *President State Normal College, Bowling Green, Ohio.*

DEAR SIR:—On behalf of the board of trustees of the Bowling Green State Normal College, you have submitted for my approval, as per section 2319 G. C. (107 O. L. 455), a contract between said board and Corl, Schwab and England of Bowling Green, Ohio, for the construction and completion of a general purpose barn and silo. You have also submitted the bond covering said contract.

It appears that the above named parties were the lowest bidders and that your board has let a contract to them at their bid. I have examined the published notice calling for bids and find same in accordance with law.

You have furnished me certificate of the Industrial Commission of Ohio showing compliance by said contractor with the workmen's compensation law of Ohio.

Having before me the certificate of the auditor of state that there are funds in the appropriations heretofore made, for the purposes set forth in said contract, sufficient to cover the amounts payable thereunder, and being satisfied that said contract and bond are in all respects according to law, I am this day certifying my approval thereon.

I have this day filed in the office of the auditor of state the contract, bond and other papers necessary for filing in said office. Herewith enclosed I return all other papers not necessary to be so filed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

456.

MUNICIPAL BOARD OF HEALTH—WITHOUT AUTHORITY TO ESTABLISH CLINIC FOR TREATMENT OF VENEREAL DISEASES UNTIL HOUSE BILL No. 211 (108 O. L. 236) BECOMES EFFECTIVE.

Until house bill No. 211 (Hughes health act, section 13) becomes effective, a municipal board of health is without authority to establish a clinic for the treatment of venereal diseases.

COLUMBUS, OHIO, June 30, 1919.

State Department of Health, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion ot this department as follows:

> "The board of health of the city of N_____is very desirous of establishing a clinic for the treatment of cases of venereal diseases but the council does not have the funds to finance such a proposition. An offer has been made by the board of health that the funds will be forthcoming from private sources if the board has the authority to administer such funds.

I should be glad therefore, to have your opinion as to whether or not a municipal board of health may receive funds from sources other than the city council and administer the same in the performance of public health work."

Sections 4404 to 4476 G. C., relating to municipal boards of health, are pertinent to your inquiry. Sections 4404 to 4419 relate to the organization and powers of such boards.

Section 4413, in part, is as follows:

"The board of health of a municipality may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. * * *"

Sections 4420 to 4424 G. C., relating to nuisances, clothe such boards with power to abate and remove all nuisances within its jurisdiction and provide effective means for the enforcement of the orders of such boards.

Sections 4425 to 4451 G. C., relating to dangerous, communicable diseases, give municipal boards of health authority to enact and enforce quarantine regulations in time of epidemic or threatened epidemic of certain kinds of diseases,but in none of these sections is there any authority for establishing a clinic of the character referred to in your letter.

It may be well to observe that the word "clinic", as considered in this opinion, has the meaning, as defined in the Standard Dictionary, of "the teaching of medicine and surgery practically at the bedside or in the presence of patients; as in a hospital or dispensary." Your letter is understood as meaning the establishment of such a clinic for the treatment of cases of the disease therein mentioned.

The nearest approach to a grant of authority for the establishment of such a clinic in the laws relating to boards of health it is suggested is found in section 4452, which in part provides:

'The council of a municipality may purchase land within or without its boundaries and erect thereon suitable hospital buildings for the * * * treatment of persons suffering from dangerous contagious disease, * * *. The plans and specifications for such building shall be approved by the board of health."

It might be contended that the establishment of such a clinic is within the implied powers of the board of health. But as has been repeatedly held in the courts of this state, the implication must be clear and necessary to the exercise of authority expressly given, before it can be claimed that an officer or board may exercise such authority.

Section 4452 G. C. is pertinent in this connection, in that necessity for invoking such implied power would not exist where express provision is otherwise made for the accomplishment of the object under consideration.

It should also be borne in mind that boards exercising a part of the police power of the state are bound, as to the limitation of their authority, to the terms and extent of authority contained in the laws creating them.

A careful examination of the laws relating to boards of health does not disclose any authority for a municipal board of health establishing such a clinic, in the absence of which such board is powerless to establish same. The existence or absence of such authority would not be affected by the fact that such a clinic may be supported by funds received from sources other than the city council, and your question is therefore

answered in the negative. Attention is directed to section 13 of house bill No. 211 (Hughes health act, 108 O. L. 236) which, when it becomes effective, will furnish ample authority for such clinic.

Respectfully,
JOHN G. PRICE,
Attorney-General.

457.

BOARD OF EDUCATION—MEMBER OF SUCH BOARD CANNOT BE EMPLOYED AS TEACHER BY SUCH LOCAL BOARD—CANNOT PARTICIPATE IN CONTRACT IN WHICH HE IS PECUNIARILY INTERESTED—PRESIDENT OF BOARD OF EDUCATION WHO IS UNDER CONTRACT AS TEACHER CAN CAST VOTE FOR DISTRICT SUPERINTENDENT BUT HIS CONTRACT AS TEACHER NULL AND VOID.

1. *A member of a board of education cannot be employed by such local board as a teacher and any such contract made by the board would be null and void.*

2. *Membership in a board of education is not lost to such member by his participating in the employment of himself as a teacher and such contract for teaching services is null and void, for a member of a board of education cannot participate in any contract in which he is pecuniarily interested or be employed in any manner for compensation by the board of education; cannot participate in any contract in which he is pecuniarily interested or be employed in any manner for compensation by the board of which he is a member, except as clerk or treasurer.*

3. *A president of a board of education who is under contract with such board as a teacher, can cast a vote for district superintendent, but his contract as a teacher is null and void.*

COLUMBUS, OHIO, July 1, 1919.

HON. W. B. BARTELS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following question:

> "Under section 4712 G. C., can a member of the board of education who is also a teacher in the district and president of his local board, participate legally in the selection of a district superintendent?"

Section 4712 G. C., which you cite, reads as follows, but seemingly has very little to do with the question at issue:

> "In rural school districts, the board of education shall consist of five members elected at large at the same time township officers are elected and in the manner provided by law, for a term of four years."

In discussion of the above question as to whether a president of a local village or rural board could participate legally in the selection of a district superintendent, it is important first to see whether a person, who is a member of a board of education, could occupy this dual relation of member and teacher and the effect of one position upon the other.

Attention is invited to section 12932 G. C., which reads in part:

> "*Whoever being a * * * member of a board of education, votes for or participates in the making of a contract* with a person as a teacher or instructor in a public school to whom he or she is related as father or brother, mother or sister, *or acts in a matter in which he or she is pecuniarily interested,* shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not more than six months, or both."

The above section was enacted in 86 O. L., p. 207, in 1889, and has therefore been the law of Ohio for practically thirty years, providing that any member of a board of education is forbidden to make a contract or to participate in making a contract with a person as a teacher to whom such member of the board is related as father, or brother, mother or sister, *or acts in a matter in which he or she is pecuniarily interested.* The seeming intent of this section is to get away as far as possible from any personal interest or relationship, in supplying the schools with teachers, the intent of the assembly seemingly having been that if one was as closely related as father, brother, mother or sister to some member of the board of education, then other applicants might not stand wholly on the same basis as the relative who desired the teacher's position. This section provides that any member of a board who is guilty of participating in a contract made with a teacher who is related in either one of these degrees to the member in question, shall be fined or imprisoned; if this is the law, and it was enacted to prevent furtherance of self-interest by drawing the line against blood relatives, with what consistency could a member of a board of education employ himself as a teacher in his own district? Seemingly the legislature thought this contingency might never arise, it being contrary to the principles of law that one can be both the employer and the employed. So such section does not provide for a contingency where a member employs himself, but it seems clear that if it is a violation of law to participate in a contract in which a brother or sister is interested, it would follow that where one is a member of the board of education in the district and votes for or participates in the making of a contract with a teacher, who is a member himself or herself, then the member at least violates that part of section 12972 G. C., which says:

> "or acts in a matter in which he or she is pecuniarily interested."

Here the interest is wholly pecuniary for the reason that the teacher, who is a member, receives a salary for services as teacher.

It would seem that the president of the board of education, in signing teachers' contracts as president of the board of education (see Form No. 20, Ohio School Laws, 1915) would be signing a contract with himself if he were both a president or member of a board of education and a teacher employed by the same board at the same time. The incompatibility of the two positions or employments is at once apparent for the reason that one is subordinate to the other and in certain respects a check upon the other.

But attention is further invited to section 4757 G. C., which says in part:

> "No member of the board shall have, directly or indirectly, any pecuniary interest in *any contract of the board* or *be employed in any manner for compensation* by the board of which he is a member, except as clerk or treasurer. * "

Bearing upon the above section, there have been a number of prior opinions of the Attorney-General, excerpts from the syllabi of which are as follows:

> "One who has a contract * * * with a board of education, relinquishes his interest in such contract when he qualifies and takes his place on such board after being elected thereto."

Opinion 911, page 20, Vol. 1, Opinions of the Attorney-General, 1918.

"A member of a board of education who is the owner and publisher of a newspaper has no right to contract with the board to publish legal notices, even though the legal rate is charged for such publication."

Opinion 474, page 1293, Vol. 2, Opinions of the Attorney-General, 1917.

"The president of a board of education who is also a director and stockholder of a material company, which material company sells its material to the principal contractor dealing with such board of education, has such an interest in said contract as is prohibited by section 4757 G. C. * * *"

Opinions of the Attorney-General, 1915, page 267, Vol. 1, Opinion No. 139.

"A teacher may not, while employed by the board of education of a school district as a teacher in the school of said district, be elected to the position of clerk of said board."

Opinion 1025, page 229, Vol. 3, Opinions of the Attorney-General, 1915.

Attention is invited to the following previous holdings on this question:

"Section 2974 R. S. (4657 G. C.) expressly provides that 'no member of a board shall have any pecuniary interest, either direct or indirect, in any contract of the board.' The real question which arises is, are the acts complained of prohibited by this statute. To us it appears plain that the statute was intended to and does embrace in its prohibition the alleged transaction. 'No member of a board shall have any pecuniary interest in any contract of the board,' seems so plain as not to need construction. The fact that Cornelius A. Brouse was at this time a member of the firm of C. A. Brouse & Company necessarily implies that he had a pecuniary interest in the contract of sale made by the firm with the board, and being so it was a contract the board was prohibited from making and therefore one it had no right to make; nor did it have any right to allow the bill of the firm or draw an order for its payment on the treasurer of the board."

Grant vs. Brouse, et al, 1 O. N. P., 145.

The Attorney-General, in Opinion No. 911, in 1918, used the following language:

"The next question then that naturally arises is, if a person has contracted with the board and the contract is not completed, can he become a member of the board while the contract is in force.

It is within the province of the legislature to say what the qualifications of the members of the boards of education shall be.

Cline vs. Martin, 94 O. S., 420;

Mills vs. Board of Education, 54 O. S., 631: 9 O. C. C., 134.

The legislature may also say what acts shall stand as a disqualification for membership on a board of education.

29 Cyc., 1380.

At no place in our statute is found language to the effect that a person who has a contract with a board of education shall be by that act alone disqualified from becoming a member of such board. What the statute does say is that no member of a board of education shall have an interest in any contract. If, then, a person who has a contract with a board of education is elected as a member of such board, and after being so elected duly qualifies and takes his place upon such board as a member thereof, he by that act causes

a forfeiture and a relinquishment of all his rights under said contract. The contract becomes void and no further rights thereunder can accrue to either the board of education or the member who was formerly a party thereto."

Continuing, the Attorney-General said in such opinion:

"It seems clear to me, from the above and many other authorities examined, that no order can be drawn by the board in favor of one of its members for any services which such member would perform, and especially in the face of a statute which specifically prohibits the board from entering into any contract with a member thereof, * * * * * but from the time he becomes such member he cannot further carry out the conditions of his contract, for a member of a board of education shall not have, directly or indirectly, any pecuniary interest in any contract of the board of which he is a member, except as clerk or treasurer."

Along the same line see the following cases:

Bellaire Goblet Co., vs. City of Findlay et al., 5 O. C. C., 418-429;
Bloom vs. Richards, 2 O. S., 395;
Doll vs. State, 45 O. S., 449;
Pickett vs. School District No. 1, 25 Wis., 551;
Cumberland Coal Co. vs. Sherman, 30 Barb., 553;
People vs. Township Board of Overyssel, 11 Mich., 222;
Waymeyer vs. Powell, 105 Ind., 328.

In opinion 102, issued by the Attorney-General November 16, 1915, that official said:

"You will observe that the above provision of section 4757 G. C. is still in force, and by its terms prohibits a member of a board of education of a school district *from serving as a teacher of said district.*"

In opinion 474, issued July 25, 1917, that official said:

"It is not only unlawful for a member of a board of education to directly or indirectly have any pecuniary interest in any contract, but * * * he shall be punished therefor.

All the above sections have been considered (sections 4757, 12910 and 12911 G. C., from time to time by this department with the result of a universal holding that *in whatever manner the officer was interested in the contract, such contract was void and the money paid thereunder was recoverable.*"

Judge Voris, in the case of Grant vs. Brouse, I N. P., 145, used the following striking language in the discussion of section 4757 of the General Code.

"We are not undertaking to censure anybody, because we believe that in this transaction the board believed that it was discharging a public duty beneficially to the public; that is, it supposed that this was a more advantageous course to take than to obey the law. I have no doubt that the member of the board, who sold these articles, undertook to make a favorable arrangement for the public. Nothing to the contrary is asserted, and it is urged in fact, by the defendants, as a reason why this court should not interfere with its jurisdiction, that no *pecuniary injury* in fact resulted.

But we cannot look upon it in this light. The dollar and the cent advantage is the lowest order of consideration that can be urged, when a public wrong, a vicious example is encouraged under high official sanction; the example, the public wrong, the prostitution of public virtue is vastly more than mere matter of dollars and cents. The law was made in the interest of sound public policy, and while in some cases it may appear to be more advantageous to ignore than to obey the law, yet we think no public officer can violate a direct provision of the law, directing the performance of his duty, or prohibiting certain acts, and have his conduct judicially approved, and where the matter comes before the court it ought to carefully see to it that public policy is upheld. I know of no better way of preserving the virtue of the public than to have its officers understand and act as if they were public servants, always recognizing that a public position constitutes a public trust that may be sacredly carried out."

As to the legality of a contract made by a board, wherein less than the full number of the board acted, the court held in the case of Bellaire Goblet Company vs. City of Findlay, 5 O. C. C., 418, wherein Mr. Gorby was a member of the board of gas trustees, and was also interested in a contract which his board was to act upon, as follows:

"So that this dual relation existing as to Mr. Gorby, prevented him from acting upon this so-called contract as a member of the board. * * * The records show he did not act. Yet the board consisted of five members; each one of the members was entitled to be heard, each one of the members was entitled to act, but on account of the personal interest of Mr. Gorby, *he could not act*, so that in fact five members constituted the board, and in law five members was a legal board, but through the personal interest of Mr. Gorby the board, for the purpose of acting upon this contract, was reduced to four, which was not a legal board, and hence had no power to act."

Following the long list of cases that might be cited, as well as those herein given it is therefore the opinion of the Attorney-General that:

1. A member of a board of education cannot be employed by such local board as a teacher and any such contract made by the board would be null and void.

2. Membership in a board of education is not lost to such member by his participating in the employment of himself as a teacher and such contract for teaching services is null and void, for a member of a board of education cannot participate in any contract in which he is pecuniarily interested or be employed in any manner for compensation by the board of which he is a member, except as clerk or treasurer.

3. A president of a board of education, who is under contract with such board as a teacher, can cast a vote for district superintendent, but his contract as a teacher is null and void.

Respectfully,
JOHN G. PRICE,
Attorney-General.

458.

BRIDGES AND CULVERTS—PUBLICATION OF NOTICE TO CONTRACTORS—SECTIONS 2352 AND 6252 G. C. CUMULATIVE—MUST COMPLY WITH BOTH SECTIONS.

Sections 2352 and 6252 G. C. are cumulative and the publication of notice to contractors under section 2352 must comply not only with that section but also with section 6252 G. C.

COLUMBUS, OHIO, July 1, 1919.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*
DEAR SIR:—Your letter of May 26 reads as follows:

"I wish to present a question as to proper advertisement for proposals for the construction of a bridge to be built by the county commissioners at a cost in excess of $1,000.00.

Under section 2352 G. C. the commissioners are required to publish notice for four consecutive weeks 'in two of the principal papers in the county having the largest circulation therein.' The question which I wish to present is this: Must notice also be published in compliance with section 6252, that is, in two newspapers of opposite politics, published at the county seat, and also in two newspapers of opposite politics provided there are other municipalities of eight thousand population in the county?

In the case in question, a compliance with section 2352 would mean to publish in two newspapers of the same politics at the county seat, but no publication in an adjoining municipality."

Reference is made by you to sections 2352 and 6252 G. C., which, together with sections 2353 and 2354 G. C., are as follows:

"Sec. 2352. When loans, drawings, representations, bills of material, specifications and estimates are so made and approved, the county commissioners shall give public notice in two of the principal papers in the county having the largest circulation therein, of the time when and the place where sealed proposals will be received for performing the labor and furnishing the materials necessary to the erection of such building, bridge or bridge substructure, or addition to or alteration thereof, and a contract based on such proposals will be awarded. If there is only one paper published in the county, it shall be published in such paper. The notice shall be published weekly for four consecutive weeks next preceding the day named for making the contract; and state when and where such plan or plans, descriptions, bills and specifications can be seen. They shall be open to public inspection at all reasonable hours, between the date of such notice and the making of such contract.

Sec. 2353. When the estimated cost of a public building, bridge or bridge substructure or of making an addition to or repair thereof does not exceed one thousand dollars, it shall be let as heretofore provided, but notice of the letting need be given for only fifteen days, by posting on a bulletin board or by writing on a blackboard in a conspicuous place in the county commissioners' or auditor's offices, showing the nature of the letting and when and where proposals in writing will be received. Plans or specifications, or both as hereinbefore provided shall be kept on file during the fifteen days and open to public inspection.

"Sec. 2354. When the estimated cost of a public building, bridge or bridge substructure or of making an addition thereto or repair thereof does not exceed two hundred dollars, it may be let at private contract without publication or notice.

Sec. 6252. A proclamation for an election, an order fixing the times of holding court, notice of the rates of taxation, bridge and pike notices, notice to contractors and such other advertisements of general interest to the taxpayers as the auditor, treasurer, probate judge or commissioners may deem proper, shall be published in two newspapers of opposite politics at the county seat, if there be such newspapers published thereat. In counties having cities of eight thousand inhabitants or more, not the county seat of such counties, additional publication of such notices shall be made in two newspapers of opposite politics in such city. This chapter shall not apply to the publication of notices of delinquent tax and forfeited land sales."

It has been the accepted view of section 6252 G. C. that it is cumulative in effect as to the matters and things governed by it. It was not intended as an alternative or exclusive method of publication but as a requirement to be complied with in the making of other publications required by law. Certain special acts of recent enactment possibly have the effect of substituting an entirely different mode of publication in particular cases. (See Opinions of the Attorney-General for 1916, Vol. I, page 838). But as between the two substitutes now under consideration it is the opinion of this department that both must be complied with.

In *Vindicator Printing Co.* vs. *State*, 68 O. S., 362, 366, the following language is used:

"Publication of the sheriff's proclamation is authorized by section 2977, Revised Statutes. * * * This is *supplemented by* section 4367, (the same being section 6252 G. C.) which requires publication in two newspapers of opposite politics."

This holding of the supreme court is consistent with the impression just described.

The result is, not that one publication is to be made under section 2352 General Code and another separate publication under section 6252 General Code; for under a proper set of facts it would be possible to comply with both sections by making one set of publications. Such facts would exist where there were no municipalities outside of the county seat having eight thousand inhabitants or more, and where the two newspapers having the largest circulation in the county were of opposite politics and published at the county seat.

Again, where such facts do not exist, but one of "the principal papers in the county having the largest circulation therein" is located at the county seat, compliance *pro tanto* with section 6252 G. C. would be effected by publishing the notice in question in a paper of opposite politics published at the county seat, if such paper were published thereat. In such a case the cumulative effect of the two sections would require publication in three papers (still assuming the absence of any municipality in the county outside of the county seat having a population of eight thousand or more), such publication to be:

(1) In one newspaper having politics and published at the county seat, and being one of the two principal papers in the county having the largest circulation therein;

(2) In the other principal paper in the county having the largest circulation therein; and

(3) In another paper published at the county seat but not being one

of the two having the largest circulation in the county, if such other paper were of opposite politics to either of the other two papers.

Without working out all the possible combinations applicable to counties like Trumbull county, which does contain municipalities other than the county seat having a population of eight thousand or more, it is felt that the principles laid down will enable the officials of the county to work out the minimum publication necessary to comply with both section 2352 and section 6252 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

459.

BANKS AND BANKING—SALE OF STEAMSHIP TICKETS—BOND UNDER SECTION 290 G. C. VALID FOR PURPOSES OF SECTION 183 G. C. ET SEQ. OF HOUSE BILL NO. 200 (108 O. L. 80).

Bonds given under sections 290 et seq. of the General Code will be valid for the purposes of sections 183 et seq. of House Bill No. 200 revising and codifying the laws relating to banking, etc., after such act goes into effect.

COLUMBUS, OHIO, July 1, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your letter of recent date, which is as follows:

"The recent act of the General Assembly amending sections 181 et seq. of the General Code relating to the sale of steamship and railroad tickets for transportation to or from foreign countries goes into effect July 11, 1919. See H. B. No. 200 (108 O. L. 80).

Persons now engaged in the business of selling bonds with us, pursuant to sections 184 and 185 G. C. bearing date as of June, 1919.

Will you kindly advise us whether or not these bonds which so bear date antedating the act will be sufficient in law and whether we have power to accept such bonds prior to July 11, 1919?"

I presume that by the reference to sections 181 et seq. of the General Code you mean sections 290 et seq. of the General Code. These sections provide as follows:

"Section 290. No person, firm or corporation shall engage in selling steamship or railroad tickets for transportation to or from foreign countries, or in the business of receiving deposits of money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries, until it has obtained from the auditor of state a certificate of compliance with the provisions of the two sections next following. The certificate shall be conspicuously displayed in the place of business of such person, firm or corporation.

Section 291. Such person, firm or corporation shall make, execute and deliver a bond to the state of Ohio in the sum of five thousand dollars, conditioned for the faithful holding and transmission of any money, or the equivalent thereof, delivered to it for transmission to a foreign country, or conditioned for the selling of genuine and valid steamship or railroad tickets for

transportation to or from foreign countries, or both if it be engaged in both of such businesses.

Section 292. The bond shall be executed by such person, firm or corporation as principal, with at least two good and sufficient sureties, who shall be responsible and owners of real estate within the state. The bond of a surety company may be received, if approved, or cash may be accepted in place of surety. The bond shall be approved by the auditor of state, and filed in his office. Upon the relation of any party aggrieved, a suit to recover on such bond may be brought in a court of competent jurisdiction.

Section 293. The auditor of state shall keep a book to be known as a 'bond book' wherein he shall place in alphabetical order all such bonds received by him, the date of receipt, the name or names of the principals and place or places of residence, and place or places for transacting their business, the names of the surety upon the bond, and the name of the officer before whom the bond was executed or acknowledged. Such record shall be open to public inspection. The auditor of state shall collect a fee of five dollars for each bond so filed.

Section 294. A person, firm or corporation which engages in such business, contrary to the provisions of the second and third preceding sections, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both.

Section 295. Nothing herein shall apply to drafts, money orders or traveler's checks issued by trans-Atlantic steamship companies or their duly authorized agents or to national banks, express companies, state banks or trust companies."

These sections are all repealed by the act referred to, which contains the following sections:

"Section 183. No person, firm or corporation shall engage in selling steamship or railroad tickets for transportation to or from foreign countries, until they shall have obtained from the auditor of state a certificate of compliance with the provisions of the two sections next following. The certificate shall be conspicuously displayed in the place of business of such person, firm or corporation.

Section 184. Such person, firm or corporation shall make, execute and deliver a bond to the state of Ohio in the sum of five thousand dollars, conditioned for the selling of genuine and valid steamship or railroad tickets for transportation to or from foreign countries.

Section 185. Such bond shall be executed by such person, firm or corporation as principal, with at least two good and sufficient sureties who shall be responsible and owners of real estate within the state. The bond of a surety company may be received, if approved, or cash, or the securities enumerated in section 150 of this act, may be accepted surety. Such bond shall be approved by the auditor of state, and filed in his office. Upon the relation of any party aggrieved, a suit to recover on such bond may be brought in a court of competent jurisdiction.

Section 186. The auditor of state shall keep a book to be known as a 'bond book' wherein he shall place in alphabetical order all such bonds received by him, the date of receipt, the name or names of the principles and place or places of residence, and place or places for transacting their business, the names of surety upon the bond, and the name of the officer before whom the bond was executed or acknowledged. Such record shall be open

to public inspection. The auditor of state shall collect a fee of five dollars for each bond so filed.

Section 187. A person, firm or corporation which engages in such business, contrary to the provisions of the four preceding sections, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both.

But nothing in the said sections shall apply to national banks, duly incorporated and qualified railroad, steamship, express companies, banks or trust companies."

The law is declared in its title to be "An Act revising and codifying the laws relating to the organization of banks and the inspection thereof." It is manifest from the title, as well as from comparison of the two groups of sections above quoted that the legislature had principally in mind the revision and codification of the law affected by the bill, and not any radical amendments of it, much less the wiping out of an old law and the passage of a new law. For instance, section 183 of the act has exactly the same effect in law as section 290 of the General Code.

Section 184 of the act is, as it were, exactly like half of section 291 of the General Code. That is to say, section 290 of the General Code authorized and required the giving of a bond in the sum of five thousand dollars conditioned for either or both of two things, the doing of which constituted in the eye of the law separate kinds of business, viz: (1) the selling of transportation to or from foreign countries; and (2) the transmission of money to a foreign country. The banking code has separated out the business of transmitting money to foreign countries and dealt with that in sections 181 and 182 of the new law, and this is one of the changes made in the process of codification which amounts to a real and substantial amendment of the law. But it was lawful under original section 291 to give bond for the selling of steamship tickets only, and it will be lawful and mandatory under section 184 to give such bond.

Section 185 makes but one change as compared with section 292 of the General Code, viz: in authorizing the deposit of certain securities in lieu of cash or personal or surety company bonds; but this is an enlargement rather than a restriction, and a bond which would satisfy one will satisfy the other.

Section 186 of the act is in the exact words of section 293 of the General Code. In other words, no change whatever was made in this section except to repeal "Sec. 293" and to enact "Section 186."

Section 187 of the act is in substance of the same legal effect as sections 294 and 295 of the General Code considered together, excepting that there may be some difference in the effect of the exemption. If there is any, such change does not affect the question which you ask.

That question comes to this: As to whether or not a bond taken in June, 1919, under sections 290 et seq. of the General Code, which are then in effect, is a compliance with sections 183 et seq. of House Bill No. 200 as to companies subject to both the old and the new law.

In my opinion it is. As to companies of the character mentioned House Bill No. 200 is not to be regarded as a change in the law. It is well settled that the mere revision or codification of a law does not have the general effect of nullifying what has been done prior thereto and requiring its repetition after the revision goes into effect. This principle applies here.

Respectfully,
JOHN G. PRICE,
Attorney-General.

460.

MUNICIPAL CORPORATIONS—QUESTION OF APPOINTMENT OF COMMISSION TO FRAME CHARTER CANNOT BE SUBMITTED AT PRIMARY ELECTION.

The question of the appointment of a commission to frame a charter for a city or village cannot under the provisions of Art. XVIII, Sec. 8 of the constitution of Ohio be submitted to the electors of such city or village at a primary election.

COLUMBUS, OHIO, July 1, 1919.

HON. LLOYD S. LEACH, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—You advise that the council of the city of Coshocton has under the provisions of section 8 of article XVIII of the constitution of Ohio passed an ordinance to submit to the people the question, "Shall a commission be chosen to frame a charter?"

You refer to an opinion rendered by my predecessor, found in Vol. II of Opinions of Attorney-General for 1916, p. 1343, holding that a primary election is not a regular election and quoting from and relying upon a similar holding in Vol. I of Annual Report of Attorney-General for 1914, p. 942. You state that on the authority of these opinions you have reached the conclusion that the question above referred to can not be submitted at the primary election to be held in the city of Coshocton in August. In this view I concur.

The language of article XVIII, section 8 of the constitution, pertinent here, is as follows:

> "* * * The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. * * *"

In addition to the two opinions of the attorneys-general referred to by you, and with which I am in accord, you will find a discussion of the distinction between general and special elections in 28 O. C. A. 10. There the court said, in the case of Yeatman vs. State, at p. 13:

> "It therefore appears that the provisions of the constitution and the General Code recognize 'regular' elections and 'primary' elections, and 'general' elections and 'special' elections. The term 'regular election' seems to be used in the same way and to mean the same thing as the term 'general election.'
>
> The legislature has, in section 4948, construed the term 'general election,' limiting it to the November election in even numbered years, while the language used in section 4980 would seem to indicate there might be a general election held in odd numbered years.
>
> A careful consideration of all the constitutional provisions and statutes cited above compel the court to the opinion that the term 'general election' was intended to apply only to the elections held on the first Tuesday after the first Monday of November both in the even and in the odd numbered years, and that all other elections would be special elections except the 'pri-

mary elections,' which are another class and otherwise provided for. A general election is one held throughout the state at regularly recurring intervals for the purpose of electing public officers and possibly at the same time voting upon such public questions as might be then legally submitted, while a special election is one held at some other time to vote upon public questions or to elect officers to fill vacancies."

As stated above, I am of the opinion that the primary election is not a regular election within the meaning of article XVIII, section 8 of the constitution.

Respectfully,

JOHN G. PRICE,
Attorney-General.

461.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN BUTLER, FRANKLIN, GUERNSEY, GEAUGA, HENRY, LOGAN AND MADISON COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, July 3, 1919.

462.

APPROVAL OF BOND ISSUE OF COSHOCTON COUNTY IN THE SUM OF $54,000.00

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 7, 1919.

463.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN MIAMI AND DELAWARE COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, July 8, 1919.

464.

APPROVAL OF LEASE FOR LOCAL OFFICE AT DAYTON, OHIO, BETWEEN ADAM SCHANTZ AND STATE FIRE MARSHAL.

COLUMBUS, OHIO, July 11, 1919.

HON. T. A. FLEMING, *State Fire Marshal, Columbus, Ohio.*

DEAR SIR:—The lease from Adam Schantz, as trustee, to the state fire marshal, through the adjutant general, which you have transmitted to this department for its approval, has received my attention.

Consideration of section 820 et seq., General Code, clearly indicates that ample authority exists for renting offices for the state fire marshal. It may be suggested, however, that by virtue of section 820 the principal office must be located in the city of Columbus, that section providing,

> "The state fire marshal shall have his principal office in the city of Columbus."

However, it appears by the third clause of the lease that the premises are to be used, as stated therein, "as the local office of the state fire marshal."

It is also noted that the lease is for a period of two (2) years and contains a provision that the rental therein provided for shall be payable from appropriations made, thereby coming within the rule laid down in State ex. rel. vs. Donahey, 93 O. S. 414.

Consideration of the sufficiency of the lease as to form convinces this department that the lease is in proper legal form, and the consideration therein provided being within the limits of the appropriation made in H-6, of appropriation house bill No. 536, such lease is hereby approved and is returned herewith.

Yours respectfully,
JOHN G. PRICE,
Attorney-General.

465.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ASHLAND, ASHTABULA, ATHENS, GEAUGA, MADISON AND SENECA COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, July 11, 1919.

466.

APPROVAL OF BOND ISSUE OF WYANDOT COUNTY IN THE SUM OF $50,903.59.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 12, 1919.

467.

APPROVAL OF BOND ISSUE OF LICKING COUNTY IN THE SUM OF $18,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 14, 1919.

468.

APPROVAL OF BOND ISSUE OF SHELBY COUNTY IN THE SUM OF $16,800.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 14, 1919.

469.

APPROVAL OF BOND ISSUE OF SHELBY COUNTY IN THE SUM OF $65,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 14, 1919.

470.

APPROVAL OF BOND ISSUE OF SHELBY COUNTY IN THE SUM OF $18,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 14, 1919.

471.

APPROVAL OF BOND ISSUE OF SHELBY COUNTY IN THE SUM OF $59,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 14, 1919.

472.

APPROVAL OF BOND ISSUE OF DARKE COUNTY IN THE SUM OF $290,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 15, 1919.

473.

ROADS AND HIGHWAYS—WHEN MAINTENANCE AND REPAIR FUND CAN BE USED BY STATE HIGHWAY DEPARTMENT.

HELD, under the facts appearing, that maintenance and repair funds might legally be used in connection with two certain contracts entered into by the state highway department.

COLUMBUS, OHIO, July 16, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—The receipt is acknowledged of your communication of recent date, reading as follows:

"Relating to the attached contract No. 1495 for the improvement of section 'B,' Delaware-Marysville road, I. C. H. No. 238, Delaware county, A. B. Shaw, contractor.

The proposal upon which bids were received and which is attached to the contract calls for grading roadway, constructing bridges and culverts and paving with bituminous macadam.

Maximum grade present, 7%. Proposed, 6.49%.

Bridges, new, 1.

Culverts, new, 22.

Depth of foundation, $6\frac{1}{2}$ inches.

Depth of top course, $2\frac{1}{2}$ inches.

Width of pavement, 16 feet.

You will notice that the unit bid of the proposal, under the caption ROADWAY provides for 12,344 cu. yds. of excavation R-1 (see page 12). Other items bid under this caption and BRIDGES and CULVERTS, indicate new construction or reconstruction.

Under this contract the improvement, when finished will consist of a change in the grade (which, I think, will eliminate all traces of the original grade at points where grading is done) new culverts and a two-course bituminous macadam pavement, at a total average cost of $20,097.07.

Letter attached to this contract and signed by the surveyor and commissioners of Delaware county, describes the road proposed to be improved as originally constructed of macadam, but does not state original depth of metal or original width of the pavement. The department's division engineer, however, states the road was what he would call a traffic bound macadam, that is the lime stone was dumped upon the road loose and not packed by means of a road roller or otherwise. He says the width of the pavement on original construction averaged about fifteen feet, but has no way of knowing the original depth of the metal.

Will you kindly advise at your earliest convenience whether or not maintenance and repair funds can be legally applied on this improvement. In asking for your opinion in this particular case, I have in mind opinion of the Attorney-General No. 542 under date of August 17, 1917, and opinion No. 1480 under date of September 26, 1918."

The two opinions of this department to which you refer appear respectively in Opinions of Attorney-General for 1917, Vol. II, p. 1553; and Opinions of Attorney-General for 1918, Vol. II, p. 1233. Under authority of the first of these opinions, this department has recently held (opinion No. 439, June 28, 1919, copy of which is enclosed) that the state highway commissioner was not empowered to make use of maintenance and repair funds in three specific cases described by him. In the opinions of June 28, 1919, as you will note, reference was also made to a former opinion of this department, of date June 10, 1915, Opinions of Attorney-General for 1915, p. 990. In the opinion dated September 26, 1918, to which you refer, the second and third paragraphs of the headnotes read (Op. 1918, p. 1233):

2 "Upon the application of county commissioners or township trustees for state aid, in the maintenance and repair of inter-county highways, the state highway commissioner has authority to use the funds derived from the registration of motor vehicles to pay the state's proportion of the cost and expense of such maintenance and repair.

3. The state highway commissioner has no authority in law to use the funds derived from the registration of motor vehicles, either upon his own motion or upon the application of the county commissioners or township trustees, to repair and maintain inter-county highways which have not been improved."

The following information, obtained partly at the state highway department and partly in an interview with your Mr. J. E. Harper, state examiner assigned to the highway department, must be considered in connection with the data set forth in your letter.

The section of road in question is 5.02 miles in length. The contract for the work was entered into under date June 13, 1919, and the contractor is proceeding thereunder. The action taken by the state highway commissioner and the highway advisory board with reference to providing part of the funds for the improvement from the maintenance and repair fund, is shown by the following entry in the journal of the highway advisory board of date January 8, 1918, the subject under consideration being the road improvement program presented by the authorities of Delaware county:

"It was agreed that the 8 miles of inter-county highway No. 238 from the Delaware and Union county line to the inter-section with Gallant road, a distance of 8 miles, was the most desirable to be improved first.

A statement was presented by the clerical department stating that $16,000.00 of inter-county highway funds is available for use in Delaware county.

Commissioner Cowen set aside from the apportionment of inter-county highway funds to Delaware county the sum of $16,000.00 and from the maintenance and repair fund the sum of $40,000.00, total $56,000.00, to aid Delaware county in the improvement of 8 miles of inter-county highway No. 238, from the Delaware and Union county lines to the Gallant road, a distance of 8 miles, on condition that the county pay the remainder of the cost of the improvement, the state not to pay in excess of 50 per cent of the

cost of same and on the further condition that the type of road selected meet with the approval of the highway department.

On motion of Mr. Humphrey, seconded by Mr. Kirwan, the following resolution was adopted:

'Resolved, by the highway advisory board that the action of the state highway commissioner in setting aside the sum of $16,000.00 from the apportionment of inter-county highway funds to Delaware county and $40,000.00 from the maintenance and repair fund, total $56,000.00, to aid Delaware county in the improvement of inter-county highway No. 238, main market No. XI, from the Delaware and Union county line to its intersection with the Gallant road, on the terms and conditions stated, be approved.'

Voting aye: Mr. McCulloch, Mr. Humphrey and Mr. Kirwan."

The state highway commissioner states, in an interview had with him, that the reason for his action in setting aside part of the maintenance and repair funds for the work in question, was the conviction on his part that the work is essentially of the character of maintenance and repair, and not of original construction; that the section of road in question, before being taken over by the state, had been improved by macadam construction, and therefore was not subject to exclusion from maintenance and repair operations under the principle stated in the above-quoted third headnote to opinion of this department dated September 26, 1918; that while admittedly of an extensive character, the repairs are only such as good workmanship demands; and that the project came within the terms of the statutes bearing upon use of maintenance and repair funds as construed in above-mentioned opinion of this department dated June 10, 1915 (Op. 1915, p. 990). As has been seen, the position thus taken by the commissioner was concurred in and approved by the highway advisory board.

In these circumstances, for reasons which will be hereinafter set forth, it is evident that the answer to your question is to be found, not in an expression of views of this department as to whether on the one hand the work comes within the scope of the opinion of 1915, or on the other hand within the scope of the opinions of 1917 and 1918, referred to by you; but rather in an inquiry into the effect of the action taken by the commissioner and approved by the Highway advisory board.

The opening sentence of section 1224, reads:

"The state highway commissioner shall *maintain and repair* to the required standard, all intercounty highways, main market roads and bridges and culverts constructed by the state, by the aid of state money or *taken over by the state after being constructed.*"

The third subdivision of section 1221 G. C. reads:

"3. The funds derived from the registration of automobiles shall be equally divided and one-half shall be applied, and used, as provided in this section, in the maintenance and repair of the inter-county highways and one-half to the maintenance and repair of the main market roads of the state. From the part of the funds appropriated for use on the main market roads the state commissioner is empowered to establish a system of maintenance to be organized in such manner as the state highway commissioner may provide."

Section 1231-9, which is part of the act appearing in 107 Ohio Laws, p. 137, creating the highway advisory board, provides in part:

"No act of the state highway commissioner * * * granting any

application for aid from any appropriation by the state for the construction, improvement, maintenance or repair of inter-county highways or main market roads or any other fund created by the state for highway purposes * * * shall be valid or have any force and effect until such act has been approved by the highway advisory board, by resolution duly passed by majority vote and entered upon its journal. * * *"

It is quite evident from a reading of these statutes that it is the duty of the state highway commissioner to determine in the first instance whether a given section of road needs repair work to the end of maintaining it to "the required standard," and of course that duty involves the further duty of determining in the first instance whether the work to be done is original construction or maintenance and repair within the contemplation of the statutes. The determination of the commissioner, however, is subject to review by the advisory board. As is readily understood, instances may arise wherein there is doubt as to the character of an improvement—whether original construction or maintenance. Assuredly, in these instances, the judgment of the highway commissioner, when exercised in good faith and concurred in by the advisory board, is to be accepted as final.

"The presumption is that public officers * * * have exercised a sound discretion, and the burden of proof is on plaintiff to show, with that clearness which is always necessary to move a court of equity to interfere, a state of facts which would constitute an abuse of discretion.

The courts cannot control public officers in the exercise of their discretion. It is only when the courts find present some of the equitable grounds of fraud or mistake, or find the decision or award to be wrongful, fraudulent, collusive or arbitrary, that they can set aside or restrain their conclusions or determinations."

Printing Co. vs. Deputy State Supervisors of Elections, 22 Ohio Cir. Ct., 584; 12 O. C. D., 477.

And see, also, Randall vs. State, ex rel., 64 O. S., 57; Shelby vs. State, ex rel., 63 O. S., 541; Roberts vs. Columbus, 15 O. N. P. (N. S.) 297; 23 O. D. (N. P.) 369.

Hence, considering the facts set forth in your letter in the light of the additional facts above stated, you are advised in specific answer to your inquiry that maintenance and repair funds may legally be applied on the improvement referred to in your letter.

Under the same date as that of your above quoted communication, you make inquiry in a separate communication as to another contract in Delaware county awarded to A. W. Burns & Co. The facts covered by the two communications, as well as those ascertained upon inquiry at the highway department, are so very similar that the views stated and conclusion reached as to one of the projects is equally applicable to the other.

Respectfully.

JOHN G. PRICE,

Attorney-General.

474.

INHERITANCE TAX LAW—WITNESSES BEFORE COUNTY AUDITOR —FEES—HOW PAID.

Witnesses testifying under subpoena of the county auditor acting as inheritance tax appraiser are entitled to the fees specified in section 3012 G. C. for testifying before an officer authorized to take depositions. Such fees are to be paid by the party at whose instance such witnesses are summoned. If such witnesses are summoned at the instance of the county auditor, he is entitled to reimbursement for the expense incurred by him in paying such fees, subject to the allowance of the probate judge.

COLUMBUS, OHIO, July 16, 1919.

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

GENTLEMEN:—Receipt of your letter of July 3d is acknowledged, requesting the opinion of this department as follows:

> "Section 5341 of the new inheritance tax law, known as amended senate bill 175 (108 O. L. 561), empowers the county auditor, when directed to act as appraiser in inheritance tax proceedings, to subpoena and compel the attendance of witnesses.
>
> Query: How are said witnesses to be paid?"

The following sections of the General Code, as amended in amended S. B. No. 175 (108 O. L. 561), may be quoted:

> "Sec. 5341. The county auditor shall be the inheritance tax appraiser for his county. * * * Such auditor for such purpose is hereby authorized to issue subpoenas and to compel the attendance of witnesses and the production of books and papers before him, and to examine such witnesses under oath concerning such property, the value thereof, and the nature and circumstances of the succession. Disobedience of such subpoena, or refusal to testify on such examination shall be punished as a contempt of the probate court. The county auditor shall report his findings in writing, together with the depositions of the witnesses examined, and such other facts in relation thereto as the probate court may order. * * *
>
> The fees of the sheriff or other officer, serving such subpoenas, and the actual and necessary traveling and other expenses incurred by the county auditor in making the appraisement shall be certified by the county auditor on such report. If the probate judge finds such fees and expenses to be correct, he shall allow such fees, and so much of such expenses as he may find to have been reasonable, having regard to the amount of the state's share of the taxes, and certify the amount so allowed for each on the order fixing the taxes. * * *."

In connection with the above quoted provisions of the inheritance tax law, the following statutes are material:

> "Sec. 3012. Each witness in civil causes shall receive the following fees: * * *; for testifying before an officer authorized to take depositions, under a subpoena, seventy-five cents, and five cents for each mile from his place of residence to the place of taking depositions, *to be paid on demand by the party at whose instance he is summoned.* * * *.

Sec. 3011. In all cases not specified in this chapter, each person summoned as a witness shall be allowed fifty cents for each day's attendance, and the mileage herein specified. When not summoned, each person called upon to testify in a cause shall receive twenty-five cents."

The first question which may conveniently be considered is as to whether or not the witness testifying before the county auditor in the capacity of inheritance tax appraiser is a "witness in a civil cause." In this connection the following provisions of sections 5340 et seq., including a part of section 5341 not heretofore quoted, may be considered.

Section 5340 (as amended by Amended S. B. 175):

"The probate court of any county of the state having jurisdiction (as specified) * * * shall have jurisdiction to hear and determine the questions arising under the provisions of this sub-division of this chapter, * * *."

Sec. 5341. * * * The probate court, upon its own motion may, or upon the application of any interested person, * * * shall by order direct the county auditor to fix the actual market value of any property the succession to which is subject to the tax levied by this subdivision of this chapter. Such auditor shall forthwith give notice by mail to all persons known to him to have a claim or interest in the property to be appraised, * * * of the time and place when he will appraise such property. He shall at such time and place appraise the same * * *. The county auditor shall report his findings * * * in duplicate; one copy thereof shall be filed with the probate court. * * *

Sec. 5345. From the report of appraisal and other evidence relating to any such estate before the probate court, such court shall forthwith upon the filing of such report, by order * * * find and determine, as of course, the actual market value of all estates, the amount of taxes to which the succession or successions thereto are liable, the successors and legal representatives liable therefor; and the townships or municipal corporations in which the same originated. * * * Thereupon the judge of such court shall immediately give notice of such order * * *.

Sec. 5346. * * * any person dissatisfied with the appraisement and determination of taxes, may file exceptions thereto in writing with the probate court within sixty days from the entry of the order * * *. The probate court shall thereupon by order fix a time * * * for the hearing of such exceptions, * * *. Upon the hearing of such exceptions, said court may make such order as to it may seem just and proper in the premises. * * *.

Sec. 5347. At the expiration of such period of sixty days * * * the probate judge shall make and certify to the county auditor a copy of the order provided for in section 5345 of the General Code. * * *.

The county auditor shall thereupon, * * * make a charge based upon such order and certify a duplicate thereof to the county treasurer, who shall collect the taxes so charged.

Sec. 5348. An appeal may be taken by any party * * *.

Sec. 5348-3. If, after the expiration of three months from the accrual of any tax under this subdivision of this chapter, such tax shall remain unpaid, the auditor of state shall notify the prosecuting attorney * * * Such prosecuting attorney shall thereupon apply to the probate judge in the name of the county auditor on behalf of the state for a transcript of the order fixing the tax. Such transcript shall be filed in the office of the clerk of the common pleas court of the county, and the same proceedings shall be had with

respect thereto as are provided by section 11659 of the General Code with respect to transcripts of judgments rendered by justices of the peace and mayors * * *.

Sec. 5384-4. The prosecuting attorney shall represent the county auditor of his county in his capacity as inheritance tax appraiser when called upon by him for that purpose. He shall also represent the interests of the state in any and all proceedings under this subdivision of this chapter. * * *"

It is clear that the proceeding for the assessment of the tax is intended to be judicial in character. It is true that it is ex parte, but this is the case with many proceedings of the probate court. It will be noticed that the statute relating to witness fees is not limited in its scope to "civil actions" in the technical sense, but that it apparently extends to all judicial proceedings not criminal in character. Section 3011 G. C., which would cover the case if section 3012 did not, evidently includes non-judicial investigations.

The county auditor acts as an officer of the probate court in exercising his function as inheritance tax appraiser, sustaining substantially the same relation to that court as a referee or a master commissioner might sustain to a court of common pleas. At the same time he is a public officer whose duty it is to represent the interests of the state. He is authorized and empowered to subpoena witnesses and this may he do upon his own motion, in an effort to get at the circumstances and value of the succession, or on the precipe of the applicant at whose instance the appraisement is made, or other party. Such party, in causing witnesses to be subpoenaed, would stand in the position of a party within the meaning of section 3012 G. C.

Thus far, then, it is the opinion of this department that witnesses subpoenaed to testify before the county auditor as inheritance tax appraiser are entitled to demand the fees prescribed in section 3012 G. C. and to have such fees paid by the applicant or other interested party at whose instance they are subpoenaed; but if summoned at the instance of the county auditor, the county auditor himself must pay the fees, if demand is made. If no demand is made, the witness loses his right to claim fees under section 3012, for that section, in so far as it relates to testimony before an officer authorized to take depositions (and the county auditor is such an officer), does not provide that witness fees be taxed in the costs.

If the county auditor at his own instance has caused witnesses to be summoned and has paid their fees, he has thereby incurred an expense for which, subject to the allowance of the probate judge, he is entitled to reimbursement under the last paragraph of section 5341 G. C., as first above quoted.

It is believed that the foregoing fully covers your question.

Respectfully,

JOHN G. PRICE,

Attorney-General.

475.

COURT HOUSE BUILDING COMMISSION—CONTRACT FOR RETENTION OF 10% OF CONTRACT PRICE UNTIL ONE YEAR AFTER COMPLETION—HAS AUTHORITY TO WAIVE RETENTION OF 10% AND MODIFY SO AS TO RETAIN 5%.

A county court house building commission appointed and acting under the provisions of sections 2333 *et seq. G. C., in constructing a new court house under a contract which provides for the retention of* 10% *of the contract price until one year after the final completion and acceptance of the court house, has authority to waive the retention of such* 10% *and modify the contract relating to such provision so that only* 5% *of the contract price (as required by section* 2360 *G. C.) may be retained after the completion and acceptance of such new court house by the building commission.*

COLUMBUS, OHIO, July 16, 1919.

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

GENTLEMEN:—Acknowledgment is made of your recent request for the opinion of this department, based on the communication of Mr. C. E. Grotton, state examiner of your department. Without quoting this communication at length, it may be stated that the facts upon which the opinion is desired are as follows:

1. The contract of the new court house building commission provided for the retention of 10% of the contract price for a period of one year from and after the completion and acceptance of the new court house contracted for.

2. No payment should be made on account of this contract except upon the written certificate of the architects, certifying that such payment is due and that such payment is allowed and ordered by said building commission.

3. That said commissioners have by agreement with the contractor waived the compliance of the 10% retention clause and have agreed that this clause may be modified to the extent that only 5%. (the amount provided in section 2360 G. C.) shall be retained.

It may be observed that, as stated in your letter "the main question that we wish to have an opinion on is whether or not, when a public contract is once entered into as was done in this case, can the terms thereof be changed by agreement?"

Sections 2333 to 2366 G. C., under the head of "Building Regulations" are pertinent to your inquiry.

Section 2333 G. C. provides for the appointment of a building commission by the court of common pleas, upon the application of the county commissioners when proper proceedings have been had for the erection of a court house.

Section 2338 G. C. provides in part:

"Until the building is completed and accepted, by the building commission, it may determine all questions connected therewith and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county."

Other sections of that chapter provide for the procedure of such commission in the record of its proceedings and preparation and adoption of plans contracting for such building and for the continued supervision of such commission.

Section 2360 G. C. in part provides that the county treasurer, upon the presenta-

tion of properly certified estimates in accordance with the contract, may give "to the person entitled thereto, a warrant on the county treasurer for the amount shown by the estimate to be due, retaining 5% thereon as additional security for the faithful performance of the contract."

From the facts above stated it is apparent that the 10% retention clause is not a statutory requirement, but an additional security provision made by the building commission, and the question in its last analysis is solved by the consideration of the power of officials to waive the performance of a public contract in a matter where the waiver on the part of the commissioners will not render such contract, as modified, in violation of any statutory building regulation.

In Benedict vs. Cincinnati, 7 O. D. Rep. 261, the superior court of Cincinnati, considering a case wherein the question of the authority of municipal officers to modify a sewer contract was involved, held that to carry out a contract already entered into and to meet an emergency, the city officials had the same right and authority as individuals, as shown by the decision in that case at p. 269:

> "It is also objected that the board, under its general powers, was not authorized to make such an agreement or contract. But it is to be remembered that this agreement was made for the very purpose of carrying out a contract already entered into, and was made to meet a sudden emergency, where delay would have been fatal to the interests of the city.
>
> But there is another view of the testimony which sustains the finding of the referees. The testimony shows that after the break in the canal the plaintiff, for the reason already stated, refused to go on with the work and abandoned the contract. This left to the board of commissioners, or rather the city, the option to sue him for damages for a breach of his contract, *or to waive the breach and enter into a new contract, or a modification of the old one.* And the authorities are to the effect that the abandonment and the refusal to proceed, constitute a good consideration for the new promise of additional compensation. Monroe vs. Perkins, 9 Pick, 298; Latimore vs. Harsen, 14 Johns., 330; Rand vs. Mathers, 11 Cush., I; Dearborn vs. Cross, 7 Cowen, 48; Townsend vs. Stone Co., 6 Duer, 208; Greenleaf on Evidence, section 303; Hart vs. Lanman, 29 Barb., 217.
>
> *And this rule applies to corporations as well as to individuals.* Dillon on Municipal Corporations, section 398; Meech vs. Buffalo, 29 N. Y., 198; Bean vs. Jay, 23 M., 121."

A more recent case, State ex rel. Jewett vs. Sayre, Auditor, 91 O. S. 85, while not directly in point, indicates that county commissioners (whose position as to roads may be said to be analogous to that of the building commission to a court house) have authority to modify a building contract, where its performance is impossible by reason of the non-existence of the material required by the contract, and by analogy furnishes warrant for the proposition that if the contractor in the present case is unable on account of the abnormal building conditions, to complete his contract and to avoid an abandonment thereof, the commissioners may waive the 10% retention clause, or rather modify it by reducing the amount to be retained to the 5% requirement of section 2360, supra.

The power of a hospital building commission to waive conditions in its contracts was considered in Cin'ti. vs. Cameron, 33 O. S. 336. The general powers and duties of this commission, as fixed by law, were very similar to the court house building commission, whose contract is now under consideration. The law relating to hospitals, as stated on p. 362 of the report of that case, in part provided as follows:

> "All contracts shall be made in the name of the city, and it shall be

475.

COURT HOUSE BUILDING COMMISSION—CONTRACT FOR RETENTION OF 10% OF CONTRACT PRICE UNTIL ONE YEAR AFTER COMPLETION—HAS AUTHORITY TO WAIVE RETENTION OF 10% AND MODIFY SO AS TO RETAIN 5%.

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COLUMBUS, OHIO, July 16, 1919.

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

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1. The contract of the new court house building commission provided for the retention of 10% of the contract price for a period of one year from and after the completion and acceptance of the new court house contracted for.
2. No payment should be made on account of this contract except upon the written certificate of the architects, certifying that such payment is due and that such payment is allowed and ordered by said building commission.
3. That said commissioners have by agreement with the contractor waived the compliance of the 10% retention clause and have agreed that this clause may be modified to the extent that only 5%. (the amount provided in section 2360 G. C.) shall be retained.

It may be observed that, as stated in your letter "the main question that we wish to have an opinion on is whether or not, when a public contract is once entered into as was done in this case, can the terms thereof be changed by agreement?"

Sections 2333 to 2366 G. C., under the head of "Building Regulations" are pertinent to your inquiry.

Section 2333 G. C. provides for the appointment of a building commission by the court of common pleas, upon the application of the county commissioners when proper proceedings have been had for the erection of a court house.

Section 2338 G. C. provides in part:

"Until the building is completed and accepted, by the building commission, it may determine all questions connected therewith and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county."

Other sections of that chapter provide for the procedure of such commission in the record of its proceedings and preparation and adoption of plans contracting for such building and for the continued supervision of such commission.

Section 2360 G. C. in part provides that the county treasurer, upon the presenta-

"In this case a county in Illinois had subscribed to the stock of a railroad, and was to issue bonds in payment of the subscription, provided the work was done by a certain date. This date for completion was subsequently extended, and it was held that the county was authorized to waive this condition as to the time of completion, and that the bonds were valid."

From the general language used by the courts in these cases, they would seem to apply to the power generally of municipal corporations to waive contractual conditions, but it may be suggested that the court house building commission in this contract is not affected by the special restrictions imposed upon municipal corporations by statutes relating exclusively to contracts made by municipalities, and the case of City of Columbus vs. McCracken, et al., No. 12,821, decided without report by the supreme court, may be distinguished from the facts in the question now under consideration.

In view of the decisions of the supreme court as above shown and in consideration of the authority and discretion vested in the building commission by law, it is concluded that by appropriate procedure to secure and expediate the performance of this contract, the building commission may waive that part of its contract requiring the retention of 10% of the contract price, and so modify that part of the contract that the amount retained may be reduced to 5%, consistent with the requirements of said section 2360 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

476.

ADJUTANT GENERAL—HAS AUTHORITY TO PURCHASE GROUNDS AND BUILDINGS FOR OHIO NATIONAL GUARD.

Under section 5238 *G. C.* (107 *O. L.* 394) *the Adjutant General has authority to purchase grounds and buildings for armories, and other buildings for the purpose of drill and for safe-keeping of military property of the Ohio National Guard.*

COLUMBUS, OHIO, July 16, 1919.

HON. ROY E. LAYTON, *Adjutant General of Ohio, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent request for the opinion of this department, as follows:

"The state of Ohio is contemplating the purchase of the building known as the Camp Perry Club House and tract of land of about eleven acres, formerly owned by the Ohio State Rifle Association, which went into the hands of a receiver. The property was sold by the receiver to a trustee representing the creditors. This tract of land lies on the east of and adjoins what is known as the Camp Perry grounds or rifle range and lies between the range and Lake Erie. It is really a part and parcel of Camp Perry rifle range, and on account of its location it really ought to be taken over by the state. The building and grounds, if taken over by the state, will be used as headquarters, etc., for the purpose of drill during the encampments of the National Guard at Camp Perry and during rifle practice, etc.

I take it that the purchase of this real estate would, both from a technical and legal standpoint, come within the provisions of section 5238 of the revised military code found on page 394 of Vol. 107 of the laws of Ohio. The fundamental purpose of this section is no doubt to give the adjutant general the power to provide and purchase grounds, armories and other buildings for military purposes in general. As a matter of fact, for many years past the adjutant general, acting no doubt under the authority of this statute or similar statutes has provided for the management, care and maintenance of the grounds and buildings at Camp Perry and large sums have been expended for that purpose. The buildings and eleven acres of ground above referred to will of course be added to Camp Perry and merely become a part of the camp grounds and rifle range. The building itself would make an excellent headquarters and furnish room for a canteen such as are always found at military camps and could no doubt also be used for the safe-keeping of clothing, equipment and other military property belonging to the National Guard, especially while in camp."

Section 5, Article IX of the Constitution of Ohio, Section 5238, General Code, as amended in 107 O. L., page 394, are pertinent to your inquiry. That section of the Constitution provides:

"The General Assembly shall provide, by law, for the protection and safekeeping of the public arms."

This mandatory section of the Constitution is pertinent as it is noted that the building upon the land about the purchase of which you inquire may be used for safekeeping of military property belonging to the National Guard, as stated in your letter.

Section 5238, referring to the Adjutant General, in part provides:

"He shall provide, grounds, armories, and other buildings for the purpose of drill and for the safe-keeping of arms, * * * and other military property issued to the several organizations of the National Guard, and *may purchase or build suitable buildings* for such purposes when, in his judgment, it is for the best interest of the state so to do."

Other sections of the same act provide that he may receive gifts and donations, which shall become the state property; that he may construct armories and have power similar to the superintendent of public works in condemning and appropriating land, and in this connection section 5241 is very significant. In part it provides:

"And such land is hereby declared to be a public necessity."

Section 5247 provides for the creation of a state military fund for the purposes of state armories and maintenance of the Ohio National Guard.

Consideration of the mandatory character of section 5, Article IX (supra) and the manifest purpose of these statutes convinces this department that if sufficient money is available in the proper fund that the adjutant general is authorized in law to purchase such buildings, including incidental and necessary land in connection therewith, for armories, drill grounds and buildings for keeping military property of the National Guard.

Yours respectfully,
JOHN G. PRICE,
Attorney-General.

477.

ADJUTANT GENERAL—ASSISTANT QUARTERMASTER—ENTITLED TO WAR-TIME SALARY UNTIL PEACE TREATY APPROVED BY UNITED STATES SENATE.

Until the peace treaty is approved and affirmed by the United States Senate, the war-time salary of the adjutant general and assistant quartermaster will be legally payable: under section 5227 *G. C. as amended in* 107 *O. L.*, 392.

COLUMBUS, OHIO, July 16, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledging the receipt of your recent request for the opinion of this department as to the salary of the adjutant general and assistant quartermaster, it is noted that the question presented is, as stated in your letter, "as to when their war-time pay should cease."

Section 5227, as amended in 107 O. L., page 392, is pertinent and in part is:

> "When the National Guard is called into service the adjutant general * * * and assistant quartermaster shall receive the pay and allowance of their rank, according to those at the time prescribed for the armies of the United States * * * *until the conclusion of peace.*"

The National Guard has been called into service and it only remains to be considered if peace has been concluded.

By clause 11, section 8, article 1 of the United States Constitution, the power to declare war is vested in Congress. There is no explicit constitutional provision relating to concluding a peace. However, section 2, article 2, provides that the president

> "shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur."

While the cessation of actual hostilities, followed by the tentative peace treaty agreed upon by the peace conference, might be claimed to have ended the war, so far as actual warfare is concerned, yet no difficulty is encountered in concluding that so far as the war status relates to the question under consideration, peace has not been concluded. "The conclusion of peace," as stated in section 5227, can only be effective upon the advice and consent of the senate and until the senate so consents, you are advised that "the conclusion of peace" will not occur.

From the above it follows that the war-time salary of the officers mentioned is legally payable.

Respectfully,
JOHN G. PRICE,
Attorney-General.

478.

APPROVAL OF BOND ISSUE OF VILLAGE OF ALEXANDRIA IN SUM OF $9,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 16, 1919.

479.

APPROVAL OF BOND ISSUE OF SHAWNEE VILLAGE SCHOOL DISTRICT IN SUM OF $12,500—FINANCIAL CONDITION OF DISTRICT DISCUSSED.

COLUMBUS, OHIO, July 16, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE bonds of Shawnee Village School District in the amount of $12,500, to refund outstanding valid obligations, being 25 bonds of $500 each.

I have examined the transcript of the proceedings of the board of education and other officers of Shawnee Village School District, relative to the above bond issue, and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the bond form submitted and executed by the proper officials, will, upon delivery, constitute valid and binding obligations of Shawnee Village School District.

In approving these bonds, permit me to call your attention to the financial condition of Shawnee Village School District, revealed in the transcript, which, although not affecting the validity of the bonds in question, should be considered by the commission to the end that the state insurance fund should be securely invested.

The bonds under consideration are issued for the purpose of paying teachers' salaries and obligations contracted with certain banks and individuals to secure money for the purpose of paying salaries and other legitimate operating expenses. In other words, the board of education is under the necessity of issuing bonds to pay its current operating expenses.

The transcript shows that on October 1, 1914, bonds of the same character were issued by this district, in the amount of $8,000; that in July, 1915, bonds in the amount of $7,000 were issued for the same purpose, and that in April, 1917, bonds in the amount of $12,000 were issued for the same purpose. All of these bonds are outstanding. In addition, bonds in the amount of $25,000 for the erection of a school building are outstanding.

It is therefore apparent that this school district is unable, under the limitations of the existing tax laws, to secure sufficient income to pay its operating expenses and that it is annually under the necessity of issuing bonds to meet its current obligations. Unless the taxation laws of Ohio are amended, or the tax duplicate of this school district is increased, the continuance of this practice can only result in bankruptcy and the Industrial Commission may meet with difficulty in disposing of these bonds or in collecting the interest and principal as they fall due.

Respectfully,
JOHN G. PRICE,
Attorney-General.

480.

APPROVAL OF BOND ISSUE OF VILLAGE OF KENMORE IN SUM OF $13,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 16, 1919.

481.

BOARD OF EDUCATION—MAINTAINS SECOND GRADE HIGH SCHOOL—REQUIRED TO PAY TUITION OF ITS PUPILS IN FIRST GRADE HIGH SCHOOL FOR ONR YEAR.

A board of education maintaining or participating in the maintenance of a second grade high school, is required to pay the tuition of its resident pupils in a first grade high school for a period of but one year.

COLUMBUS, OHIO, July 17, 1919.

HON. LLOYD S. LEECH, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

> "A special school district exists in Pike township and some few years ago the township school board and the special district board united for the purpose of maintaining a second grade high school, to be supported by the township and special district as provided by law. Certain scholars who reside in Pike township school district and within three miles of the high school, as aforesaid, have been attending high school at Frazeysburg, Ohio, which is outside of the confines of this county, and are demanding that the Pike township school board pay their tuition at such school.
>
> The board wishes to know if they can be compelled to pay tuition for the scholars for a longer time than one year, the time required to complete a first grade high school course after leaving the second grade high school."

Your attention is invited to section 7748 G. C., which reads in part as follows:

> "A board * * * providing a second grade high school, as defined by law, shall pay the tuition of graduates residing in the district *at any first grade high school for one year*, except that, a board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing *more than four* miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living *more than four miles* from said high school, maintained by the said board of education to said high school. * * *."

In the question at hand you indicate that the "special school district" which is now a rural school district, has joined with the township rural school district in the maintaining of a joint high school, which is of the second grade, and is supported by the two rural districts, as provided by law. You advise that certain scholars residing in said township district are attending a high school across the county line at Frazeysburg, but that such pupils reside within three miles of the high school maintained as a joint high school by the two districts located within the confines of Pike township.

Inasmuch as the joint high school is of the second grade and the pupils in question reside within three miles of the said high school, their attendance at the Frazeysburg high school is entirely voluntary, as they are not taking advantage of the privilege of attending the high school of the second grade which is located within their district and within three miles of their respective residences. The law plainly provides that where pupils have the privilege of a second grade high school, then they are entitled to but one year of tuition at a first grade high school, which tuition shall be paid by the board of education of the district in which they reside.

It is, therefore, the opinion of the Attorney-General that a board of education maintaining or participating in the maintenance of a second grade high school is required to pay the tuition of its resident pupils in a first grade high school for a period of but one year.

Respectfully,
JOHN G. PRICE,
Attorney-General.

482.

INTOXICATING LIQUORS—APPROVAL OF SYNOPSIS FOR REFERENDUM PETITION OF HOUSE BILL No. 526 (108 O. L. 720)—PROVIDING AGAINST SALE ANDMANUFACTURE OF SAME.

COLUMBUS, OHIO, July 17, 1919.

MR. L. H. GIBSON, MGR., *The Ohio Home Rule Association, Cincinnati, Ohio.*

DEAR SIR:—You have submitted to me under date of July 9, 1919, for my certificate under section 5175-29e a synopsis to be embodied in a referendum petition against an act known as house bill No. 526 (108 O. L. 720), said synopsis being in words and figure, as follows:

"The purpose of the act known as House Bill No. 526, passed by the General Assembly of Ohio June 17, 1919, approved by the Governor June 21, 1919, and filed in the office of the secretary of state June 23, 1919, is to provide against the manufacture and sale of intoxicating liquors as a beverage and to repeal the provisions of an act to provide for license to traffic in intoxicating liquors as found in Volume 103, Ohio Laws, at pages 216-243, being sections 1261-16 to 1261-73 inclusive, of the General Code, and to repeal all other sections of the General Code inconsistent therewith.

The act provides a penalty for manufacturing, selling, furnishing or giving away intoxicating liquors as a beverage except as permitted by the act or for the keeping of a place where intoxicating liquors are manufactured, sold, furnished or given away in violation of law or constitutional amendment; and on second or subsequent offense for the abatement of said place as a nuisance or for the giving of a bond against further violation and makes the giving away of intoxicating liquors or other shift or device to avoid provisions of the act unlawful selling. It defines intoxicating liquors to include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor containing more than one-half of one per cent of alcohol by volume, and all alcoholic liquids and compounds, whether medicated, proprietory, patented or not, and by whatever name called, which are potable or capable of being used as a beverage. It excepts the manufacture, importation, exportation or sale of flavoring extracts, perfumes, toilet preparations or patent medicines sold in good faith for culinary,

flavoring, toilet or medicinal purposes which contain no more alcohol than is necessary for the purpose of extraction, solution or preservation. It excepts gifts of intoxicating liquors by a person in his bona fide private dwelling, unless such dwelling is a place of public resort. Except in case of druggists, it makes the payment of the United States special liquor tax prima facie evidence that the tax-payer is violating the state law. It makes the placing of a sign on a building announcing the manufacture, sale or giving away of intoxicating liquors prima facie evidence of an offense; also provides that the keeping of intoxicating liquors in any room, except a drugstore, or a permitted factory or bona fide private residence shall be prima facie evidence of violation of law. The act excepts the sale of alcohol or wine at retail by a regular druggist for exclusively known medical, mechanical, pharmaceutical, scientific or sacramental purposes, also the manufacture of cider and fruit juices for vinegar or for use and sale when not intoxicating as defined, also the manufacture and sale of alcohol and wine for permitted purposes by the manufacturer or wholesale druggist, providing he obtains a permit therefor and providing a record is kept of the sales. It excepts transportation of liquors to places outside the state for purposes not prohibited at the point of destination. The act requires in the sale of alcohol or wine for medicinal purposes a prescription by a reputable physician; prescription to be used but once and cancelled. It provides what the prescription shall contain; requires a record to be kept by each druggist of the kind, quantity and price of the liquors sold, the purpose for which it is sold and the name and residence of the purchaser. It provides for the inspection of said records by a certain county, state, municipal and township officers, or by persons holding their order to inspect.

The act provides that fines and forfeited bonds shall attach as a lien upon the real property in which the unlawful act was committed. It prohibits transportation and receipt of intoxicating liquors under a false name and requires the labeling of the package as to the kind and quantity of liquor and it makes the unlawful transportation and delivery of any such liquors work a forfeiture.

The act provides a penalty upon a druggist for violating the act and for a revocation of the druggist's certificate. It also provides for the prosecution of any druggist or manufacturer of alcohol or wine who violates any of the provisions of this act and the liquors seized by virtue thereof are to be used as evidence in such trial which must take place in not more than thirty days and may be continued to not more than fifteen days thereafter.

The act gives jurisdiction to any justice of the peace, police judge, mayor, municipal judge, common pleas judge or probate judge in the county, who tries the case without a jury unless imprisonment be a part of the penalty. It dispenses with information by the prosecuting attorney and indictment by grand jury. It requires leave granted by the reviewing court to file a petition in error; provides the time for filing the petition in error and provides that fines and forfeited bonds collected by the county court shall be paid into the county treasury; if enforced in the municipal court, into treasury of the municipality, or if enforced in the court of a justice of the peace, then into the treasury of the township. It provides that the cost of seizure shall be taxed with the other costs in the case.

The act repeals the license laws and other statutes inconsistent with the act."

I, John G. Price, Attorney-General of the state of Ohio, do hereby certify that

the foregoing synopsis is a truthful statement regarding the contents and purpose of said act.

JOHN G. PRICE,
Attorney-General.

Dated July 17, 1919.

483.

INTOXICATING LIQUORS—APPROVAL OF SYNOPSIS FOR REFERENDUM PETITION OF AMENDED SENATE BILL NO. 162 (108 O. L. 725)—APPOINTMENT OF PROHIBITION COMMISSIONER.

COLUMBUS, OHIO, July 17, 1919.

HON. L. H. GIBSON, *Manager Ohio Home Rule Association, Cincinnati, Ohio.*

DEAR SIR:—You have submitted to me under date of July 9th for my certificate under section 5175-29e, a synopsis to be embodied in a referendum petition against an act known as amended Senate Bill No. 162 (108 O. L. 725), said synopsis being in words and figures as follows:

> "The purpose of the act known as Amended Senate Bill No. 162, passed by the General Assembly of Ohio June 16th, 1919, approved by the Governor June 21st, 1919, and filed in the office of the secretary of state June 23rd, 1919, is to provide for the appointment of a commissioner of prohibition of Ohio and assistants to secure the enforcement of laws prohibiting the liquor traffic and to prescribe their powers and duties and to fix their compensation.
>
> The act provides for the appointment of a commissioner of prohibition by the Attorney-General with the consent of the senate for a like term with the Attorney-General, and provides for such commissioner a salary of $5,000 per annum and expenses. It gives the Attorney-General the right to remove the said commissioner for immoral conduct, inefficiency or neglect of duty upon proper charges. It provides for the appointment by said commissioner and removal at his pleasure of a deputy for each of four districts at a salary each of $3,600 and their expenses. It provides for the appointment by the commissioner and removal at his pleasure of not to exceed 16 inspectors at a salary of not less than $1,500 nor more than $2,000 each, and expenses. It provides also for the appointment of other temporary inspectors, the number not to exceed that fixed by the Attorney-General, who shall receive not to exceed $10.00 per day, and expenses. It provides that said commissioner, deputies and inspectors shall be without the classification of the civil service laws of the state.
>
> It provides for four districts—Columbus, Cleveland, Cincinnati and Toledo—and prescribes the boundaries.
>
> It provides for the office of the commissioner in the city of Columbus and makes provision for office rooms, furniture, stationery and other facilities and also for clerical help as the needs of such office demand.
>
> The act requires the commissioner and his deputies and inspectors to enforce the laws of the state having to do with the prohibition of liquor traffic and places a penalty upon any person who hinders, obstructs or interferes with the said officers or who fails to assist the officers when called upon. It requires the said commissioner or his deputies to make complaints against violators of the liquor law and institute proceedings and exempts all such officers from the giving of bonds or security for costs. It gives the commis-

sioner, his deputies and inspectors the power to serve criminal process and provides that the fees for his services shall be taxed in the bill of costs in the case, which costs, when collected, shall be paid into the state treasury.

The act gives the Attorney-General and his assistants, the commissioner, his deputies and inspectors the power to administer oaths and examine any persons they may suspect of having knowledge of any violations of the laws relating to intoxicating liquors wherever they may find such persons. It places a penalty upon any person refusing to testify or testifying falsely before said officers and it exempts persons so testifying from prosecution for violations of the laws relating to intoxicating liquors as to any matter disclosed by his testimony; nor shall such statement be used against him in any civil action, or criminal, quasi-criminal or statutory prosecution except in prosecutions for perjury.

It gives the Attorney-General, his assistants, the commissioner and his deputies and inspectors the power to summon and compel the attendance of persons before them for examination, and they may require the production of any book, paper, document or other thing under the control of such person. Each person summoned for examination shall receive the same fees as witnesses before justices of the peace, and the serving officers the same fees as sheriff.

It gives the commissioner and his deputies and inspectors the right at all reasonable hours to enter all buildings except such or parts thereof as are exclusively used as bona fide residences.

It gives the commissioner, his deputies and inspectors the power to arrest, without warrant, any person found by them violating the liquor laws and to take each person before the proper tribunal.

It gives the Attorney-General and any of the persons appointed by him under section 334 and 336 of the General Code, the power to exercise in any part of the state all the statutory powers of prosecuting attorneys, in any matter connected with the violation of the liquor laws of the state of Ohio and to have all the powers conferred by section 13560 General Code upon prosecuting attorneys.

It gives to justices of the peace, mayors, municipal courts and probate courts final jurisdiction of misdemeanors arising under the liquor laws or for the enforcement of said laws throughout the entire county.

It requires the commissioner to make an annual report to the Attorney-General on the first of June of each year and for the printing and publishing of the report.

It requires the commissioner, his deputies and regular inspectors to take and file an oath of office, and the commissioner to give a bond of $10,000, each of his deputies $5,000, each regular inspector $2,000.

It gives the commissioner, deputies and temporary inspectors the right to go armed when on duty

It provides for the payment of all salaries out of the general revenue fund of the state.

Each section of the act and every part thereof, is declared to be an independent section and part of section, and if one section or part thereof is void, it shall not affect any other."

I, John G. Price, Attorney-General of the state of Ohio, do hereby certify that the foregoing synopsis is a truthful statement regarding the contents and purpose of said act.

Respectfully,

JOHN G. PRICE,

Attorney-General.

Dated July 17, 1919.

484.

INTOXICATING LIQUORS—APPROVAL OF SYNOPSIS FOR REFERENDUM PETITION OF HOUSE BILL No. 527 (108 O. L. 716)—PROVIDE LAWS FOR ENFORCEMENT OF PROHIBITION.

COLUMBUS, OHIO, July 17, 1919.

HON. L. H. GIBSON, MGR., *Ohio Home Rule Association, Cincinnati, Ohio.*

DEAR SIR:—You have submitted to me under date of July 9th for my certificate under section 5175-29e a synopsis to be embodied in a referendum petition against an act known as house bill No. 527 (108 O. L. 716), said synopsis being in words and figures as follows:

"The purpose of the act, known as house bill No. 527, passed by the general assembly of Ohio June 17, 1919, approved by the governor June 21, 1919, and filed in the office of the secretary of state June 23, 1919, is to provide for the enforcement of laws and the constitutional amendment prohibiting the manufacture and sale of intoxicating liquors as a beverage, and to repeal the provisions of an act to provide for license to traffic in intoxicating liquors as found in Vol. 103, Ohio laws, at pages 216-243 being sections 1261-16 to 1261-73, inclusive, of the General Code, and to repeal all other sections of the General Code inconsistent therewith.

The act gives to any person the right to make a complaint before a mayor, justice of the peace, judge of the common pleas court, probate court, municipal or police court where intoxicating liquors are manufactured, sold, furnished or given away as a beverage or kept for such purpose in violation of any law or constitutional amendment, and directs the magistrate or judge to issue a search warrant, directed to any officer designated by the complainant having power to serve criminal process and to seize all liquors found upon the premises, and all implements and furniture used for the purpose complained of. It provides that the liquors, furniture and implements shall be held to be used as evidence.

It requires the warrant officer, or if he refuses it permits the complainant, to file an affidavit charging an offense under the act. It requires the affidavit for such warrant of at least two persons describing the place to be searched, the things to be searched for and alleging substantially the offense in relation thereto.

It provides that the fluids poured out to prevent their seizure when the premises are searched shall be prima facie evidence of an offense, and that the officer making the seizure set forth in his return the place of detention of goods seized.

It provides that upon conviction, the liquors shall be destroyed and upon acquittal they will be returned. Such liquors seized shall not be discharged or returned to a person claiming them by reason of an alleged insufficiency of the description, in the complaint or warrant, of the liquor or place, but such person shall be entitled to a hearing when the case is tried on the affidavit provided in section 6171 or at the hearing provided in section 6178.

It provides that the seizure officer shall post a copy of his warrant upon an uninhabited building or premises wherein liquors are seized; that the magistrate shall fix a time for the hearing which will also be posted on the building or premises and if no claimant appears the liquor shall be destroyed. It provides that a warrant shall not be issued to search an occupied private residence unless it, or some part of it, is used as a store, shop, hotel or boarding house, or unless it is a place of public resort.

It provides that the applicant for the warrant may accompany and assist such officer. It deprives the owner of liquors seized on the right of replevin, or in cases of conviction, to damages for their seizure. It provides for the search without a warrant of any place by the marshall, sheriff or other criminal law officer if he has personal information that intoxicating liquors are kept with the intention of violating the law, and such officer shall seize them and any persons in charge thereof or aiding in any way in carrying on the business, and bring said persons before a court of competent jurisdiction.

It repeals the liquor license laws and other statutes inconsistent with the act."

I, John G. Price, Attorney-General of the state of Ohio, do hereby certify that the foregoing synopsis is a truthful statement regarding the contents and purpose of said act.

Respectfully,
JOHN G. PRICE,
Attorney-General.

485.

BOARD OF EDUCATION—WHEN MAP FILED WITH COUNTY AUDITOR TRANSFER OF TERRITORY IS THEN REQUIRED TO BE MADE FOR TAXING PURPOSES—TIME OF TRANSFER CAN NOT BE POSTPONED.

Under section 4692 G. C., where a county board of education transfers territory from one school district to another, and a map has been properly filed with the auditor of the county, that official is required by law to transfer the territory for taxing purposes at the time of such transfer and regardless of any listing day.

COLUMBUS, OHIO, July 18, 1919.

HON. P. H. WIELAND, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

"The county board of education of Morrow county has made several transfers of territory during the months of April and May. These transfers have been from rural school districts to adjoining village school districts. In arranging the tax duplicates the auditor of the county refuses to transfer this territory for taxing purposes this year but holds that it shall stay in the old district until the tax duplicates are made up next year. His theory is that any property transferred after listing day shall not be transferred until the next year."

It is presumed that the transfers of territory in question, which you say took place during the months of April and May, were made under section 4692 G. C., which reads in part as follows:

"The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is

filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, * * *. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

It will be noted that, from the language of the above section, such transfer is not effective until a map is filed with the auditor of the county, showing the boundaries of the territory transferred, and in fact such transfer is held up and of no effect until such map is filed.

It is pertinent to here ask as to why the law makes it mandatory that this map should be filed at the particular time of the transfer and that such transfer is held up in its consummation by the proper filing of the map in question, showing boundaries. It seems to be the clear intent of the law that this map must be filed with the auditor at the time of the proposed transfer, in order that such official can at that time transfer the territory for taxing purposes on his duplicate, and not at such later period as he may see fit to do so.

You say the auditor of your county refused to transfer this territory for taxing purposes this year, but holds that it shall stay in the old district until the tax duplicates are made up for next year, his theory being that property transferred after listing day shall not be transferred until the next year. In order to show the fallacy of this proposition, it is only necessary to mention that as soon as the transfer is carried out by the board of education, from that moment the people of the transferred territory begin to receive the service for which they were transferred, and it must follow that if they receive the service in a district to which they were transferred, seemingly then they should pay their share, from and after that date, of the necessary taxes required to maintain such service of which they receive their proportional part.

It is a clear principle of law that the taxes necessary for the maintenance of the schools in a district shall be spread uniformly over the whole of the district, and it has so been held by this department in prior opinions. If the auditor waited until next year to make this transfer upon the tax duplicates of the districts in question, then it would be apparent that the maintenance of the schools in the particular district or districts was not kept up by taxation laid uniformly upon the whole of the district or districts.

It is, therefore, the opinion of the attorney general that under section 4692 G. C., where a county board of education transfers territory from one school district to another, and a map has been properly filed with the auditor of the county, that official is required by law to transfer the territory for taxing purposes at the time of such transfer and regardless of any listing day.

Respectfully,
JOHN G. PRICE,
Attorney-General.

486.

BOARD OF EDUCATION—CENTRALIZATION MUST BE SUBMITTED TO WHOLE OF RURAL SCHOOL DISTRICT—DISTINCTION BETWEEN CENTRALIZATION AND CONSOLIDATION CONSIDERED.

1. *The question of centralization of schools must be submitted to the whole of a rural school district and not to a part of such district.*

2. *Centralization is the bringing together of all the schools of a township or rura district while consolidation is the combining of two or more schools brought about through suspension. Questions of centralization of schools are governed by sections* 4726 *and* 4726-1 *G. C.; consolidation of schools is accomplished under section* 7730 *G. C.*

COLUMBUS, OHIO, July 18, 1919.

HON. A. V. BAUMANN, JR., *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts'

> "The district is divided by the Sandusky river, with considerable territory on each side. On one side of the river they want to build a centralized school building, which will include high school. On the other the consolidation of the schools so that a single building will care for all pupils through the elementary grades is desired.
>
> Can part of a rural school district be centralized? If so, what is the procedure? What is centralization? Can it be distinguished from consolidation? What is the proper procedure in submitting the above proposition to the voters?"

In reply to your first question asking whether a part of a rural school district can be centralized, it is advised that in order to centralize schools the entire district must vote thereon and no part of a rural school district can centralize its schools without joint action and consent of all the electors in the rural school district.

In reply to your question as to what is centralization, and as to whether it can be distinguished from consolidation, it is advised that centralization is the case where all the schools of a rural school district take action towards centralizing their educational activity, while consolidation is where two or more schools join together in their educational activity and hence a lesser amount of territory is usually involved in consolidation than in centralization.

The section which governs centralization of a rural district is section 4726 G. C., which reads as follows:

> "A rural board of education may submit the question of centralization,and upon the petition of not less than one-fourth of the qualified electors of such rural district or upon the order of the county board of education, must submit such question to the vote of the qualified electors of such rural district at a general or a special election called for that purpose. If more votes are cast in favor of centralization than against it, at such election, such rural board of education shall proceed at once to the centralization of the schools of the rural district, and, if necessary, purchase a site or sites and erect a suitable building or buildings thereon. If, at such election, more votes are cast against the proposition of centralization than for it, the question shall not again be submitted to the electors of such rural district for a period of two years, except upon the petition of at least forty per cent. of the electors of such district."

Consolidation of schools is usually accomplished under section 7730 G. C., as amended in 107 O. L., 638, which reads as follows:

> "The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide, and in such rural school district shall provide, for the conveyance of all pupils of legal

school age, who reside in the territory of the suspended district, to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and all of the pupils of legal school age, who reside in the territory of the suspended district, transferred to another school or schools when the county board of education so directs the board of education of the village or rural district in which said school is located. Notice of such suspension shall be posted in five conspicuous places within such village or rural district by the board of education of such village or rural district within ten days after the county board of education directs the suspension of such schools; provided, however. that any suspended school as herein provided, shall be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of said suspended district shows twelve or more pupils of lawful school age. Any school district that is entitled to state aid for salary of teacher according to provisions of sections 7595 and 7595-1 when such schools are not consolidated, or centralized, shall receive the same amount of state aid after such schools are consolidated or partly consolidated, but to be applied to the cost of transportation of pupils to consolidated school, or schools, or for salary of teachers and the transportation of pupils."

It often occurs that the very thing accomplished by centralization is later accomplished by processes of consolidation under section 7730 G. C. and a board of education, under such section, has clear authority to suspend those schools which are no longer advantageous to operate. It follows, therefore that after a sufficient number of schools have been discontinued and transportation provided to a neighboring district school, in many instances the district will be practically centralized without having taken advantage of section 4726 G. C. Upon this point the Attorney-General said in opinion No. 1377, Annual Report of the Attorney-General for 1913:

"The abolishment of all the schools in all the subdistricts by virtue of section 7730 and 7731 G. C., the establishment of new schools and the conveyance of pupils to these schools, operate as a centraliztion of the schools of the township, provided that no election has been held upon the question of centralization which resulted adversely and provided that no petition may be filed for an election according to law."

Attention is invited to the fact that section 7730 G. C. has been frequently amended, the present law being the amendment adopted in 107 O. L., 638, but the present general assembly, has amended this section twice in separate acts, which are H. B. 348 and H. B. 406, the latter of which is effective August 18th and the former of which is effective September 22nd. So that, whatever may be done by the local board of education concerned under section 7730, the law that is in effect at that particular date should be the one under which the board should operate.

Answering your question as to what is the proper procedure in submitting the question of centralization, attention is invited to section 4726, which provides that the rural board of education may itself submit the question of centralization to the qualified electors of the rural district and this is done in the usual manner by making the proper request of the deputy supervisors of elections for the county that an election be called in such rural district upon the question of centralization of schools and if more votes are cast in favor of centralization than against it, such rural board of education shall proceed at once to the centralization of the schools of the rural district and if necessary purchase a site or sites and erect a suitable building or buildings

thereon. This means that it is not entirely necessary that all the pupils of the entire rural school distict be brought to one central building for the whole district, for there can be more than one school building in a centralized school district, as has been previously held in the opinion of the Attorney-General rendered heretofore. Thus it would be entirely possible in Sandusky township, which you say is divided by the Sandusky River, to have the schools of the township centralized and have a school building on each side of the river and still be within the law.

Should the board of education of the township in question care to operate under section 7730, there is ample authority to suspend any or all of the schools in the rural districts by the board and then provide transportation to a public school in the rural district. As to whether the board desires centralization under section 4726 or desires consolidated schools under section 7730, is a question for the board of education to decide.

It is therefore the opinion of the Attorney-General that:

1. The question of centralization of schools must be submitted to the whole of a rural school district and not to a part of such district.
2. Centralization is the bringing together of all the schools of a township or rural district while consolidation is the combining of two or more schools brought about through suspension. Questions of centralization of schools are governed by sections 4726 and 4726-1 G. C.; consolidation of schools is accomplished under section 7730 G. C.

Very respectfully,

JOHN G. PRICE,
Attorney-General.

487.

OIL INSPECTION LAW—APPLICABLE TO OILS AND GASOLINE BROUGHT INTO STATE FOR USE WITHIN STATE WITHOUT REGARD TO PLACE OF SALE—CONSTITUTIONALITY OF LAW DISCUSSED.

The oil inspection act (sections 844 to 871 G. C. inclusive) is applicable in its provisions for inspection and fees to oils and gasoline brought into the state for use within the state, without regard to the place of sale of such products.

Said act since its amendment in 1915, whereby the inspection fees were reduced, is not subject to the infirmity of the original act with respect to excessive inspection fees, and it is held that the act in its present operation is constitutional.

COLUMBUS, OHIO, July 18, 1919.

HON. CHARLES L. RESCH, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for a written opinion as to liability for inspection fees of owners of oils and gasoline shipped into Ohio from a point without the state.

You submit with your correspondence statement of facts of certain cases where inspections have been made and payment of fees refused, on the ground that the oil or gasoline was sold at a point outside of the state of Ohio and that its shipment into the state does not render the owner amenable to the oil inspection laws of this state.

You also submit a communication from C. D. Chamberlain, general counsel of the National Petroleum Association, in which it is contended that there is no liability

for the inspection fees where the oils or gasoline are bought outside of Ohio for use in the state of Ohio, and citing the case of Castle vs. Mason, 91 O. S. 296, in support of his position.

You summarize your statements with the inquiry as follows:

> "In rendering your opinion I wish you would give me the exact status of persons other than the government who receive shipments from without the state."

The oil inspection act as now in force comprises sections 844 to 871 of the General Code, and the sections directly pertinent to your inquiry are perhaps sections 850, 854 and 865 G. C.

Section 850 provides a graduated scale of fees chargeable for oil inspections, the same to be paid into the state treasury.

Section 854 G. C. provides:

> "Before being offered for sale to a consumer for illuminating purposes within this state, all mineral or petroleum oil, and any fluid or substance, the product of petroleum, or into which petroleum or a product of petroleum enters or is a constituent element, whether manufactured within this state or not, shall be inspected as provided in this chapter."

Section 865 G. C. provides in part:

> "Gasoline, petroleum, ether or similar or like substances, under whatever name called, whether manufactured within this state or not, having a lower flash test than provided in this chapter for illuminating oils, shall be inspected by the state inspector of oils. * * *"

Said section further provides that the same inspection fee shall be charged as for inspection of oils and a certificate of inspection attached to the container.

The provisions of the oil inspection law are substantially the same as the provisions of its predecessor in force at the time the case of Castle vs. Mason was presented to the courts, the only material alteration made in the amendment of the law as now in force being a reduction of the fees provided for inspections.

With respect to the scope of operation of the law in its application to oils brought into the state in interstate commerce, the supreme court, in the Castle vs. Mason case, in referring to the contention of the state that the act was applicable only to products sold in this state, said:

> "This is too narrow a construction of the facts pleaded and of the scope of the Ohio act. The act is not in terms made to apply to intrastate products, applies generally to any and all oils, gasoline, etc., 'whether manufactured in this state or not.' The language employed would require inspection of products shipped into the state, and the features of the inspection would necessarily, though indirectly, impose a burden upon interstate commerce."
>
> Castle vs. Mason, 91 O. S. 296.

This judicial interpretation of the scope of the law may be said to be determinative of that question and therefore I advise that the act in question by its terms is applicable to oils and gasoline brought into the state, for use within the state, without regard to the place of sale.

In fact it was with reference to the operation of the oil inspection law as applied to interstate commerce that the original act was held to be violative of the constitution in the Castle vs. Mason case.

The particular in which the original act was found to be invalid was with respect to the extent of the fees provided for inspections, and since the amendment of the law has reduced the fees to one-half that provided in the original act, the fault in the original act, the fault in the original law no doubt has been removed, which was the legislative purpose and intent in the amendment of the law.

It was pointed out in the Mason case, supra, that Article I, Section 10, Clause 2 of the Federal Constitution provides:

> "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The court determined from the annual reports of the department of oil inspection covering the years 1907 to 1913 that the fees provided were not only excessive but continued from year to year yielding increasing net revenue, which was said to show the operative effect of the inspection act to be in direct violation of Article I, Section 10 of the U. S. Constitution. In the seven years of operation of the law as considered by the court, it was shown to have produced a net receipt above disbursements in the amount of $395,876.00 and the court said:

> "Under these circumstances the court feels warranted in holding that the resultant operation of the law is in direct and flagrant conflict with the Federal Constitution."

I have examined the annual reports of the department of oil inspection disclosing the resultant operation of the amended act, which reports disclose that in the first year of its operation there resulted a deficit of over $2,000 and that in the years 1916 and 1917 there was a small excess in receipts over disbursements for each of said years, while for the year ending June 30, 1918, there was a substantial increase in the excess of receipts over disbursements, which fact may have been due to abnormal conditions during said year.

The supreme court in the Mason case, supra, pointed out that

> "It is not necessary that the legislature determine with exact nicety the amount of the inspection charges required to carry its purpose into execution. This is manifestly impossible owing to the varying fluctuations of trade. Mere excess in net surplus revenues is of itself no warrant in disturbing the law, nor would we feel disposed to hold that a flagrant excess in a single year over the expenses would invalidate it."

The test seemed to be regarded and expressed by the court as follows:

> "It may be subject to judicial attack if the inspection charges are so unreasonable and disproportionate to the service rendered as challenge the good faith of the law."

From the reports of the department of oil inspection covering the operation of the amended act as now in force. I am not able to conclude that there is any such excess in the proceeds of the fees chargeable, over and above expense of administration of the law, as to render the act void within the reasoning of the court in the Mason case, nor the holding by the Supreme Court of the United States in the case of D. E. Foote & Co. vs. Stanley, 232 U. S., 494, which was followed by our Supreme Court in the Mason case.

In the case of D. E. Foote & Co. vs. Stanley, the United States Supreme Court said:

"Inspection necessarily involves expense, and the power to fix the fee, to cover that expense, is left primarily to the legislature, which must exercise discretion in determining the amount to be charged, since it is impossible to tell exactly how much will be realized under the future operations of any law. Beside, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fees exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately on application, because of the presumption that the legislature will reduce the fees to a proper sum."

I therefore advise that the owners of oil shipped into Ohio for use in this state are liable for the inspection fees provided by the oil inspection act as amended and now in force, and that the fees provided are not shown to be so disproportionate to the expense incident to the administration of the law in its operation as to render the act unconstitutional.

Respectfully,
JOHN G. PRICE,
Attorney-General.

488.

ROADS AND HIGHWAYS—CONSTRUCTION OF HOUSE BILL 162 (108 O. L. 478)—(BUSB-FOUTS ACT)—STATE LEVY GOES INTO IMMEDIATE EFFECT—OTHER LEVIES ARE SUBJECT TO REFERENDUM.

An act which amends several sections of the General Code is subject to the referendum by the General Code sections so amended, rather than by the formal sections of the act itself.

House Bill No. 162 (108 *O. L.* 478) *amending various sections of the highway law is in general subject to the referendum and does not go into effect until ninety days after it was filed in the office of the secretary of state.*

The amendment therein of section 1230 G. C. constitutes a law providing for a tax levy and went into immediate effect.

The amendment therein of section 1231-2 *G. C. is so intimately related to the amendment of section* 1230 *that it also went into immediate effect.*

The amendment therein of section 1222 *G. C. so as to authorize county commissioners to levy a tax at the rate of one and one-half mills instead of one mill, as formerly, for the purpose of paying the county's share of a state road improvement, and taking such one and one-half mill levy in part outside of the limitations of the Smith one per cent law is not a "law providing for tax levies." This question is doubtful and the conclusion is reached on the principle of strict construction of exceptions to the reserved right of the referendum. Accordingly, this section will be held not effective until the expiration of ninety days from and after the date of filing in the office of the secretary of state.*

COLUMBUS, OHIO, July 18, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Careful consideration has been given to the recent request of the commission for the opinion of this department, which is as follows:

"The commission assumes that under the decision of the supreme court

of Ohio, in the case of State ex rel. vs. Roose, 90 O. S. 345, the provisions of sections 1222, 1330 and 1231-2 G. C., as amended by H. B. No. 162 (108 O. L. 478), filed in the office of secretary of state May 28, 1919, relating to the levy of taxes, became effective upon the date of such filing. If this assumption is correct the commission desires to inquire whether, under the second paragraph of section 1222 G. C., the county commissioner may, in the event of less than one and one-half mills being levied, place more than one mill thereof outside of the maximum limitations and whether they can place less than one-half mill thereof inside such limitations."

It is understood that the commission desires the advice of this department as to the correctness of the assumption referred to in the first sentence of the above inquiry So far as section 1230 of the General Code as amended by the act referred to is concerned, the decision cited is directly in point. The former section carrying this number provided for the levy of a tax on the grand duplicate of the state at the rate of three-tenths of one mill. This provision is repealed and a levy of five-tenths of a mill is made by the amended section. The levy is direct and in fact is exactly the same kind of a levy as that involved in the case cited.

For perhaps slightly different reasons, section 1231-2 must be deemed to have gone into immediate effect. The original section bearing this number into immediate effect. The original section bearing this number made the three-tenths mill levy one in addition to all other levies and unlimited by any tax limits. The function of, this section was to make clear what otherwise would have been left to inference, namely the effect of the Smith law limitations upon the subsequently levied state highway tax. While sections of this character are, as will hereinafter be pointed out, not universally within the class of "laws providing for tax levies" mentioned in article II section 1d of the constitution, yet the provision of section 1231-2 is so closely related to that of section 1230 that it is the opinion of this department that both take effect at the same time.

There is another reason which points in the same direction: original section 1231-2, as has been mentioned, took the three-tenths mill levy outside of the limitations of the Smith law. The main legislative motive embodied in this original section was that the state highway levy should be outside of the Smith law limitations rather than that a levy of three-tenths mill, as such, should be outside of such limitations. That is to say, it would have been possible for the legislature to have expressed the idea embodied in that section without using the words "of three-tenths of one mill," which were descriptive merely and were not intended to define in terms of mills the extent to which the fifteen mill limitation of the Smith law was to be exceeded for road purposes; so that the full scope of the legislative intent could have been expressed by the language "the annual levy on all the taxable property within the state provided for in this act shall be in addition, etc." Had that been the form of original section 1231-2 it would not have been necessary to amend it in the act of 1919. That being the case, the amendment is one of form only rather than of substance. So that no substantial right of the people under the initiative and referendum is denied by giving effect to this section at the time when section 1230, to which it relates, goes into effect, which certainly would promote convenience.

The amendment of section 1222 presents an entirely different question. For the purpose of getting in mind exactly what that question is the following quotation from section 1222 as previously in force and the same section as amended will be made.

Section 1222 as amended, 107 Ohio Laws, 132:

"For the purpose of providing a fund for the payment of the county's proportion of the cost and expense of the construction, improvement, maintenance and repair of highways under the provisions of this chapter, the county

commissioners are hereby authorized to levy a tax, not exceeding one mill, upon all taxable property of the county. Said levy shall be in addition to all other levies authorized by law for county purposes, and subject only to the limitation upon the combined maximum rate for all taxes now in force. * * *"

Section 1222 as amended by House bill No. 162:

"For the purpose of providing a fund for the payment of the county's proportion of the cost and expense of the construction, improvement, maintenance and repair of highways under the provisions of this chapter, the county commissioners are hereby authorized to levy a tax, not exceeding one and one-half mills, upon all the taxable property of the county. Said levy shall be in addition to all other levies authorized by law for county purposes, but subject, however, to the extent of one-half mill thereof, to the limitation upon the combined maximum rate for all taxes now in force. The remaining one mill of said levy so authorized shall be in addition to all other levies made for any purpose or purposes, and the same shall not be construed as limited, restricted or decreased in amount or otherwise by any existing law or laws. The proceeds of such levy shall be used solely for the purpose of paying the county's proportion of the cost and expense of constructing, improving, maintaining and repairing inter-county highways and main market roads or parts thereof in co-operation with the state highway department or the federal government or both; and the funds produced by such levy shall not be subject to transfer to any other fund, either by order of court or otherwise.

The county commissioners of any county in which less than one and one-half mills is levied in any year under the provisions of this section shall within the above limitations determine what part of such levy shall be subject to the limitations upon the combined maximum rate for all taxes now in force and what part of such levy shall be outside such limitation and unrestricted by any existing law or laws."

* * * * * * * * * * * * *

Both sections contain a paragraph authorizing the making of a township levy which is unchanged.

Two statements may be made of this section:

1. In its original as well as in its amended form it is not self-executing; it does not itself levy a tax; it merely grants authority to the county commissioners to make a levy.

2. The only changes made in the course of amendment relate to the extent of the authority granted; no new tax is authorized; the limitations are merely altered. The former section imposed the following limitations:

(1) Of one million the amount of the specific levy.

(2) Of fifteen mills on the amount of the levy together with all other levies in a given taxing district, exclusive of those exempted from the fifteen mill limitation.

The amended section imposes the following limitations:

(1) Of one and one-half mills on the specific levy.

(2) Of fifteen mills as to one-half mill of the specific levy operative as above described.

(3) Of one mill on the rate of the specific levy in excess of the fifteen mill limitation.

For the purpose of analyzing the effect of these changes with a view to determining whether or not they make the section a "law providing for tax levies," let us at the outset eliminate the first change from consideration. That is, let us suppose that the rate of the levy for the purpose specified (which is the same under both the old and the new law) had remained unchanged in process of amendment, so that the only change had been to provide that in whole or in part the levy should be outside of the fifteen mill limitation.

Such a change would be merely a change in tax limitations—in real effect a change in what is popularly known as the Smith law. As such, it would come squarely within the decision in State ex rel. vs. Milroy, 88 O. S. 301, referred to in a recent opinion to the commission. That case may be taken as authority for the statement that a law altering the limitations of the Smith law is not a law providing for tax levies; rather it is a law providing for limitations on tax levies, which is an entirely different thing.

So far, amended section 1222 has been considered as if it were a "law" within the meaning of the constitution only to the extent that it may have changed the pre-existing law embodied in the same section. This statement is believed to be correct. It is a fundamental principle that where a new law re-enacts a whole section for the purpose of amendment, introducing new matter or striking out old matter, the unchanged portion of the section is taken to have been the law all the time. So that it is only with respect to the changes made that the new law speaks from the date of its effectiveness.

See State ex rel. Durr vs. Spiegel 91 O. S. 13.

By an analogous course of reasoning it is submitted that it should be held that an act amending a section of the General Code which originally may have provided for a tax levy but also provided for some other subject such as limitations on tax rates and which changes the original section without making any new provision for tax levies but in some other respect is not itself a law providing for tax levies; rather it is a law amending a previous law providing for tax levies in some respect other than making provision for tax levies.

Upon these principles then it is the opinion of this department that the fact that the act of May 28 1919 amends section 1222 so as to repeal the authority of the commissioners to make a levy for a particular purpose which authority previously existed and to change the application of the Smith law to such levy does not make the section if it may be separately considered a "law providing for tax levies."

A more difficult question arises when we take account of the fact heretofore eliminated from consideration that the limitation on the specific levy is raised by the new section from one mill to one and one-half mills. This question may be considered from two angles of view. In the first place the authority to levy being present in the law before its amendment, and the only change being in the limitation on that authority expressed in terms of rate, is the case different from that already supposed, and does not State ex rel. vs. Milroy supra apply as well to this change as to the other? In other words it is still the same levy for the same purpose that the commissioners are authorized to make; the levy itself is not changed, for it need not have amounted to one mill under the old law; it did not levy a tax but merely granted authority to levy subject to the limitation that the levy made by the commissioners should not exceed one mill.

Putting it in another way: Suppose the subject matter of the section were divided into two sections; one granted authority to the commissioners to levy a tax; the other contained a proviso to the effect that the tax levied under the first section should not exceed one mill. Then suppose an amendment to the second section, striking out the phrase "one mill" and inserting "one and one-half mills," would the law making this change be a "law providing for tax levies:" It would seem that the answer to this question should be clearly in the negative.

However it is perhaps reasonable to consider the increase from one mill to one

and one-half mills to be in the nature of new authority to levy to the extent of a half mill; so that to this extent the new section may be regarded as a law authorizing the county commissioners to levy for a particular purpose on particular property a tax not greater than half a mill in rate. Such a view would raise squarely a question which is difficult of solution, but which may as well be considered in this connection as in any other in which it is likely to arise. That question may be put as follows:

> Suppose a law grants authority to the proper officers of a local subdivision to levy taxes for a specified purpose on the grand duplicate of the subdivision; is such a law a 'law providing for tax levies' which under article II section 1d of the constitution is to go into immediate effect.

This question has never been determined in this state.

However in State ex rel. vs. Milroy supra we have something very closely approximating a definition of a "law providing for tax levies" in the following quotation:

> "The general assembly did not in this act impose a tax stating distinctly the object of the same nor did it fix the amount or the percentage of value to be levied nor did it designate persons or property against whom a levy was to be made. * * * The act cannot be said to be one 'providing for tax levies' within the meaning of those words as used in section 1d of article II of the constitution."

In section 1222 no tax is directly imposed. The section grants authority to the commissioners to levy a tax but it does not execute that authority in and of itself. Neither does the act fix the amount or the percentage of value to be levied; it leaves that to the local authorities merely prescribing certain limits beyond which they may not go.

An act of the type imagined would have the other essentials mentioned in this definition. It would state distinctly the object of the tax authorized to be levied and designate the persons or property against whom the levy was to be made.

It is true that section 5 of article XII of the constitution, which the supreme court seems to have had in mind in framing the above definition, provides that:

> "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

The latter part of this section of the constitution is certainly intended to be as broad as the first part of it. That is, the word "imposing" used therein must be understood as meaning "in pursuance of which" a tax "is levied." So that for the purposes of article XII, section 5 of the constitution a law "imposing a tax" is a law in pursuance of which a tax may be levied, whether by local authority or otherwise. Therefore, it may be that within the scope of the court's definition an act of the kind imagined for the purpose of the present discussion would be one which "imposed" a tax. Nevertheless, it would still lack the one essential element of failing to fix the amount or percentage of value to be levied. What it does, as previously stated, is to fix a limitation beyond which the levy shall not go.

At the very least, the question now under discussion as applied to a law of the type imagined would be very doubtful. In view of such doubt what should be the attitude of the administrative officers of the state? It seems to me that that attitude ought to be one of extreme conservation in the interpretation of article II, section 1d of the constitution. We have here an exception to the reserved right of the people to exercise the power of the referendum. Certainly it is subject to a strict

construction. Certainly, too, the supreme court of this state when called upon to construe it has given it such a strict construction; for in State ex rel. vs. Milroy, supra, that court held a law but slightly different from the new law introduced by the amendment of section 1222 to be not within the exception, and in State ex rel. vs. Roose, referred to in your inquiry, the court limited what is even the natural import of the words used in article II, section 1d so as to interpret the section as if it read "sections of laws providing for tax levies" instead of "laws providing for tax levies," as it actually does read.

Under all these circumstances, the only safe and proper course for the administrative officers of the state is to construe the phrase "providing for" strictly rather than liberally, and to hold that no law comes within the scope of the exception thus created which is not self-executing as to the levy to which it relates. In other words, without a judicial determination of the question this department feels unable to advise that a law authorizing local authorities, like county commissioners, township trustees and municipal councils, to levy taxes for a particular purpose is a law "providing for tax levies." Accordingly the present advice of this department is that such a law should be regarded as subject to the referendum and not effective until after the expiration of ninety days from and after the time of filing it in the office of the secretary of state.

So far as section 1222 is concerned, of course, there are other considerations previously referred to which make it extremely doubtful that the amendment made by the section could even be considered as if it were a new law authorizing a particular tax levy for some particular purpose. Without repeating what has been previously said along this line, but merely in amplification thereof, it is now pointed out that the new matter in section 1222 as amended in nowise specifies the object of the tax to which the amended section refers nor the property upon which it shall be levied. The only new thing is a change in the limitation on the specific rate; so that it is only by regarding that changes as if it were new authority to levy for the designated purpose to the extent of the increase authorized to be levied that the question last discussed is even raised. For this reason the department advances with even greater confidence than would otherwise be the case the view that the law of 1919, in so far as it amends section 1222 of the General Code is not a "law providing for tax levies."

In the preparation of this opinion one important consideration not previously mentioned has not been overlooked. As suggested in your letter, State ex rel. vs. Roose, cited by you, holds that though a law as a whole may be subject to the referendum, if it contains a section which provides for a tax levy such section may go into immediate effect. As previously stated, this rule constitutes a strict interpretation of section 1d of article II of the constitution. It authorizes us, as it were, to separate a law into sections to determine whether or not any part of it goes into immediate effect. Thus far it has been assumed and held that the General Code sections amended in the act of May 28, 1919, are "sections" within the meaning of this rule. The rule itself is derived from reading section 1d of the article in connection with section 1c thereof, which provides that referendum petitions may be filed as against

> "any law, section of any law or any item in any law appropriating money passed by the general assembly."

The question is as to what is meant by the phrase "section of any law" as used in this context and adapted to section 1d by the supreme court in the case cited. For while sections 1222 and 1230, for example, are sections of the General Code, they are not, strictly speaking, sections of house bill No. 162. That bill, strangely enough contains but three sections, numbered respectively, section 1, section 5 and section 6. Section 1 provides that certain sections of the General Code be amended and certain supplemental sections be added "to read as follows." Then follow numerous

General Code sections quotes in their amended form. Section 5 directs that the "sections of this act and parts thereof" shall be regarded as "independent sections and parts of sections," etc. Section 6 repeals the original sections amended.

The view might be taken that there are only three sections in this law for referendum purposes; so that "section 1" would have to stand or fall as a "law providing for tax levies" as an entirety. From this it might be argued, on the one hand, that because one provision of it, viz.: amended section 1230 G. C. admittedly provided for a tax levy the whole section would go into immediate effect. The converse might also be argued, viz.: that because the provision for a tax levy in section 1 is so small a part of it, so that its paramount characteristics might partake of another nature, none of "section 1" of the act—not even sections 1230 and 1231-2 is to go into immediate effect. Just enough doubt is raised by this suggestion to make even the opinion heretofore given respecting the immediate effectiveness of sections 1230 and 1231-2 one with respect to which some reservation may be made. Indeed it would be well if the whole question could be authoratively settled in the courts. However, it is the opinion of this department that the phrase "section of law" as used in the initiative and referendum provisions of the constitution is to be construed in connection with section 16 of the same article of the constitution, which provides in part that:

> "no law shall be * * * amended unless the new act contains the * * * section or sections amended, and the section or sections so amended shall be repealed."

In other words, the word "section" as used in article II, section 1c and as understood according to the judicial interpretation thereof in article II, section 1d should be held to refer to the section or sections amended when the act is an amendatory act. Any other interpretation would, it is believed, defeat the purpose of the referendum on sections of laws, for by far the greater bulk of the laws passes by the general assembly take the form of amendments to existing Code sections. They most frequently have but one or two sections, an amending section and a repealing section—that is, they have but these two sections in the one sense suggested; but in the typical section 1 will be found very frequently several sections of the General Code amended "to read as follows." The framers of the initiative and referendum amendment and the people who voted for it could hardly have intended to limit the right to file a referendum petition against "any section of any law" to those cases in which the law is of the exceptional type which contains numerous consecutively numbered sections. For this reason it is the opinion of this department that where an amendatory law contains two "sections," in one of which there are re-enacted in their amended form numerous sections of the General Code, the right to file a referendum petition exists as to the various Code sections thus amended.

To be sure some technical difficulties exist. For eaxmple, the typical "section 1 of a bill of the type under discussion will set forth the sections amended, and the typical "section 2" will repeal the original sections mentioned in section 1. Suppose a referendum petition is filed against a Code section merely and the section is defeated, what would be the effect of such vote of the electors upon the repeal of the original section? Technically, it might be argued that the result would be that the entire section, both in its original and in its amended form, will be expunged from the statutes. It is believed, however, that the courts would not be so technical in working out the practical operation of the referendum, but would hold that in such case the vote of the people would have the effect of destroying the repeal of the section by the typical "section 2" of the bill, though no referendum had been filed against that section. Indeed, such a holding would be the only way in which it would be possible to give any practical operation in the great majority of cases to the right to file a referendum petition against a "section of a law."

The foregoing conclusion makes it unnecessary for me to answer your inquiry respecting the interpretation of section 1222 as amended at this time.

Respectfully,
JOHN G. PRICE,
Attorney-General.

489.

MUNICIPAL CORPORATIONS—NON-CHARTER CITY—MAY CHARGE FEES TO RESIDENTS FOR COLLECTION OF GARBAGE.

The officers of a non-charter municipality, acting under a legally enacted ordinance providing therefor, may charge reasonable fees to the residents of the municipality for the collection of garbage.

COLUMBUS, OHIO, July 18, 1919.

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

GENTLEMEN:—Acknowledging the receipt of your request for the opinion of this department, it is noted that, as stated in your letter, the question is "may the officers of a non-charter municipality legally charge fees to the residents of the municipality for the collection of garbage?"

It is also noted that you call attention to section 3649 G. C.

While your question relates to officers charging the fees concerned, it is assumed for the purpose of this opinion that such officers are acting under a regularly enacted ordinance.

Bearing upon the powers of municipal corporations in such matters, sections 3646, 3649 and 3809 G. C. are pertinent.

Section 3646 of the chapter enumerating the general powers of municipal corporations, generally empowers municipal corporations to provide for the public health, to secure the inhabitants of the corporation from the evils of contagious, malignant and infectious diseases.

Section 3649 of the same chapter also empowers such corporations " to *provide* for the collection and disposition of * * * garbage * * * and to establish maintain and regulate plants for the disposal thereof."

Section 3809, more special in its nature, provides that:

> "The council of a city may authorize * * * a contract with any person * * * for the collection and disposal of garbage in such corporation."

It will be seen that sections 3646 and 3649 are general grants of power. Section 3616 of the same chapter provides that such corporation shall have the general powers enumerated in that chapter, and "council may provide by ordinance or resolution for the exercise and enforcement of them."

Section 3809 directly authorizes the council to make a contract for the collection and disposal of garbage, while the power granted in section 3649 is more general in that the corporation is authorized *"to provide* for the collection and disposition of * * * garbage."

In Stadler vs. Cleveland, 17 O. D. (N. P.) 340, this power of the corporation is considered.

On page 342 the court says:

> "The city may exercise the powers already referred to as given to it by

the legislature of the state, and in exercising these powers it may use every means 'which are plainly adapted to an end'."

That was the language of Marshall, J., in McCullach vs. Maryland, 17 U. S. (4 Wheat.), 316.

In California Reduction Company vs. Sanitary Reduction Works, 199 U. S., 306, the supreme court used this language:

> "Municipal bodies under legislative sanction may exercise the power—to prescribe such regulations as may be reasonable, necessary and appropriate for the protection of the public health * * *. Equally well settled is the principle that if a regulation enacted by competent public authority, avowedly for the protection of the public health, has a real, substantial relation to that object, the courts will not strike it down."

While the precise question presented by you was not raised in the Stadler case, supra, the court's consideration of the powers of the municipality in such matters is pertinent.

The case of Bauer vs. Casey, 6 C. C. (n. s.) 69, does not dissent from the general principles announced in the Stadler case.

Believing that the powers in such matters granted to the municipal corporation are very comprehensive, it is concluded that by ordinance or resolution, duly enacted, the officers of a non-charter municipality may legally charge reasonable fees to the residents of the municipality for the collection of garbage.

This opinion is restricted to the general question stated in your letter, in which it is noted no facts are stated, and the opinion does not pass upon nor consider a case where the ordinance not only fixes a fee to be paid by the resident of the municipality for the collection of garbage, but at the same time requires all of the residents to dispose of their garbage by delivering it to the officers of the municipal corporation.

Respectfully,
JOHN G. PRICE,
Attorney-General.

490.

BOARD OF EDUCATION—SUMMER SCHOOLS FOR TEACHERS—INTERPRETATION OF SECTION 7868 G. C.—SUCH SCHOOLS CAN BE LOCATED EITHER IN OR OUTSIDE OF OHIO—WHEN BOARD OF EDUCATION MAY PAY FOR INSTITUTE ATTENDANCE OF TEACHERS.

1. *The recognized summer school for the training of teachers, mentioned in section 7868-1 G. C., can be located either in or outside of Ohio, but such summer school for teachers must be one that has been officially recognized as such by the superintendent of public instruction of Ohio.*

2. *Boards of education may pay for institute attendance that takes place in another county in this state, but such attendance must be certified by a county superintendent in Ohio.*

COLUMBUS, OHIO, July 18, 1919.

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

GENTLEMEN:—Acknowledgement is made of your request for an opinion upon the following questions:

"Referring to section 7868-1 G. C.:

1. Must the 'recognized summer school' have been held in Ohio?
2. How is the fact established and officially made known, that a summer school was recognized"?

Referring to section 7870 G. C.:

3. May a board of education pay for institute attendance that took place in another county in this state?
4. May institute attendance be paid for when it took place in another state?"

Section 7868-1 G. C. reads as follows:

"Each village and rural boards (board) of education in counties in which no county institute has been held in any year, shall pay ten dollars to each teacher employed by such board, who has attended for at least six weeks during such year, a recognized summer school for the training of teachers."

It will be noted that nothing in the above section stipulates that such attendance at a summer school for teachers' training must have taken place within the state of Ohio, but it is necessary that such summer school for teachers must be a "recognized" summer school. It is found that there are a large number of recognized summer schools for teachers' training held in other states and that the superintendent of public instruction has had representatives of his department visit these summer schools outside of Ohio, in order that they may be given a proper rating, and it has been found that their courses of study for the training of teachers is equally as good as recognized summer schools within the state of Ohio, and it is therefore not necessary that the attendance mentioned in section 7868-1 G. C. should have taken place at a recognized summer school for teachers within the state of Ohio.

Answering your second question, as to how the fact is established that a summer school is a "recognized" summer school, it is for the superintendent of public instruction of the state of Ohio to say whether any summer schools for the training of teachers, either within Ohio or outside, come within the class known as recognized summer schools for the training of teachers. An official knowledge as to whether any summer school comes in that class can be secured from that official.

Answering your third question as to whether a board of education may pay teachers for institute attendance that took place in another county in this state, attention is invited to the language of section 7870 G. C. which provides that teachers shall be allowed two dollars a day for actual daily attendance for the week they attend the institute, such attendance to be certified by the county superintendent of schools. After providing that such payment of ten dollars for attendance at the county teachers' institute must be paid as an addition to the first month's salary after institute, by the board of education by which such teacher or superintendent is then employed, the section further provides as follows:

"* * *. In case he or she is unemployed at the time of the institute, such salary *shall be paid by the board next employing* such teacher or superintendent, if the term of employment begins within three months after the institute closes."

The seeming intent of this legislative section is that teachers shall be encouraged to attend a county teachers' institute, for which they shall be allowed ten dollars for that particular week. Such teachers' institute commences in August, when a majority of the teachers are free to take up other employment for the summer vacation, than

that of their regular employment as a teacher. They must quit, for one week, whatever other employment they may have taken up, and receive in lieu of any other amount they might have earned, the sum of ten dollars for such attendance, which would be practically the paying of the expense of attendance in many cases, without any allowance for actual time lost.

It must be remembered that under the recently enacted school code of 1914, the schools of the state have become co-ordinated more or less, and there is considerable reciprocity in educational matters between the cities and the counties. Very frequently a teacher will have her home in southern Ohio but may be teaching in a distant county It would hardly seem right, if she has returned to her home, that she should be compelled to return to the county of her employment for the week of the teachers' institute, where a teachers' institute is also held in her own county or near thereto.

It is noted that in order to secure the payment for attendance at a county teacher institute it is necessary to have the certificate of such attendance signed by the county superintendent. Clearly, if the legislature has arranged that the examinations and certificates of one county shall be recognized by the county board of school examiners of another county, it would seem that the certificate of a county superintendent, that a teacher had attended a county institute in his county, would be recognized by the superintendent of another county or a board of education in another county. As an illustration of this, a teacher who is unemployed in August attends the county institute in Marion county. Shortly thereafter the teacher is employed by a board of education in Miami county, and the law contemplates that such situation shall be taken care of by using the language, "Such salary (ten dollars) shall be paid by the board *next employing* such teacher or superintendent, if the term of employment begins within three months after the institute closes."

Coming to your fourth question, however, it may be said that there is no provision in the Ohio law for the payment of institute attendance that took place in another state, in that there are no reciprocal arrangements between the counties of different states, and while the Ohio statutes refer to the certificating that may take place in other states, nowhere in our law is there found any intimation or any official knowledge taken of the fact that county institutes for teachers are held in other states. Hence the contemplation of the law is that in order to avail themselves of the benefits of section 7870 G. C., teachers must attend a teachers' institute that is a part of the Ohio educational system.

It is therefore the opinion of the Attorney-General:

1. The recognized summer school for the training of teachers, mentioned in section 7868-1 G. C., can be located either in or outside of Ohio, but such summer school for teachers must be one that has been officially recognized as such by the superintendent of public instruction of Ohio.

2. Boards of education may pay for institute attendance that takes place in another county in this state, but such attendance must be certified by a county superintendent in Ohio.

Respectfully,
JOHN G. PRICE,
Attorney-General.

491.

ROADS AND HIGHWAYS—LEVY UNDER SECTION 1222 G. C. IS OUTSIDE OF TEN MILL LIMITATION OF SECTION 5649-2 G. C. AND SUBJECT ONLY TO FIFTEEN MILL LIMITATION OF SECTION 5649-5b G. C. THOUGH PART OF LEVY ANTICIPATED BY ISSUANCE OF BONDS UNDER SECTION 1223 G. C.—LEVY PROVIDED BY SECTION 1223 G. C. SUBJECT TO TEN MILL AND THREE MILL ALSO FIFTEEN MILL LIMITATION.

The entire levy under section 1222 *G. C.* (107 *Ohio Laws*, 132) *is outside of the ten mill limitation of section* 5649-2 *G. C. and subject only to the fifteen mill limitation of section* 5649-5b *G. C., though part of such levy has been anticipated by the issuance of bonds under section* 1223 *G. C.*

The deficiency levy required to be provided for by section 1223 *G. C., if made, is subject to the ten mill and three mill limitations, as well as to the fifteen mill limitation.*

COLUMBUS, OHIO, July 18, 1919.

HON. ISSAC C. BAKER, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:- I acknowledge the receipt of your letter of recent date requesting my opinion upon the following question:

"The board of county commissioners have submitted to me the following statement requesting to me the following statement requesting an opinion from me:

'Section 1222 G. C. permits counties for the improvement of roads with state aid to levy one mill in addition to other taxes but within the fifteen mill limitation.

Section 1223 G. C. authorizes counties for such purpose to issue bonds in anticipation of the collection of such levy and the collection of assessments against property benefited.

This county has divided the one mill, levying part for road improvements and part for the payment of bonds issued in anticipation of the collection of taxes and assessments the total of the two keeping within the specified amount.

The blank tax budgets furnished by the county auditor place the direct levy in the 15 mill limitation column but levy for bonds in the 10 mill column.

This to us does not appear at all consistent with the intent of the law and we believe that the bond levy should also be within the 15 mill limitation.

Respectfully,

Board of County Commissioners,

By W. W. Crawford, Clerk.'

This matter was likewise submitted to the tax commission of Ohio at Columbus for their opinion and under date of June 3, 1919, the tax commission through its secretary, George L. Gableman, sunmitted the following letter as their opinion relative to the matter:

'The commission is in receipt of the copy of the communication from the county commissioners of Butler county to Hon. Isaac C. Baker, prosecuting attorney, relative to levy under section 1222 G. C. and bonds issued under section 1223 G. C.

In reply will say section 1222 provides for a levy of one mill within the 15 mill limitation upon all taxable property in the county, and a two mill levy by township trustees upon all taxable property in a township. The funds from this levy may be expended annually as provided in the law gov-

erning the construction of state aid roads, or it may be expended as provided in section 1223, which permits the county commissioners, in anticipation of the collection of taxes from the levies provided for in section 1222, to sell bonds, and the levies under section 1222 shall be for the payment of the bonds and whether the levy of one mill is expended annually or applied to the payment of bonds issued under section 1223, it is within the 15 mill limitation, it being optional with the commissioners as to either expending the amount annually to issue bonds. We beg to differ with your commissioners as to the budget form being in error, that is, if the form is the one prescribed by the commission in 1915.

The budget on line 22 calls for the levy under section 1222, and this applies to all the levy, whether for annual use or for bonds. Section 1223 does not provide for any levy and could not have a place upon the budget, for it does not authorize any levy, and for this very reason could not be included with the levies enumerated within the 10 mill limitation.

The proper course for your commissioners is to place the whole levy under section 1222, and direct the auditor as to the distribution of the levy. From the levy for the county the auditor will apply the amount necessary to pay the bonds, and follow the same procedure with that of the township. The balance should be placed in the proper road fund.

Trusting this will explain the matter, we are

Yours very truly,

The Tax Commission of Ohio,

George L. Gableman, Secretary.'

Now I desire to know whether or not your office is of the same opinion in regard to this matter as the tax commission of Ohio in order that we may know whether or not the levy for the bonds will come within the 15 mill limitation as we think it does."

You have evidently misinterpreted the tax commission's letter. The commission holds that the entire levy under section 1222 of the General Code is outside of the ten mill limitation but subject to the fifteen mill limitation. This is correct and apparently in accord with the contention of your commissioners. So that there is really no dispute between the tax commission and your commissioners. The commission is correct in its ruling that a levy under section 1222 of the General Code is an entirety, regardless of whether the entire amount of such levy is anticipated by the issuance of bonds or not.

Said section 1222 in its present form (it has been amended by the last session of the legislature but your question does not relate to such amendment) provides that:

"* * * the county commissioners are hereby authorized to levy a tax, not exceeding one mill, upon all taxable property of the county. Said levy shall be in addition to all other levies authorized by law for county purposes, and subject only to the limitation upon the combined maximum rate for all taxes now in force."

Section 1223 provides in part that:

"The county commissioners, in anticipation of the collection of such taxes and assessments or any part thereof, * * * may, * * * sell the bonds of said county * * *."

In other words, the levy may, as in your case, exceed that required to pay the

county's proportion of specific improvements for which bonds have been issued and therefore anticipated by the issuance of such bonds. This is immaterial and, as pointed out in the commissioner's letter, the fact that a part of the levy is for the accumulation of a fund and part is appropriated by anticipation in the issuance of bonds makes no difference so far as the application of the second sentence of the first paragraph of section 1222 of the General Code is concerned. The levy is subject to the fifteen mill limitation as an entirety and is outside of the ten mill limitation as an entirety. As previously stated, this seems to be the view both of your county commissioners and of the tax commission and I am at a loss to know why there seems to be any controversy for further settlement.

In strict accuracy it must be said that the tax commission's letter contains at least one misleading statement, namely, that section 1223 of the General Code does not provide for any tax levy. The contrary is the case. That section provides in part that:

> "Prior to the issuance of such bonds the county commissioners shall provide for the levying of a tax upon all the taxable property of the county to cover any deficiency in the payment or collection of any special assessments or township taxes anticipated by such bonds."

This tax levy, if made, would be subject to the ten mill limitation and to the three mill limitation on taxes for county purposes imposed by section 5649-3a of the General Code, as well as to the fifteen mill limitation. In other words, it is not exempt from any of the limitations which would naturally apply to it. This is so for the simple reason that there is no language in the section which makes it so exempt from any such limitation. In other words, no such language as appears in section 1222 is found in section 1223.

Now the levy which must be "provided for" by the resolution of the county commissioners prior to the issuance of the bonds is one which may not actually be made except for the purpose of supplying any deficiency in township levies or special assessments. It is a guaranty levy which stands behind the assessments and township taxes and secures the bonds so as to comply with the requirement of Article XII, Section 11 of the Constitution, which provides that:

> "No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

Unless the county commissioners were authorized to levy such a tax the statute in question would be unconstitutional. However, the tax need not actually be levied unless a deficiency appears or is threatened. Where all things are done in accordance with law and expectation no such levy will have to be made.

It is suggested that possibly the blank tax budgets furnished by the Tax Commission refer to this hypothetical levy under section 1223 of the General Code in mentioning a levy which is subject to the ten mill limitation. If so, the blanks are correct. Your commissioners have merely been misled into supposing that such blank form amounted to a ruling to the effect that so much of the levy under section 1222 as was anticipated by the issuance of bonds was subject to the ten mill limitation. The levy under section 1222, as stated, is wholly outside of the ten mill limitation and is for the sole purpose of meeting the *county's share.* The levy under section 1223, if made, is entirely within the ten mill limitation and is for the purpose of guaranteeing or securing the township and property owners' share—not the county's share.

I trust that the foregoing statement will clear up what appears to be a mere misunderstanding between your commissioners and the tax commission.

Respectfully,
JOHN G. PRICE,
Attorney-General.

492.

BOARD OF EDUCATION—BONDS ISSUED UNDER SECTIONS 7630-1 AND 7625 G. C.—NOT SUFFICIENT—MAY ISSUE ADDITIONAL BONDS UNDER SAME SECTIONS.

A board of education which has issued bonds under sections 7630-1 *and* 7625 *of the General Code and finds that the amount of the bond issue will not be sufficient to construct a school house which is necessary for the proper accommodation of the schools of the district, may, by complying again with these sections, issue additional bonds in an amount sufficient to produce the required aggregate sum necessary to construct such building.*

COLUMBUS, OHIO, July 18, 1919.

HON. F. M. CUNNINGHAM, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—In your letter of recent date you request the opinion of this department on the following question:

> "The board of education of Franklin Village School District has issued bonds in the sum of $100,000 for the purpose of erecting a new school house to take the place of one which has been condemned. Upon advertising for bids for the construction of the building it was discovered that it was impossible to construct the building according to the requirements of the building code and the necessities of the school district for the amount for which bonds were issued, and that at least the same amount in addition, viz: $100,000, would be necessary in order to construct the building in question. The plans and specifications have been approved by the Industrial Commission.
>
> Has the board of education authority at this time to issue and sell additional bonds in the sum of $100,000 for the purpose referred to?"

You append to your request a financial statement of the school district.

Your question may be answered shortly by the statement that the board of education of its own motion and without securing the approval of the electors does not have the authority in question. The only authority a board of education has to issue bonds for building purposes without a vote of the people is that expressed in section 7629 of the General Code. The limit on the amount of bonds so issued for such purpose is the equivalent of a tax at the rate of two mills for the year next preceding such issue. The financial statement shows that this limit in dollars and cents figured on the 1919 duplicate would only amount to about $6,700. It would naturally be less for the year 1918, and obviously the authority of the board of education falls very short of issuing $100,000 in bonds without a vote of the people.

Your statement of facts does not show whether or not the $100,000 previously issued was upon a vote of the people, but this is assumed, else the bonds could hardly have been disposed of as you say they were. It is assumed also that section 7630-1 of the General Code was complied with, inasmuch as the facts show a warrant for proceeding under that section. It provides in effect that to replace a building destroyed

by fire or condemned by the department of workshops and factories a board of education may, if "without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district," * * * "subject to the provisions of sections seventy six hundred and twenty-six and seventy-six hundred and twenty-seven, and upon the approval of the electors in the manner provided by sections seventy-six hundred and twenty-five and seventy-six hundred and twenty-six issue bonds." It is then provided that a tax shall be levied for the interest and sinking fund purposes of such bonds.

In the same connection section 5649-4 G. C. provides in effect that such interest and sinking fund levies shall be outside of all limitations of the Smith One Per Cent. Law.

In this connection it would seem that the taxing district in question must be about up to the limit of the Smith Law, inasmuch as the aggregate levies of the district, the township and the corporation, excluding those not subject to the limitation of fifteen mills, apparently amount to about thirteen mills, without any allowance being made for county levies or state levies subject to the limitation. Therefore, it would seem to be "not practicable to secure such funds * * * because of the limits of taxation applicable to such school district," within the meaning of section 7630-1 G. C. In other words, the board of education could, assuming the authority to act at all, in the fair exercise of its discretion make the necessary findings required to be made by section 7630-1 G. C. and thus, if the approval of the electors should be obtained, lay the foundation for a levy outside of the Smith Law limits. That being the case, the fact that the Smith Law limits are now practically exhausted would be immaterial.

It still remains to be inquired whether or not the fact that bonds have already been issued for this purpose in an amount which proves to have been insufficient will preclude the district from completing the accumulation of a sufficient fund by further issues of bonds. It will be observed that section 7630-1 authorizes the issuance of bonds when "the district is without sufficient funds applicable to the purpose * * * to construct a new school house for the proper accomodation of the schools of the district." The facts as stated by you fit this provision; the board has $100,000.00 applicable to the purpose, but that amount is not sufficient to construct a new school house for the proper accommodation of the schools of the district, to the satisfaction of the state department having authority to approve plans and specifications and in compliance with law. However, section 7630-1 refers us back to section 7625, 7626 and 7627 of the General Code. The last two named sections need not be considered. Section 7625, which must be complied with, authorizes a board of education, whenever it determines

> "that for the proper accommodation of the schools of such district it is necessary to * * * erect a schoolhouse * * *, to complete a partially built school house, to * * * furnish a schoolhouse, * * * or to do any or all of such things, that the funds at its disposal or that can be raised under the provisions of sections seventy-six hundred and twenty-nine and seventy-six hundred and thirty, are not sufficient to accomplish the purpose and that a bond issue is necessary," to "make an estimate of the probable amount of money required for such purpose or purposes and at a general election or special election called for that purpose, submit to the electors of the district the question of the issuing of bonds for the amount so estimated."

It is clear that the terms of this section are satisfied by the facts as they exist. The board has at its disposal $100.00; it could raise under section 7629 G. C. something like $6,500.00; this aggregate amount would not be sufficient to accomplish the pur-

pose, indeed, this department has held that under such circumstances section 7629 is not available at all, regardless of the amount that could be produced thereunder; a bond issue is necessary.

The only question is as to whether or not the fact that this procedure has once been taken and the estimate made and the people have approved a one hundred thousand dollar building will preclude the construction of a two hundred thousand dollar building.

In the opinion of this office such fact does not have this effect, and upon the approval of the electors as provided in sections 7625 et seq. General Code bonds for the additional amount of $100,000.00 needed for the purpose may be issued.

Respectfully,
JOHN G. PRICE,
Attorney-General.

493.

INHERITANCE TAX—ACT OF JUNE 5, 1919—APPLICATION TO UNSETTLED ESTATES.

1. *The inheritance tax law effective June 5, 1919, does not apply to any particular successions in favor of collateral relatives of the decedent upon whose successions inheritance taxes had accrued prior to June 5, 1919, under original sections 5331 et seq. G. C., the collateral inheritance tax law. Such taxes accrued under said law at the death of the decedent; so that if a tax would have been collectible under said collateral inheritance tax law, but for the act of 1919, and the decedent died prior to June 5, 1919, the said act does not apply to such successions.*

Query as to accrual of tax under original collateral inheritance tax law in case of contingent remainders and executory devises.

2. *In all other cases the question as to whether or not the act of 1919 applies, depends upon whether or not the taxable succession thereunder occurred on or after June 5, 1919.*

A "succession," for the purpose of the act of 1919, occurs when beneficial interests pass to particular heirs, next of kin, devisees, legatees or donees, though perfect legal title or specific equitable estates and actual possession or enjoyment may be postponed until after such time.

The act of 1919 makes no artificial rule as to when such taxable successions take place, but such rule is furnished by the statutory and common law relative to the kinds of successions taxed.

For the purpose of the question relative to the application of the tax to successions arising out of the estates of persons dying prior to June 5, 1919, the successions taxed by the act of that date, as enumerated in subparagraphs of section 5332 G. C., as therein amended may be divided into the following classes:

(a) *The successions referred to in paragraph three (gifts in contemplation of death, etc.), are not taxable under the new law, even though the decedent may die subsequently to June 5, 1919, if the gift itself was effective prior to that date.*

(b) *The successions mentioned in paragraphs four and seven of section 5332 are not successions in anywise dependent upon the death of the original testator or grantor, but are successions taking place—*

(1) *By the exercise or failure to exercise of a power of appointment (paragraph four); and*

(2) *(As regards the increase then accruing) by the happening of a contingency referable to the death of a person other than the original testator. In such cases the date of death of the original testator or donor is immaterial, the date of succession depending upon*

some other event. Such successions therefore may be taxable under the act of 1919, *though the death of the original testator or donor occurred prior to June* 5, 1919.

Query again as to application of these paragraphs to collateral successions under wills of testators dying prior to June 5, 1919.

(c) *The successions mentioned in paragraph one, two and six of section* 5332 *are successions by will or intestacy. Said successions may be considered under two headings:*

(1) *As to real estate, all vested interests therein passing from testators or intestates dying prior to June* 5, 1919, *are excluded from the operation of the new law.*

Query as to operation of new law to interests in real estate of the nature of contingent remainders, executory devises, etc., arising under wills of testators dying prior to June 5, 1919, *and not vested prior to that date.*

(2) *As to personal property, the interest of the legatee or distributee, taxable under the said paragraphs of section* 5332 *is that which arises immediately on the death of the testator or intestate. It does not depend upon the making of final distribution and the consequent vesting of perfect titles in possession and enjoyment. Therefore all intestate successions to personal property and such legacies as are not analogous to contingent remainders, etc. (as to which latter, query), arising out of the estate of a decedent dying prior to June* 5, 1919, *are not taxable under the act of that date.*

(d) *The successions mentioned in paragraph five of section* 5332, *as amended, take place at the death of a person, though they constitute no part of such person's estate. The test for determining whether or not such successions are taxable under said act is furnished by the date of the death of the joint owner.*

COLUMBUS, OHIO, July 18, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This department is informed that at a recent meeting of certain probate judges of the state, called by the tax commission, it was agreed by those present that an administrative ruling as to the application of the inheritance tax law, approved June 5, 1919, and effective from and after its approval, to any successions taking place by virtue of deaths occurring prior to that date, is desirable.

This department is in receipt of a request for opinion on this point from the prosecuting attorney of Hamilton county. In view of the conference of probate judges above referred to, the opinion of this department is addressed to the commission.

The act in question contains the following section which constitutes a schedule and the office of which is to provide for the manner in which the act as a whole shall go into effect:

> "Section 4. This act shall not affect pending proceedings for the assessment and collection of collateral inheritance taxes under the original sections hereby amended, nor the duty to pay, nor the right to collect any such tax which has accrued prior to the approval of this act, nor the rights or duties of any officer with respect to the assessment and collection of such inheritance taxes; nor shall this act affect successions taking place prior to its approval, whether the death of the decedent occurred prior to such approval or not, but all successions occurring subsequently to the approval of this act shall be affected by and taxable under it, whether the death of the decedent occurred prior to its approval or not, unless a tax has already accrued thereon under the provisions of the original sections hereby amended."

The first part of the above quoted section, down to the semicolon therein, makes it clear that if a collateral inheritance tax has accrued in the case of any estate, the public rights and private liabilities resulting from such accrual shall be in nowise disturbed by the repeal of the old law and the enactment of the new. The very last clause in the section, beginning with the word "unless," makes it clear that succes-

sions to which the new act would otherwise in terms apply are to be withdrawn from its application if a collateral inheritance tax has already accrued in respect of such successions.

These provisions make it possible at once to eliminate from further consideration, in connection with your inquiry, all cases in which the death of the decedent occurred prior to June 5, 1919, and the particular successors are collateral relatives whose privileges were taxed under original sections 5331, et seq. G. C. For the test under both the provisions of section 4 above referred to is the accrual of the collateral inheritance tax. Such collateral inheritance tax accrued under original section 5331 "upon the death of the decedent" (see last sentence of that section).

This statement can not, perhaps, be taken without any reservation. For instance, it was held in Kibler vs. Glynn, 12 N. P. (N. S.) 657, that the legatee of what might be termed a contingent remainder in testator's personal estate, after a life estate in the wife with power to dispose of such part of the personal estate as she might see fit, was not liable to the collateral inheritance tax at all. Such a holding raises the question under the collateral inheritance tax, which afforded no express machinery for the deferred assessment or appraisement of contingent remainders, both true and by analogy, as to whether a tax accrued against such estates at the death of the testator, as a literal application of the last sentence of original section 5331 would require, or not until the estate actually vested in right in the remainderman. Other future interests of the same character would give rise to the same question.

It is the purpose of this opinion to lay down some general principles only, and not to attempt to cover the entire field suggested by the question. Therefore, no holding is made herein as to the application of the new inheritance tax law to estates originally contingent but becoming vested after the approval of the new law, and owing their existence to the provisions of wills and other instruments such as declarations of trust and the like "made or intended to take effect in possession or enjoyment after the death of the grantor" (original section 5331) when the death of the testator or grantor occurred prior to June 5, 1919. In other words, this question is saved for future consideration and the holding of the department as to the effect of the two provisions of section four which have thus far been considered is limited to the statement that all estates and interests, legal or equitable, which had vested in right prior to June 5, 1919, by and through the death of a testator or intestate occurring prior to such date, and in favor of collateral relatives and strangers whose privileges were subject to the collateral inheritance tax, including distributees of personal estates and legatees, whether the estates were settled prior to that date or not, are not subject to the inheritance tax law effective thereon.

It will be understood, therefore, that from this time forward we are considering the application of the new law to estates passing to persons whose successions were not subject to the provisions of original sections 5331, et seq. G. C. We know that what may be termed direct relatives, being those specifically mentioned in that section as last in force, come within this class, and we are reserving for further consideration the question as to whether or not persons within the class of collateral relatives so far as their relationship to the decedent is concerned, but whose interests had not vested in right prior to June 5, 1919, are within the same class for the purposes of this question.

In connection with this last question, a case which might be cited against a conclusion that the takers of contingent remainders, etc., not vested until after June 5, 1919, are subject to the new law, is Executors of Eury vs. State, 72 O. S. 448. It is believed that this case is distinguishable from the case imagined, but, as previously stated, the question will not be determined in this opinion.

In this same connection, because it is the first time in the course of this discussion the question arises, mention may be made of a general principle which applies throughout. Inheritance taxes are laid on the equitable estate or interest passing,

and not upon the bare legal title; or, putting it in another way, it is the right or privilege of succeeding to beneficial interests, and not the insubstantial and really valueless privilege of succeeding to legal estates, that constitutes the subject of the tax. Therefore the fact that the legal title of an estate created at the death of a testator occurring prior to June 5, 1919, was held on trusts in favor of ascertained beneficiaries who were collateral relatives of the testator, and does not ripen into a legal estate in them until after that date, is immaterial.

With these observations out of the way, we come to the consideration of the remainder of said section 4, the quotation of which is repeated here for convenience, as follows:

> "nor shall this act affect *successions taking place* prior to its approval whether the death of the decedent occurred prior to such approval or not; but all *successions occurring* subsequently to the approval of this act shall be affected by and taxable under it, whether the death of the decedent occurred prior to its approval or not, * * *."

Here are two provisions. The effect of the first of them may be disposed of in a few words. It has relation to the successions mentioned in paragraph three of section 5332, as amended by the act. This paragraph imposes a tax upon successions "by deed, grant, sale, assignment or gift" under certain circumstances. Such successions obviously "take place" or "occur" *inter vivos*. According to the provisions of section 5336, as amended, the tax under the new law does not accrue on such successions until the death of the decedent, who in this case is the grantor or doner. In other words, if in contemplation of death a person has, prior to June 5, 1919, disposed of all his property, reserving a life interest in himself, and then dies subsequently to June 5, 1919, it might be claimed that a tax would accrue under sections 5332 and 5336 at the death of such person, on account of such disposition of his property; but here section four steps in and declares that such tax shall not accrue because the act as a whole is not to apply to or affect successions taking place prior to its approval, whether the death of the decedent occurred prior to such approval or not. This point is mentioned not because it is responsive to the general question under discussion, but merely for the purpose of noting the effect of one of the provisions of the schedule section of the law under examination, it being the object of this opinion to discuss generally, though not in exhaustive detail, all the provisions of that section.

We now come to the last remaining provision of section four which, with the exception previously noted, has the effect of subjecting to the tax imposed by the body of the act "all successions occurring subsequently to the approval of this act * * * whether the death of the decedent occurred prior to its approval or not." We must give some effect to this declaration, and it at least evinces an intent to ignore the mere time of the death of the decedent, as in and of itself a criterion for determining the going into effect of the act. But this does not mean that the time of death is to be ignored altogether. The real purport of the provision is that the date of the succession shall be determinative, whether that date corresponds to the date of death or not. As we shall see the date of death is in many, if not most, cases also the date of the succession.

It thus becomes apparent that a further general answer to your question may be said to depend upon the answer to the still more general question as to what successions, taxable under the act, do take place simultaneously with the death of the decedent, and what do not. In the consideration of this question, however, it must be borne in mind that we are not dealing with successions generally, but with those transfers of interest which are called successions and make taxable as such for the purposes of the act, and that moreover we are not dealing with the term "succession" in any general or undefined sense, if it be ascertained that the act itself furnishes a definition of that term for its own purposes.

We must therefore look to other provisions of the law to see whether they throw any light upon these questions. Suppose we start with the definition of the word "succession," as it appears in subparagraph 2 of section 5331 as amended in the act in question. It is as follows:

> "'Succession' means the passing of property in possession or enjoyment, present or future."

Right at this point a further question might arise, as to whether the word "property" in this definition means specific property, so that its "passing" would be equivalent to a transfer of legal title. Here the first definition of section 5331 comes to our aid, as follows:

> "1. The words 'estate' and 'property' include everything capable of ownership, or any interest therein or income therefrom, whether tangible, or intangible * * * which passes to any one person * * * from any one person, whether by a single succession or not."

Here we see that for the purposes of the act property does not denote specific chattels or land, or even specific choses in action. It also includes all kinds of interests in such things. From these two definitions, therefore, we get the idea that a succession takes place whenever any proprietary interest passes from one person to another. Of course the act is an inheritance tax law and, as we shall see, it does not purport to tax all such "successions" as have been previously described, which would include all kinds of commercial transactions, as well as inheritances.

The section which imposes the taxes is section 5332 as amended. The general clause thereof is of interest here. It provides that:

> Section 5332. A tax is hereby levied upon the succession to any property passing, in trust or otherwise, to or for the use of a person, institution or corporation, in the following cases; * * *."

This provision makes clear what has been previously laid down as a general principle, namely, that the taxes are levied upon the beneficial interest and not upon the naked legal title.

Following this general clause, we find seven specific instances of successions which are taxed. For convenience this opinion will depart from the numerical order in the discussion of these instances. It will be remembered that we are examining the act for the purpose of noting whether or not there are any successions which are taxable under it and which do not take place at the death of the decedent. It is believed that certain of the paragraphs of section 5332 afford instances where this is clearly the case.

The third paragraph of section 5332 has been previously dealt with and need not be again considered.

The fourth and seventh paragraphs of the section are as follows:

> "4. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property heretofore or hereafter made, such appointment when made shall be deemed a succession taxable under the provisions of this subdivision of this chapter in the same manner as if the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by said donee by will; and whenever any such person or corporation possessing such power of appointment shall omit or fail to exercise the same within

the time provided therefor, in whole or in part, a succession taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as if the persons, institutions or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise the same, taking effect at the time of such omission or failure.

7. When any property shall pass subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person, institution or corporation, on the extinction and determination of such charge, estate or interest, shall be deemed a succession taxable under the provisions of this subdivision of this chapter, in the same manner as if the person, institution or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived. Such tax shall be upon the excess of the actual market value of such property over and above the exemptions made and at the rates prescribed in this subdivision of this chapter."

Here are two kinds of taxable successions, i. e., instances in which interests in property pass from one person to another, which clearly do not take place at the time of the death of the decedent. Section four provides that whenever (note the time idea present here) a power of appointment derived from any disposition of property heretofore or hereafter made, shall be exercised or its exercise shall be omitted, "a succession taxable under the provisions of this act shall be deemed to take place" (I have quoted one of the two similar provisions of the section). That is to say, the taxable succession under paragraph four shall take place *when* the power of appointment is exercised or omitted to be exercised, and not when the disposition of property, by which the power of appointment was created, took place.

Paragraph seven begins likewise with the word "when" (as indeed do all the paragraphs of section 5332) and makes the increase accruing to the ultimate taker of an estate, which passes subject to a charge, estate or interest, determinable by the death of a person on the extinction and determination of such charge, estate or interest, and independent succession. That is to say, the entire estate or interest of the ultimate taker is not taxed by this paragraph, but merely the increase accruing to him at the death of the holder of the life estate or other intervening estate determinable by death. In such cases the ultimate taker will undoubtedly have received a vested estate in the first instance, the succession to which has presumably once been taxed. This is not to be taxed again by virtue of paragraph seven, but to the extent that the determination of the intermediate estate or charge enhances or increases his interest, and to that extent only, he is deemed, for the purposes of the act, to receive a new and independent succession which is made taxable because it is to the extent of the increase a proprietary interest devolving upon him by the death of another person, though in this instance not the person whose will created the intervening estate or charge.

Without going more deeply into these two paragraphs of the section, it is sufficient to state that under either of them successions take place subsequently to the death of the original decedent. All such successions to direct relatives of the original decedent and to such collateral relatives of such original decedent, if any, against whose interests a tax did not accrue under the collateral inheritance tax law, are subject to the provisions of the act in question, though the death of the original decedent may have taken place prior to June 5, 1919.

Right here another question is presented, upon which this opinion will not pass definitely, viz., whether or not the "succession" upon which a specific tax is imposed

by paragraph seven of section 5332 G. C., as amended, is subject to that tax, even though the original succession by will (which, as has been observed, is an independent succession for the purposes of the new act) became subject to the collateral inheritance tax by the death of the testator prior to June 5, 1919.

We come now to paragraphs one, two and six of section 5332. These impose taxes on ordinary successions by will or intestacy. As to real estate it is clear that such successions take place as of the date of the death of the decedent.

Carr vs. Hull, 65 O. S. 394.
Douglass vs. Massie, 16 Ohio 271.
Faran, Admr. vs. Robinson, et al., 17 O. S. 242.
9 R. C. L. 72.

The succession is in specie. The statutory power of the administrator or executor to sell real estate to satisfy debts of the decedent's estate does not change the nature nor the time of the succession, further than to make the titles thus devolved upon the successors contingently defeasible. See 9 R. C. L. 74.

This is the rule as to all vested estates in real property created by intestacy or by will and arising from the death of the testator or intestate occurring prior to June 5, 1919. As to such vested interests, therefore, whether legal or equitable, the new law does not apply.

Here another question arises which will not be passed upon in this opinion, viz: as to whether or not estates created by the wills of persons dying prior to June 5, 1919, but not vested until after that date because of their contingent character, are subject to the new law. Take the ordinary case of a contingent remainder in real property, when does the "succession" take place? It would seem that the succession to such contingent remainders, executory devises and the like, could not take place until the happening of the contingency and that accordingly the date of the death of the testator is immaterial; so that where the testator died prior to June 5, 1919, having created by his will contingent remainders or other estates that do not vest until after that date, such contingent remainders or other estates would be subject to the new law.

In this connection I may point out that section 5336, as amended by the act, postpones the accrual of the tax in such cases until the time "when the persons or corporations then beneficially entitled thereto shall come into actual possession or enjoyment thereof." This is not of itself determinative, because it relates to the accrual of the tax and does not attempt to accelerate or postpone the time of the succession itself. In fact, the new law attempts to create no artificial rule whatever as regards to date of the succession, leaving that to the operation of the law of property. In this connection, Ex'trs of Eury vs. State, supra, which contains a dictum pointing in the other direction, may be very easily distinguished, as it had to do with the operation of a law under which the tax was to become due and payable "immediately upon the death of the decedent." Moreover, it merely exemplifies the general rule applied in the absence of express schedules like that found in section four of the law, now under examination; and which is to the effect that the inheritance tax laws are to be construed generally as applicable only to "such interests * * * as arise by reason of death subsequent to the act." This general rule is admitted but it does not necessarily apply here because of the presence in the act of an express schedule. As stated, however, final opinion on the question as to the effect of the act upon contingent remainders and executory devises of real estate arising under wills of decedents dying prior to June 5, 1919, and not vesting until after that date, is reserved for further consideration.

We come now to the last and perhaps the most important specific question involved in the general inquiry which has been considered, viz: the application of the new law to successions to personal property, from decedents dying prior to June 5,

1919. For the purpose of this discussion the question will be thus considered, no discrimination being made as between specific legacies on the one hand and residuary legacies and intestate successions on the other hand.

It is established general law that the immediate successor to the personal property of a decedent, whether he be testate or intestate, is his executor or administrator. No specific property right to any particular chattels or choses in action vests in the next of kin or legatee at the time of the death of the decedent. This is abundantly proved by McBride vs. Vance, 73 O. S. 258, wherein the plaintiff, as general legatee of her deceased mother, attempted, unsuccessfully, to bring suit upon a note belonging to her mother's estate, upon which no administration had ever been made. As a matter of fact, the essential right of the next of kin, or even the specific legatee, is rather in the nature of a money demand, than a specific property right. Therefore we may predicate the following statements of the nature of the interest of the next of kin or legatees in the state of their ancestor or testator prior to distribution:

1. They have no specific property right, legal or equitable, in any particular personal property.
2. They do not have legal title to any of such personal property and of course have no possessory right in it nor any right to the immediate enjoyment of it or any part of it.

From these statements it is clear that if the word "succession',' as used in the act (and it appears to have been used in the same sense throughout) means devolution of title or devolution of an equitable right in a particular thing, it would have to be held that the time of such succession, as to personal property, is postponed until distribution.

But as heretofore pointed out, the combined effect of the definitions of the word "succession" and the word "property," as found in section 5331, as amended, do not so limit the import of the first term. A succession may take place as to a mere interest in property, less than a specific title either legal or equitable, in and to particular property. That being the case, it is the opinion of this department that the principles laid down in Conger vs. Barker, 11 O. S. 1, Armstrong vs. Grandin, 39 O S. 368, and Banning vs. Gotschall, 62 O. S. 210, apply. In these cases it was held in the following language quoted from Armstrong vs. Grandin, supra, that:

"Subject to administration on the personal estate of an intestate, the right of a distributee vested at the death of the intestate."

The question involved in that case was raised by the death of the distributee before distribution and it was held that the rights of the distributee passed to his or her personal representative. A similar holding in the case of a legatee was made in the last of the three cases cited. This is held to be the general rule in those states where the legal title and immediate possessory interests vest in the administrator or executor. See 9 R. C. L. pp. 77-79. Of course in states in which the title to personal property is treated like the title to real estate is treated in general, viz., as vesting specifically *in rem* at the time of the death of the decedent, the same result would follow for even stronger reasons.

The case of Orlopp vs. Schueller, 72 O. S. 41, was decided upon an interpretation of the statutes relating to attachment and garnishment and is not to be taken as authority for the statement that the distributees or legatees, prior to distribution, have no vested interest whatsoever in the estate of their ancestor or testator. The case of McBride vs. Vance, supra, is one in which the plaintiff's case required the support of a legal title or at least a specific right in the nature of a right *in rem* in and to the chose in action which was the subject of the suit.

The case of Lewis vs. Eutsler, 4 O. S. 355, is not inconsistent with the general principle laid down. In fact the case is of extreme interest in this connection. One P. died in 1852, intestate, unmarried and without issue. He was an illegitimate child and survived his mother who left other children who were legitimate. The statute in force at the time he died had been previously construed so as to produce an escheat under such circumstances. Prior to the distribution of P's estate, viz., in 1853, an act was passed which if applicable would entitle the surviving children of P's mother to his personal estate. It contained a schedule which was as follows:

> "This act shall not affect any estate, to which any natural person shall have become entitled, by or under any statute of the state heretofore in force; *but this section shall not apply to escheats to the state.*"

Ranney, J., delivering the opinion of the court, at p. 361, says:

> "There is certainly nothing in the act of 1853, that evinced an intention to make it retrospective in its operation; nor was it necessary that there should have been. When P. died, the legal title to all his personal property vested in his personal representative. He alone could sue for and recover it, and convert it into money. *It vested in him, it is true, as a mere trust estate, for the benefit of creditors and distributees. The right to distribution was a vested right, and if it had belonged to a private person, could not have been impaired by subsequent legislation. In such case, the distribution must have been made according to the law in force when the right accrued,* but it belonged to the state, and she had unlimited control over her own interests."

Some of these cases were considered and the principle that seems applicable here was laid down in In re Bushnell, 2 N. P. (N. S.) 673. The decision itself is possibly not perfectly applicable to the question now under consideration because it is ruled by the general principle above stated, to the effect that inheritance tax laws, in the absence of specific provisions to the contrary, are to be construed as inapplicable to interests arising by the will or intestacy of a person dying prior to the date when such laws take effect. It contains, however, a discussion of the very question now under consideration, in the following language:

> "When is the *right of succession* complete? * * * While the question of the date of the vesting of the personal property has not been as frequently discussed in the state of Ohio as in some other states, yet we find it touched upon in a number of cases (the court here discusses and quotes from some of the cases above cited and others which have not been mentioned). The interest of a legatee or distributee vests at the time of the death of the testator, so that he has a claim against the executor which does not depend upon any contingency, the only uncertainty being as to the amount. * * *
>
> I think that there can be no doubt that in the case at bar the interests of the various legatees were vested absolutely upon the death of the testator, and that the duty of the executors was merely to administer the estate in compliance with the will of the testator, and to pay the legacies as provided in the will. The right to succeed to or inherit the property * * * was absolutely and unalterably fixed at the instant of his death, and there was nothing that could then be done to change or alter or delay the vesting of the various interests. The control of the executors was merely fiduciary and their action or lack of action could in no way alter, enlarge or diminish the vested right of those entitled to the property under the will, be the same real or personal. It is true that the right of enjoyment in possession of the

personalty was to be postponed until the executors had performed such duties as are imposed upon them by law and the will of the testator."

It is the opinion of this department that these principles are sound and determine the question now immediately under discussion. It is true that succession on the part of the distributees or legatees to all that they ultimately succeed to does not take place immediately at death. They ultimately acquire legal title and full possession and enjoyment of particular property, but the word "succession" in the law does not depend upon or relate to present possession or enjoyment alone, as paragraph two of section 5331 shows. It being the policy of the law to tax beneficial interests and not mere naked legal titles, and the law not being limited to complete property rights, but extending to interests in property as well, it is clear that the distributees and legatees have the only taxable interest under the law prior to distribution, if they have any interest at all, for the legal title and right of possession of the executors or administrators is fiduciary merely. Their right to a reasonable compensation out of the estate is not taxable (paragraph six of section 5332 as amended). It is only gratuitious beneficial interests that are intended to be and are reached by the law.

The cases cited show that distributees and legatees have beneficial interests of this character, contingent as to quantity, to be sure, but vested in right as of the death of the decedent. If they have no such interest, it is clear that no one has any such interest as is taxable under the law during the period of distribution. But as heretofore stated, it is the opinion of this department that the succession as to personal estate of a decedent occurs under the general property law of this state and the statutes of descent and distribution at the death of the decedent, and that the inheritance tax law of 1919 not only does not change this general rule for its purposes, but in imposing the tax which it levies places the burden thereof upon and in respect of rights of the kind and quality which accrue to distributees and legatees at the instant of death and prior to distribution.

It is, therefore, the opinion of this department that, except as to such gifts over upon contingencies as may not have vested under any possible theory of the law at the death of the testator, and may have vested after June 5, 1919 (as to which opinion is reserved) the distributive shares or legacies passing to direct relatives of a testator or intestate who died prior to said date, are not taxable under the act approved on that date, hough distribution may not have occurred prior thereto.

The foregoing opinion is intended to furnish the general principles relative to the going into effect of the act of June 5, 1919, and its application to estates in process of administration on that date. It is not intended as an attempt to cover every possible detail of the questions that may arise. Certain specific questions have been mentioned but not passed upon in the course of the opinion. There are doubtless others of similar character. All of such cases will have to be decided on the specific facts as they are presented.

In closing, I note that the successions referred to in paragraph five of section 5332 have not been mentioned. This paragraph, however, gives rise to no question in this connection, as by its very terms it refers to a species of successions occurring at the death of a person. Like paragraphs four and seven, however, it has nothing whatever to do with any question arising out of the settlement of estates.

Respectfully,

JOHN G. PRICE,

Attorney-General.

494.

SPECIAL ELECTION—ADDITIONAL LEVY OF TWO MILLS FOR SCHOOL PURPOSES AS PROVIDED IN SENATE BILL 187 (108 O. L. 924) HELD AUGUST 12, 1919.

The special election for an additional levy of two mills for school purposes as provided in S. B. 187 (108 O. L. 924) can be held only on August 12, 1919, and in school districts where such election is called it shall be conducted as other special school elections.

COLUMBUS, OHIO, July 18, 1919.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter requesting the opinion of this department on the following statement of facts:

> "The two mill school financial measure provides for a vote at the August primary. Primary elections are held only in places of 2,000 or more people. In school districts where no primary election will be held, what are the provisions for a vote?"

In reply to the above question it is assumed that reference is made to senate bill No. 187 (108 O. L. 924), which was passed with an emergency clause and is now the law. Such act reads as follows:

> "Section 1. In lieu of proceeding under an act entitled 'An Act to authorize the taxing authorities of counties, municipal corporations, townships and school districts to fund deficiencies in operating revenues for the year 1919, issue bonds and to levy taxes for such purposes but not otherwise,' the board of education of any school district may levy in the year 1919, not to exceed two mills for any and all purposes for which such boards may levy taxes, upon securing the approval of the electors of such district in the following manner:
>
> By resolution passed by an affirmative vote of a majority of all its members elected or appointed, such board may order that the question of levying such tax, at a rate to be fixed therein, shall be submitted to the electors of the district at a special election to be held therein on Tuesday the twelfth day of August, 1919. A copy of such resolution shall be certified to the deputy state supervisors of elections of the county or counties in which the district is situated. The deputy state supervisors shall prepare the ballots and make the necessary arrangements for the submission of such question. The result of the election shall be certified and canvassed in like manner as all regular elections for the election of members of boards of education. Notice of such election for not less than ten days shall be given by the deputy state supervisors of elections in one or more newspapers printed in the district, once a week on the same day of the week for two consecutive times prior thereto. If no newspaper is printed therein such notice shall be posted for ten days prior to the election in five conspicuous places in the district, and published as aforesaid in a newspaper of general circulation therein. A notice substantially in the following form shall be sufficient:
>
> NOTICE OF SPECIAL ELECTION
>
> Notice is hereby given that a special election will be held in the ..... school district, Ohio, on Tuesday, the twelfth day of August, 1919, to de-

termine whether an additional tax levy of ------ mills, outside of all limitations, for the year 1919, shall be made for school purposes in such district.

The expense of giving such notice shall be certified by the deputy state supervisors to the clerk of the board of education and shall be paid as expenses of notices of school elections are paid.

Section 2. The ballots used at such election shall indicate the name of the school district and, further shall be in form as follows:

'For additional tax levy of------mills for the year 1919, for school purposes, Yes.

'For additional tax levy of------mills for the year 1919, for school purposes, No.

Section 3. If a majority of the electors voting on the proposition so submitted vote in favor thereof, upon the certification and canvass of such result it shall be lawful for such board of education to levy taxes on the duplicate made up in the year 1919, at the aggregate rate so authorized for such purposes in addition to all other taxes for like purposes. Such levy shall be certified to the county auditor who shall place it on the tax duplicate; it shall not be subject to any limitation on tax rates now in force, and shall not be subject to the control of the budget commission nor shall such budget commission reduce the amount of other levies made by any board below the amount allowed such board for the preceding year.

(Section 4 is emergency clause.)"

Attention is invited to the fact that nothing is said in the law itself relative to the August primary, but the language is "at a special election to be held therein on Tuesday, the 12th day of August, 1919." This language again occurs in the notice of special election, wherein it is stated that "a special election will be held * * * on Tuesday, the 12th day of August, 1919. * * *" The procedure necessary is for the board of education to adopt a resolution calling such election and stating in exact language the question to be voted upon, with the number of mills, including fractions, but not to exceed two mills as a whole; such resolution to be regularly certified to the deputy state supervisors of elections of the county and a special election conducted in the same manner that all other special school elections are conducted.

Attention is invited to the fact that senate bill 187 takes no official notice that the 12th day of August, 1919, happens to be the day on which the primaries are held in municipalities this year, but refers to the 12th day of August, 1919, as the date on which there shall be a special election held for the purpose of taking care of deficiencies existing in the financial affairs of school districts. In these municipalities over 2,000 in population, primaries will be held for the nomination of municipal officers and electors of all parties of the male sex will be handed the special school levy ballot provided that the board of education of such districts have taken steps to have such special election called on such date and for such purpose. In those communities which are subdivisions with less than 2,000 population and in which on the 12th day of August there will be no primary election for the nomination of any officials, the special election will be conducted on such date in the same manner as in other special school elections, provided the school board of such subdivision has called the election provided for in senate bill 187.

Respectfully,
JOHN G. PRICE,
Attorney-General

495.

MUNICIPAL CORPORATIONS—BOND ISSUE AUTHORIZED UNDER SECTION 3939 G. C.—INTERPRETATION AS TO WHAT PURPOSES ARE INCLUDED IN SAID SECTION—FOR FIRE DEPARTMENT BUT NOT FOR AUTOMOBILES FOR POLICE SERVICE, PARK, HEALTH, ETC.

Section 3939 G. C. authorizes the issuance of bonds by a municipal corporation for purchasing apparatus for the fire department, including automobiles and other conveyances necessary for the complete usefulness of the buildings and equipment specially authorized in paragraph 27 of said section.

Section 3939 G. C. does not authorize the purchase of automobiles for the police department, service department, park department, health department, or general miscellaneous purposes.

COLUMBUS, OHIO, July 19, 1919.

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

GENTLEMEN:—You recently requested my written opinion as follows:

> "We are enclosing herewith copy of a communication to state examiner Parmelee, together with copy of an opinion of the city solicitor of Youngstown, Ohio, to the city auditor, as the writer in several instances has held according to his best judgment on the issuance of bonds to cover motor vehicles of various natures, we think it advisable and therefore respectfully request your written opinion upon the following matters:
>
> 1. Can bonds be legally issued to cover general apparatus of a fire department other than those which are specifically listed in paragraph 27 of section 3939 of the General Code.?
>
> 2. Can bonds be legally issued to cover the cost of motor patrol wagons, police chief's car, two automobiles for general police purposes and motor vehicles for police usage?
>
> 3. Can bonds be legally issued to purchase motor vehicles for general miscellaneous purposes, such as automobiles for service director, service department, park department, health department, etc.?"

With your communication you also submit a copy of opinion of the city solicitor of Youngstown, in which he considers the legality of a bond issue under the provisions of section 3939 G. C. for the purpose of purchasing for the central police station of Youngstown an auto patrol wagon, a chief's car, two Ford cars, four motorcycles and other equipment.

The determination of your question will depend upon the construction of the provisions of section 3939 G. C., as amended in 106 Ohio Laws, 536, as I do not find any other general or special provision which might be considered in point upon the question involved.

Section 3939 G. C. in its amended form is of the same general purport and substance as the original section 3939, which was enacted as a part of the Longworth act, so-called, which provided a comprehensive authorization for issuance of bonds for specifically enumerated purposes. The section is quite lengthy and provides by an extended enumeration of particular purposes authorization for the issuance of bonds by the council of a municipal corporation upon a two-thirds vote of its members.

I have examined the enumeration of purposes embodied in the section and find that the only ones which might be said to be in point as an authorization for the issuance of bonds for the purposes comprehended by your inquiry are found in subsec-

tions 2 and 7. Therefore I quote so much of the section as will illustrate the application of the provisions mentioned.

> "Sec. 3939. When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent. per anum, as said council may determine and in the manner provided by law, for any of the following specific purposes:
> * * * * * * * * *
> 2. For extending, enlarging, improving, repairing or securing a more complete enjoyment of a building or improvement authorized by this section, and for equipping and furnishing it.
> * * * * * * * * *
> 7. For erecting workhouses, prisons and police stations.
> * * * * * * * * *"

I have examined the copy of opinion of the city solicitor of Youngstown which you have attached to your communication, in which the conclusion is reached that section 3939 authorizes the issuance of bonds for the purpose of purchasing automobiles for the police department, and the conclusion being arrived at by deduction of an analogy to the case of the issuance of bonds for purchasing an automobile hose truck and similar equipment for a fire department. which was determined to be authorized under said section in a previous opinion of this department rendered on December 8, 1914, and appearing in volume II of the Report of the Attorney-General for that year, at page 1512.

I find myself unable to agree with the conclusion of the city solicitor, and likewise unable to agree that the case presented in your inquiry and as considered by the solicitor of Youngstown in the construction of an ordinance of that city, providing for the issuance of bonds for the purchase of motor vehicles for the police department, is analogous to the case of issuance of bonds for purchase of a hose truck as considered in the previous opinion of this department.

The question considered by my predecessor with relation to the authority to issue bonds for purchase of a hose truck involved a consideration of subsection 27 of section 3939 G. C., supra, which sub-section provides:

> "27. For erecting any building necessary for a fire department, purchasing fire engines, fire boats, constructing water towers and fire cisterns, and paying the cost of placing under-ground the wires or other signal apparatus of any fire department."

In the opinion referred to it was pointed out that said sub-section 27 and subsection 2 of the same statute should properly be considered together and by so doing the provision of sub-section 2 amounted to an enlargement of the specific authorization contained in sub-section 27, to the extent that it provides for issuing of bonds for

> "extending, enlarging, improving, repairing or securing a more complete enjoyment of a building or improvement authorized by this section, and for equipping and furnishing it."

The case thus considered is distinguishable from the one now under consideration for the reason that sub-section 7, which is the substantive provision to be relied upon in the present case, only pertains to the erection of workhouses, prisons and

police stations; while sub-section 27, in addition to the enumeration of buildings for the fire department, also enumerates items of equipment, and by reading sub-section 2 in connection with the latter section the provision for extending, enlarging and securing a more complete enjoyment applies as well to the provision for equipment as to the provision for buildings; while the same result does not follow in the case of reading sub-section 7 and sub-section 2 together, for the reason that, as above pointed out, sub-section 7 does not relate to equipment for the police department but is aptly limited in its language to buildings, thus necessitating the limitation of the effect of sub-section 2 to extending, enlarging and securing the more complete enjoyment, etc., of the buildings.

Thus, while conceding the suggestion of the solicitor of Youngstown that sub-section 2 should be read in connection with sub-section 7, yet I am of the opinion the conclusion does not follow that any authorization is found for issuing bonds to purchase automobiles, as it could not be said they pertain to the enjoyment or enlargement, etc. of the police station.

Sub-section 7 is not as broad in its language in this regard as sub-section 27, and with respect to the matter of supplying general equipment for the respective departments of the city government concerned with the police station under sub-section 7 and the fire department under sub-section 27 there appears to be no analogy.

Therefore, I advise that the provisions of section 3939 G. C. do not authorize the issuance of bonds for the purchase of automobiles for the police department, nor for the service, park or health departments of the city government.

Your first inquiry pertains to apparatus for the fire department, and I am of the opinion that the section does authorize the issuance of bonds for the purchase of apparatus calculated to secure more complete enjoyment or to extend and enlarge the improvements authorized in sub-section 27, being not only the necessary building for the fire department but also fire engines and other enumerated apparatus. In securing the complete usefulness of the fire engine undoubtedly other equipment would be found necessary, and in fact various motor trucks and conveyances might be found appropriate and necessary for conveying the chief and other officers to the scene of a fire for effecting the proper and complete use of the fire engines and other apparatus specifically authorized and would therefore seem to be within the spirit and scope of the section, and I hold that the authorization is sufficient when properly invoked for such purposes.

Respectfully,
JOHN G. PRICE,
Attorney-General.

496.

BOARD OF EDUCATION—ELECTION HELD FOR BOND ISSUE AND APPROVED BY ELECTORS—FIRST INTEREST AND SINKING FUND LEVY SHOULD BE CERTIFIED TO COUNTY AUDITOR ALTHOUGH ELECTION HELD AFTER FIRST MONDAY IN JUNE—SUCH LEVY NOT SUBJECT TO CONTROL OF BUDGET COMMISSION—WHEN SECTION 5660 G. C. MUST BE COMPLIED WITH.

The first interest and sinking fund levy on account of bonds issued under section 7630-1 G. C. should be certified to the county auditor by the board of education, though the election authorizing the issuance of such bonds and the resolution providing therefor are not held and passed, respectively, until shortly after the first Monday in June. Such

levy is not subject to the control of the budget commission and need not be included in the annual budget.

The making of such levy is not a proper predicate for the issuance of a clerk's certificate under section 5660 G. C. in connection with the awarding of a contract for the construction of a school building. The bonds must be sold and in process of delivery before such certificate can be issued.

COLUMBUS, OHIO, July 19, 1919.

HON. GEORGE S. MAY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Acknowledgement is made of the receipt of your letter of June 27th setting forth the following facts upon which the opinion of this department is invited:

> "In May of this year the board of education of Napoleon Village School District, acting under section 7630-1 of the General Code, passed a resolution submitting to the electors of the district at a special election to be held on June 10, 1919, the question of issuing bonds for the construction of a new school house and the repair of the present building in the district; the election was held and duly canvassed; a majority of the electors voted in favor of the issue. Thereupon a resolution was adopted by the board of education providing for the issuance and sale of bonds.
>
> *Query.* May the first sinking fund levy on account of such bonds be made on the duplicate to be made up this fall, or does section 5649-3a of the General Code prevent the making of such levy on account of the date for the submission of the annual budget thereunder having gone by?
>
> You also ask whether contract can be let and the auditor's certificate issued as soon as the levy is made and the bonds are advertised for sale, or whether the issuance of such certificate and the letting of the contract will have to await further action?

In the above statement of the question it has been assumed that the proceedings thus far taken were had under authority of section 7630-1 G. C., which need not be quoted. It is sufficient to observe that this section authorizes the issuance of bonds for the purpose broadly of complying with orders of the department of workshops and factories and that upon favorable vote of the electors thereunder it then becomes the mandatory duty of the board of education to make interest and sinking fund levies for the retirement of such bonds.

Attention is invited in this connection to the provisions of section 5649-4 G. C., which provides, among other things, that for the emergencies mentioned in section 7630-1 of the General Code "the taxing authorities of any district may levy a tax sufficient to provide therefor, irrespective of any of the limitations of this act."

In other words, the interest and sinking fund levies which now must be made in the school district in question are outside of all the limitations of the Smith One Per Cent. Law, so-called, and made so by one of the provisions of that very law itself.

Such levies being so made it is obvious that they are not subject to the control of the budget commission, and in fact are not to be taken into account by the budget commission in making its apportionment of levies to the school district for other purposes. In other words, the exception made in section 5649-4 G. C. are broad enough, in the opinion of this department, to obviate the necessity in the legal sense of submitting the levies therein provided for in the annual budget for any purpose whatsoever.

From this fact it is concluded that section 5649-3a, which deals with the submission of the annual budget and fixes the first Monday in June as the date on which such submission shall be made, is not controlling as to levies authorized by section 5649-4.

Even if it were controlling it is submitted that it is directory merely. Surely the levy of taxes for all the necessary purposes of a political subdivision is not to be denied on the mere ground that it is not made in time. (See in this connection State ex rel vs. Roose, 90 O. S., 345.)

Of course, in this case the levy in question not only was not included in the annual budget and filed on or before the first Monday in June, but it could not have been so included and filed because it was not authorized until the vote was taken on June 10th. In the opinion of this department, this fact makes no difference in the legal result of the election. The general principle is that statutory provisions as to time are to be regarded as directory merely, especially where there is no express provision as to what shall be done in the event that the stipulation as to time is not complied with. A corrollary of the same principle is that where the controlling purpose of the law is that the thing shall be done at all events this purpose is to prevail over a provision that it shall be done on or before a certain date. Here there can be no question as to the existence of the controlling purpose that the levy shall be made at all events. We find that purpose expressed not only in section 7630-1 of the General Code, which provides, *inter alia*, that

> "For the payment of the principal and interest on such bonds * * * and to provide a sinking fund for their final redemption at maturity, such board of education shall annually levy a tax as provided by law.";

but also in Article XII, Section 11 of the Constitution, which contains similar language of general application. In other words, the requirement is that annual levies during the life of the bonds shall be made. It is physically possible to make such a levy at this time, and it is not subject to the control of the budget commission. Therefore, the mandatory requirement of the constitution and of section 7630-1 G. C. is that the levy shall be so made, though it is impossible to make it through the agency of the budget commission, even if section 5649-3a could be held applicable to such a levy.

Thus far sections 7586 and 7594 of the General Code have not been considered. These sections provide as follows:

> "Sec. 7586. Each board of education, annually, at a regular or special meeting held between the third Monday in April and the first Monday in June, shall fix the rate of taxation necessary to be levied for all school purposes, after the state funds are exhausted."
>
> "Sec, 7594. The amount of the levy fixed by the boards of education under the next eight preceding sections, shall be certified to the county auditor, in writing, on or before the first Monday in June of each year by the boards of education, and on or before the first Monday in August of each year by the county commissioners when the levy is made by them, who shall assess the entire amount upon all the taxable property of the district, and enter it upon the tax duplicate of the county. The county treasurer shall collect it at the time and in the same manner as state and county taxes are collected, and pay it to the treasurer of the district upon the warrant of the county auditor."

The reference in section 7594 is to the provisions of section 7610 of the General Code, which authorizes the county commissioners to make the levy when the board of education fails to make it. It will be observed that upon a very strict interpretation of these sections no more extreme holding could be made than that the board of education itself is without authority after the first Monday in June to make the levy, but that the county commissioners have authority to do so up to the first Monday in August (See section 7594). However, under the circumstances of this case it seems

to me that the principle of directory statutes should be adhered to, at least to the extent of holding that if the board of education is willing after the first Monday in June to make a levy which is not only authorized but which is positively required by law and by the constitution to be made in that year, such levy when made by the board of education after that date is legal and the action of the county commissioners is not necessary.

Your first question is therefore answered by the statement that the board of education is authorized at the present time, and indeed it is its duty to certify a levy to the county auditor for the purpose of paying the interest and accumulating a sinking fund against the retirement of the bonds in question, assuming that they were properly issued under section 7630-1 G. C.

Your second question invokes consideration of section 5660 of the General Code, which provides in part as follows:

> "The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund * * *."

The form in which you express your inquiry suggests that you have considered the possibility of regarding the levy when made as money "in process of collection and not appropriated for any other purpose" than the purpose of the contract. Such an assumption is erroneous, for two reasons:

> (1) The levy does not provide money sufficient to pay the contract price, but only one installment of interest and sinking fund on account of the bonds.
>
> (2) The proceeds of the levy are appropriated to a purpose other than the discharge of the contract, namely, the payment of the principal and interest on the bonds. It is the proceeds of the bonds which may be used to discharge the contract, and not the proceeds of the levy.

You will observe that the section further provides that

> "money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund."

It is, therefore, not necessary to wait until the proceeds of the sale of the bonds actually reach the treasury, but when the bonds have been sold and are in process of delivery the contract may be entered into and a certificate issued.

In the same connection it may be observed that the supreme court of this state has held under the somewhat similar language of sections 3806 et seq. of the General Code, applicable to municipal corporations, that an auditor's certificate is not necessary at all as against the proceeds of bonds.

> See Emmert vs. Elyria, 74 O. S., 185;
> Akron vs. Dobson, 81 O. S., 66.

These cases, however, do not stand upon a very firm foundation (Carthage vs. Diekmeier, 79 O. S., 323), and in the opinion of this department cannot safely be followed, especially by boards of education.

You are advised, therefore, that section 5660 G. C. should be literally followed, and that the letting of the contract should be postponed until the bonds are sold and in process of delivery, but not necessarily until the proceeds of the sale are actually in the treasury of the school district.

Respectfully,
JOHN G. PRICE,
Attorney-General.

497.

INHERITANCE TAX LAW—PARAGRAPH 4 OF SECTION 5332 AS AMENDED CONSTRUED.

COLUMBUS, OHIO, July 19, 1919.

HON. HOMER, Z. BOSWICK, *Probate Judge, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 18th in which you call my attention to paragraph 4 of section 5332 of the General Code as amended by the act approved June 5, 1919, being an act providing for the levy and collection of a tax on all inheritances etc. This paragraph provides as follows:

> "4. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property heretofore or hereafter made, such appointment when made shall be deemed a succession taxable under the provisions of this subdivision of this chapter in the same manner as if the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by said donee by will; and whenever any such person or corporation possessing such power of appointment shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a succession taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as if the persons, institutions or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise the same, taking effect at the time of such omission or failure."

You state that you are unable to comprehend the meaning of this provision, and request the rendition of an opinion "setting forth in simplified language what the legislature meant to say in this paragraph." (You call attention especially to the last three lines of the paragraph).

The paragraph is one which is found in one form or another in the inheritance tax laws of perhaps a dozen different states. (See Gleason & Otis' Inheritance Taxation, pp. 109, 111, 209). It has two purposes which may be summed up as follows:

To make it clear that a tax is imposed by the act upon successions under wills effectual before the passage of the act but not vesting an ultimate estate at such time because of the interposition of a power of appointment to be exercised within limits of time expiring after the act became effective. For example, let us suppose that A. died in 1917 leaving to his executors a sum of money to be distributed by them in

1920 among such of the testator's blood relatives as might seem to be most worthy, in accordance with the discretion of the executors.

Suppose again that the testator dying in 1917 had devised lands to his wife for her life, with power to appoint the remainder by her will.

Now suppose in both of these cases that the power created by the will is so exercised as to make the succession devolve upon direct relatives of the testator, i. e., those whose succession would not have been taxable under the original collateral inheritance tax law. This paragraph declares the intent of the law to be, in the first place, that the exercise of such power of appointment, with the resultant devolution of estates or interests upon the appointees of the donee of the power, shall constitute taxable successions under this act. This is brought about by the use of the word "heretofore" which appears twice in the paragraph. The paragraph is divided into two parts, separated by the semicolon. The first part states what shall happen in the event of the exercise of such power, and the second part states what shall happen in the event of the failure of the donee of the power to exercise it. This part of the paragraph, in so far as it relates to the result upon estates passing from testators dying before the law of 1919 became effective, had been held unconstitutional in New York, but sustained as to its constitutionality in Massachusetts. (See the work above cited). Of course what results is that the property will go as in the case of partial intestacy. But the policy of the law is that though there is an intestacy there shall not be a relation back as to the date of death for the purpose of determining the taxability of the succession, but the result shall be regarded in law (as it is in fact) as brought about through the agency of the donee of the power through his failure to exercise it.

All that has been said relates to the effect of the paragraph as bringing within the purview of the law successions that might be otherwise held to be not subject to it at all. This is only half, however, of the intent embodied in the paragraph; for the paragraph aims to clear up what would otherwise be a doubtful question as to the application of the tax to an estate passing under a power of the kind described or because of failure to exercise it. You will observe that it is not the will of the testator (or grantor—for such powers can be created by deed as well as by will) that has the effect of ultimately vesting the estate in the appointee or appointees, but it is the concurring will of the testator or grantor, as the donor of the power, and the donee of the power that brings about this result. This question becomes particularly difficult of solution when (as is very frequently the case) appointment is made by the will of the donee of the power, as in the second case above supposed. There the property passes from the original donor to the ultimate successor as the cumulative result of two wills—one that of the donor, and the other that of the donee of the power. One possible result of such a situation in the absence of a specific statute governing the case might be the double taxation of the succession—once as a contingent remainder arising under the first will, and again as a fee arising under the second will. To avoid this the paragraph provides that such a transaction shall be deemed a succession taking place at the time of the exercise of the power of appointment. Similarly, as to failure to exercise the power of appointment. The law provides that the resultant devolution of estates shall be regarded as taking place as the result of the conduct—that is to say the will or intent—of the donee of the power rather than as the result of the act or will of the original donor.

Exhaustive notes illustrating the holdings of the courts on such questions, both under statutes of this kind and under the common law, as affecting inheritance taxes are found in

33 L. R. A. n. s., 236; and
L. R. A. 1918-D, 339.

You ask for a paraphrase of the section. I do not know that I can make the

language used any simpler than it is, but I can at least put it in another way, as follows:

> "Whenever the owner of property by deed or will grants, bequeaths or devises it to another person for a limited period and empowers such other person to appoint the ultimate successors to it, or whenever the original owner by will leaves property to such person as may be selected by some designated person, the taxable succession for the purposes of the act shall be that which occurs when the selection is made by the person so empowered, rather than that which occurs when the estate passes out of the original owner; and if the person so empowered fails to exercise the power, so that the estates descend or are distributed according to law, yet such descent or distribution shall be regarded as taking place through the agency or will of the person who failed to exercise the power, so that the taxable succession shall be deemed to have taken place at the time such person should have exercised such power; and in order to bring about such a result the succession shall be considered in the same light for the purposes of the tax as if the person who exercised the power or failed to exercise it, as the case may be, had died on the date of such exercise or failure to exercise, leaving a will by which the estates ultimately vesting had been immediately created. This shall be the result whether the instrument of the original donor creating the power was effective for that purpose before or after the taking effect of this act."

I may add that the last three lines will be clearly understood, I think, if the word "failing" therein be read "who has failed," and if it be remembered that the phrase "taking effect at the time of such omission or failure" modifies the word "will."

I trust that this makes the matter clear.

Respectfully,
JOHN G. PRICE,
Attorney-General.

498.

JANITOR OF OHIO SENATE—WHEN ENTITLED TO COMPENSATION FOR ADDITIONAL SERVICES.

1. *The janitor of the Ohio senate, who is regularly employed and receives a stated monthly salary, is not entitled to secure compensation for services in cleaning the senate chamber after a meeting or conference which was incidental to or connected with the senate sessions or meetings or conferences of its committee.*

2. *Such janitor is entitled to compensation for services rendered in cleaning the senate chamber when he is employed for that purpose by the industrial commission after a meeting of the division of boiler rules and inspection under section 1058 G. C., provided such work does not interfere with the discharge of his duties as janitor of the senate.*

COLUMBUS, OHIO, July 19, 1919

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department, as follows:

> "It has come to my official notice that the janitor of the Ohio senate is

in the habit of being paid additional sums by state departments for cleaning up the senate chamber after a joint conference or meeting has been held by one of the state departments of government.

The present incumbent, Edward Cain, is janitor of the senate rooms and is on the Ohio senate payroll and receives $75.00 per month. He states that previous to this time janitors have received extra compensation from departments for cleaning up the senate chamber after a conference.

Recently the industrial commission, division of boiler rules and inspection, held a meeting and have tendered a voucher to this department in the sum of $5.00 for additional compensation to the janitor who is on the state payroll.

I wish you would advise me whether or not Mr. Edward Cain can lawfully receive money from other departments for janitorial services in view of the above facts. This department has always discouraged double salaries or compensation where the employe receives a reasonable payment for services of a specific nature."

Your letter of inquiry does not define the duties of the janitor of the senate rooms nor does it indicate the character of the meeting or conference which was held in the senate chamber other than this: that it indicates that it was a meeting held by the division of boiler rules and inspection of the industrial commission.

It is noted that the question upon which you desire the opinion of this department is whether the janitor of the Ohio senate, who is a senate employe receiving a monthly salary, may legally be paid compensation for cleaning the senate chamber after the meeting of such boiler rules and inspection division.

Section 29, article II of the constitution of Ohio, sections 56, 871-6 and 1058-6 General Code are pertinent to this question.

At the outset it may be observed that because of the absence of information, as above indicated, the question of the legality of this payment cannot be answered categorically but the statement of the correct rules of law applicable to the payment of extra compensation to a senate employe and the correct rule as to the payment of a person employed by the industrial commossion may furnish you with an alternative rule which it is hoped may be responsive to your needs.

Section 29, article II, in part provides:

"No extra compensation shall be paid to any officer, public agent, * * * after the service shall have been rendered, * * * nor shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General assembly."

In State ex rel. vs. Williams, 34 O. S., 218, it is held that this inhibition applies to any person employed in the public service, whether as an officer, public agent, or employe. This is evidenced by the following language in the opinion, page 219:

"This language is very broad and was intended to embrace all persons who may have rendered services for the public in any capacity whatever, in pursuance of law, and in which the compensation for the services rendered is compensated by law."

If the claim for extra compensation in the question under discussion is considered as extra services rendered by a senate employe the following language of the court in the case above quoted is pertinent:

> "Now, they (senate sergeant-at-arms) were required to take an oath to 'faithfully and diligently discharge the duties required of them in their respective offices.' * * * They were, therefore, bound to perform their duties faithfully and diligently, and, if this was done, the performance in addition thereto of extra services in discharge of their duties would not be possible."

Paraphrasing this quotation in its application to the present case we would find that if the janitor of the senate were obliged to perform all of the work incident to his employment as such janitor for which he was employed and compensated it would follow that, as above quoted,

> "Extra services in discharge of (such) their duties would not be possible."

In Sage, Auditor, vs. Commissioners, 82 O. S., 186, the court, speaking by Judge Shauck, holds it to be a rule long established in this state

> "that if a statute imposes a duty upon a public officer it is presumed to be performed by him in consideration of the general emoluments of his office, unless the legislature has clearly indicated that compensation shall be paid for the performance of the duty so imposed."

So, it would be very well said that if the meeting which necessitated the work of the janitor referred to in your letter was incident to or connected with the sessions of the general assembly, in the absence of any expression of the senate indicating a different intention, it would be concluded that that work was incident to the janitor's employment and so contemplated in the fixing of his monthly salary, in which event no extra compensation would be payable to him.

If, however, the meeting referred to was not of the character above referred to and was not incident to or connected with the senate sessions or meetings or conferences of its committees a different result would be reached.

Section 871-6, General Code, authorizes the payment of expenses for providing suitable rooms for the industrial commission and section 1058, General Code, requires the division of boiler rules and inspection to hold "examinations and public hearings * * * in the city of Columbus * * * on the second Wednesday * * * in May * * * of each year and at such other times as it may determine." It may be noted that such a meeting of this division of the industrial commission may or may not be held in the senate chamber and such a meeting could not be said to be a meeting in connection with the sessions of meetings of the senate chamber.

The sections above referred to and others related thereto would authorize the payment for janitor services by the industrial commission and if the meeting referred to in your letter was of such a character you are advised that authority in law exists for the payment of the expenses of such meeting including that of expenses necessarily incurred in cleaning the senate chamber where it met.

This result is reached not on the theory that the janitor is entitled to compensation as extra compensation as a senate employe but as one who has rendered services for the industrial commission.

There is nothing incompatible in the two empoyments and unless the rendition of such services for the industrial commission interfered with his work as janitor of the senate no legal objections can be raised to the payment for such services rendered to the industrial commission.

Respectfully,
JOHN G. PRICE,
Attorney-General.

499.

MOTHER'S PENSION FUND—HOUSE BILL No. 507 (108 O. L. 264), INCREASING RATE OF LEVY FOR SAID PURPOSE EFFECTIVE IN NINETY DAYS AFTER IT IS FILED IN OFFICE OF SECRETARY OF STATE.

House bill No. 507 (108 O. L. 274), amending section 1683-9 G. C. by increasing the rate of the levy which may be made by county commissioners for mothers' pension fund purposes, is subject to the referendum and does not go into effect until ninety days after it was filed in the office of the secretary of state. This being the case, action under H. B. 507 can not be taken so as to affect the next tax year.

COLUMBUS, OHIO, July 19, 1919.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—In your letter of July 3 you request the opinion of this department on the question as to whether or not house bill 507 (108 O. L. 624), amending section 1683-9 G. C., by authorizing the levy, for the uses and purposes of the juvenile court in the administration of the mothers' pension law, to be made at the rate of one-fifth of a mill, instead of one-tenth of a mill as formerly, went into immediate effect by virtue of the exception in the rc'erendum provision of the constituiton found in section 1d of Art. II of the constitution.

I am enclosing a copy of an opinion addressed to the tax commission of Ohio, dealing with the precisely similar question arising under the act amending the highway laws of the state. Applying the principles of this opinion to your question, the result is that house bill 507 does not go into effect until ninety days after it was filed in the office of the secretary of state, and I so advise.

This conclusion answers your first question and makes unnecessary an answer to your second question.

In answering your third question, as to whether or not, if the act in question is subject to the referendum, its benefits may be made possible for the next tax year I note that the act was filed in the office of the secretary of state on June 6, 1919. This was after the first Monday in June, 1919, when county budgets are required to be made up and filed with the budget commissioner. The ninety day period will expire early in September, 1919. In any possible view of the law relative to the time of making tax levies, this would be too late to make possible the use of H. B. No. 507 for the next tax year.

Section 1683-9 G. C. is of course not self-executing, being a mere grant of authority to the county commissioners. Moreover, it is not mandatory on the commissioners to levy any particular rate, as would be the case if it were an interest and sinking fund levy governed by Art. XII, Sec. II of the constitution, for example. In short, it is a matter of mere discretion and power in the county commissioners. Such power, to be exercised at all, must be exercised at the time provided by law, or at least within a reasonable period thereafter. Moreover, the mothers' pension levy is one of the levies which is subject to the control of the budget commission. The budget commission under existing laws is required to complete its work before the time at which this act will go into effect. See section 5649-3b G. C.

For all these reasons, therefore, your third question is answered in the negative.

Respectfully,

JOHN G. PRICE,

Attorney-General.

500.

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN PORTAGE COUNTY.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, July 19, 1919.

501.

BOARD OF EDUCATION—VILLAGE SCHOOL DISTRICT—TOWNSHIP RURAL SCHOOL DISTRICT—CANNOT CENTRALIZE UNDER SECTION 4726-1 G. C.—CAN COMBINE UNDER SECTION 4735-1 G. C.

1. *A village school district cannot participate in an election for the centralization of the schools in a township under the provisions of section* 4726-1 *G. C.*

2. *Where a township rural school district and a village school district desire to combine their school activities regard should be had to section* 4735-1 *G. C., which provides for the dissolution by election of the rural district and its joining to the village school district.*

COLUMBUS, OHIO, July 21, 1919.

HON. HARRY M. RANKIN, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

> "In Jefferson township, Fayette county, Ohio, there are two school districts, to-wit: The Jefferson village school district and the Jefferson township rural school district. Jeffersonville is an incorporated village. The boards of education of each of these districts are of opinion that these two school districts should be consolidated, provided that the schools therein were centralized.
>
> They are not in favor of the county board of education transferring territory from one to the other and thus effecting consolidation for the reason that centralization might thereafter fail in the consolidated district. These matters are mentioned for the purpose of explaining the importance of the questions hereafter to be discussed.
>
> Section 4726-1 of the General Code, if applicable to this situation, will accomplish their objects. In the application of this section to the facts, however, several questions are encountered.
>
> 1st. Does G. C. 4726-1 apply where there is a village school district involved? That section in part reads:
>
> 'In townships in which there are one or more school districts, the qualified electors of such school districts may vote on the question of centralization of the schools of said township districts, or of special school districts therein,' etc.
>
> Does the language of this section limit its application to the two classes of school districts just mentioned?
>
> It also appears from this section that in case centralization carries 'the probate judge of the county shall create a new board of education for the

said township. If the consolidated district is thereafter to be a township district (meaning rural) it would seem that there is a conflict with General Code section 4681, which defines a village school district.

2nd. In case this section is applicable, the question next arises: How shall the machinery be set in motion to submit the questions to a vote of the people, and who is entitled to vote at such election?

On this question the law makes no provision for the electors petitioning any board or body for submission of the question; no provision for the joint boards acting in the matter or for the boards acting separately is to be found."

Section 4726-1 G. C., which you cite, reads as follows:

"In townships in which there are one or more school districts, the qualified electors of such school districts may vote on the question of centralizing the schools of said township districts, or of special school districts therein, without interfering with the existing school district organization until the result of the election shall have been determined. If at such election in any township a majority of all the votes cast shall be in favor of centralizing the schools in said township, the probate judge of the county shall create a new board of education for the said township, without delay, by selecting from the several boards of education thus consolidated, five suitable persons, giving each former district its fair representation in such selection, which such five persons so selected shall constitute the board of education for said township until the first township election thereafter; at such first township election thereafter the electors of such township shall elect two members of the board of education for two years, and three members to serve for three years, and at the proper elections thereafter their successors shall be elected for four years. If a majority of the electors in said township vote against said centralization at the time above designated, then the several school districts in said township shall proceed as though no election had been held."

You desire to know whether the language of this section limits its application to township districts and to special school districts, the two kinds of districts mentioned in the section, special school districts now being rural school districts under the law, and whether a village school district could come within the language of such a section.

The answer to this question is that nowhere in section 4726-1 G. C. is there any provision for the centralization of a village school district because in practical life the schools of a village school district are in reality very greatly centralized; that is to say, instead of the number of school buildings as would occur in a rural school district, in a village school district this number might be limited to only one or two and there is little occasion for the centralization of the schools of a village school district, because under section 7730 G. C. the board of education of such village school district has ample authority to transport its pupils to the village school without any question of centralization entering therein.

You are therefore advised that the Jeffersonville village school district and the Jeffersonville township rural school district cannot proceed under section 4726-1 G. C. in the matter of centralization for the reason that such section does not provide for the centralization of village school district schools.

It may be further said that section 4726-1, in order to have any effect at all, and the General Assembly intended it should have, must be read in conjunction with section 4726 G. C., which provides the manner and method of calling the election, which very important feature does not appear in the supplemental section 4726-1 G. C.

As regards your particular case, which seems to be the joining of some method by

the township rural school district and the village school district, attention is invited to section 4735-1 G. C., which reads as follows:

> "When a petition signed by not less than one-fourth of the electors residing within the territory constituting a rural school district, praying that the rural district be dissolved and joined to a contiguous rural or village district, is presented to the board of education of such district; or when such board, by a majority vote of the full membership thereof, shall decide to submit the question to dissolve and join a contiguous rural or village district, the board shall fix the time of holding such election at a special or general election. The clerk of the board of such district shall notify the deputy state supervisors of elections, of the date of such election and the purposes thereof, and such deputy state supervisors shall provide therefor. The clerk of the board of education shall post notices thereof in five public places within the district. The result shall be determined by a majority vote of such electors."

This section provides that upon the petition of one-fourth of the electors in the Jeffersonville township rural school district, there shall be an election called on the question of the dissolution of such rural school district and joining to the village school district of Jeffersonville; that if a majority of the male electors in the rural school district vote to join the village school district and become a part thereof, then the whole of the territory affected, including the old village school district and the rural school district, becomes an enlarged village school district, in which the Jeffersonville board of education would still be the board of education controlling all the schools in such enlarged village school district. It has been indicated that part of the rural school district population is opposed to this because it would give them no representative on the village board of education at this particular time, but this could be amicably arranged if such action were taken before the election of November, 1919, when several new members of every board of education in the state are elected. Both the voters of Jeffersonville village school district as it exists today and the voters of Jeffersonville township rural school district having been joined to the Jeffersonville school district, would have the privilege of voting for the new members of the board of education in November, 1919, in which election both male and female electors could participate. After the joining of such territory to the village school district, the board of education of the enlarged village school district has ample authority under section 7730 G. C. to suspend any or all schools in such enlarged district and provide for the conveyance of pupils to the village school, with the result that this process of consolidation would bring about the same result as centralization which both of these boards are attempting to seek under section 4726-1.

Section 7730 G. C., as amended in 107 O. L., 638, reads as follows:

> "The board of education of any rural or village school district may suspend any or all schools in such village or rural school district. Upon such suspension the board in such village school district may provide, and in such rural school district shall provide for the conveyance of all pupils of legal school age, who reside in the territory of the suspended district, to a public school in the rural or village district, or to a public school in another district. When the average daily attendance of any school for the preceding year has been below ten, such school shall be suspended and all of the pupils of legal school age, who reside in the territory of the suspended district, transferred to another school or schools when the county board of education so directs the board of education of the village or rural district in which said school is located. Notice of such suspension shall be posted in five con-

spicuous places within such village or rural district by the board of education of such village or rural districts within ten days after the county board of education directs the suspension of such school; provided, however, that any suspended school as herein provided, shall be re-established by the suspending authority upon its own initiative, or upon a petition asking for re-establishment, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age. Any school district that is entitled to state aid for salary of teacher according to provisions of sections 7595 and 7595-1 when such schools are not consolidated, or centralized, shall receive the same amount of state aid after such schools are consolidated or partly consolidated, but to be applied to the cost of transportation of pupils to consolidated school, or schools, or for salary of teachers and the transportation of pupils."

In taking advantage of section 7730 G. C., attention is invited to the fact that such section has been twice amended by the present legislature, first in house bill 406, which is effective August 17, 1919, and again in house bill 348, which is effective September 19, 1919. Copies of the new sections occurring in these bills can be secured by addressing the secretary of state, but should your procedure take place before August 17th, then section 7730 G. C., as herein quoted from 107 O. L., would govern.

It would seem, therefore, that your proper avenue to consummate the desires of both boards of education, as indicated in your letter, would be to take advantage of section 4735-1 G. C., for section 4726-1 G. C. does not cover village school districts in centralization proceedings.

It is therefore the opinion of the Attorney-General that:

1. A village school district cannot participate in an election for the centralization of the schools in a township under the provisions of section 4726-1.

2. Where a township rural school district and a village school district desire to combine their school activities, regard should be had to section 4735-1 G. C., which provides for the dissolution by election of the rural district and its joining to the village school district.

Respectfully,
JOHN G. PRICE,
Attorney-General.

502.

COUNTY AGRICULTURAL AGENTS—COUNTY COMMISSIONERS ARE AUTHORIZED TO ENTER INTO ARRANGEMENTS WITH STATE FOR THEIR EMPLOYMENT—COMPENSATION HOW PAID—SEE SECTION 9921-2 G. C.

County commissioners are authorized under the provisions of sections 9921-2 G. C. et seq. to enter into arrangements with the state for employment of county agricultural agents and provide the funds for the compensation of such agent, and this function may be exercised by appropriation from the general county fund or a contingent fund in case no special levy has been made for that purpose.

COLUMBUS, OHIO, July 21, 1919.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your communication relative to

employment of a county agricultural agent, and requesting my opinion as follows:

> "Section 9921-4 of the General Code provides for county authorities making appropriations for the support and expenses of county agricultural agents.
>
> At the time of making the annual appropriations the commissioners of Miami county did not appropriate any money for the maintenance, support and expenses of a county agricultural agent, but said county has had an agent, who has been paid by the aid of state and national funds, but this fund ceases to be available on July 1, 1919, and unless provision is now made the county would be without an agent from July 1, 1919, to March 1, 1920.
>
> My first impression was that no appropriation could be made at this time, but on considering section 9921-5 of the General Code I find a provision made for a referendum vote by the electors of the county and the further provision that if a majority vote in favor of such appropriation that the county commissioners "shall proceed at once to make appropriations for the employment of such agent." It appears to me that if the county commissioners during a fiscal year could by a vote of the electors make an appropriation, that the commissioners would likewise have the power to make that appropriation without such vote and that the appropriation could now be made by the commissioners of Miami county, Ohio, of not to exceed one thousand dollars for the period from July 1, 1919, to March 1, 1920.
>
> The county officers, however, do not wish to take the steps necessary to proceed for the transfer of such money from the county fund to a special fund for this purpose without the sanction of your office.
>
> Will you kindly inform me if I am correct in my construction of the section indicated?"

The statutes providing for the employment of a county agricultural agent are sections 9921-2 et seq. G. C.

Section 9921-2 provides for the appropriation by the state of a sum not to exceed $3,000.00 in any one year for employment of a county agricultural agent in event that the county shall raise at least $1,000.00 for the support of the agricultural agent for one year and shall give satisfactory assurance to the trustees of Ohio State University that a like sum shall be raised for a second year.

Section 9921-4 provides:

> "Each and every county of the state is authorized and empowered to appropriate annually not to exceed fifteen hundred dollars, for the maintenance, support and expenses of a county agricultural agent, and the county commissioners of said county or counties are authorized to set apart and appropriate said sum of money and transmit the same to the state treasurer who shall place it to the credit of the agricultural extension fund to be paid for the purposes aforesaid, on warrant issued by the auditor of state in favor of the Ohio state university. If for any reason it shall not be used as contemplated in this act (G. C. sections 9916 to 9921-5) before the expiration of two years, it shall revert to the county from which it came."

Section 9921-5 provides that if the county commissioners of any county shall not make provision for an agricultural agent, that they may be directed and required to make such provision by the qualified electors of the county on referendum vote, and if a majority of the electors are in favor of the employment of a county agricultural agent, "then the county commissioners shall proceed at once to make the appropriation for the employment of such agent."

The foregoing resume of the statutes will perhaps be sufficient to show their general purport with respect to the plan for providing county agricultural agents.

You state that your county now has the services of an agricultural agent whose compensation has heretofore been provided by state and national funds, which funds cease to be available on July 1st, and your question as to the authority of the county commissioners to now provide for the continuance of the services of the county agent and compensation therefor, no doubt arises in large measure from the provision of section 5649-3a G. C. which provides in substance that on or before the first Monday in June of each year the county commissioners and taxing officials of other local subdivisions shall submit to the county auditor an annual budget setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, which budget, among other things, shall set forth the amount to be raised for each and every purpose allowed by law, for which it is desired to raise money for the incoming year, as well as the provision of section 5 of article XII of the constitution, which provides that

> "no tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied,"

and the further provisions of section 5660 G. C. which provide that county commissioners shall enter into no contract or obligation involving the expenditure of money unless the auditor shall first certify that the money required for the payment of such obligation is in the treasury to the credit of the fund from which it is to be drawn, etc.

However, I am of the opinion that the provisions of the statutes above noted providing for county agricultural agents import a policy of the state and a legislative direction to the county commissioners to provide for the county agricultural agent without regard to the matter as to whether a tax has been levied specifically for that purpose in advance of the employment of the agricultural agent.

These statutes are of later enactment than the other statutes to which attention has been directed, and in some of the provisions is clearly indicated a policy in contravention of that policy embodied in the statutes relative to the levy of taxes and requirement for funds to be available before the obligation may be incurred.

Such policy is indicated for example by the provisions of section 9921-5 that in event of an affirmative determination by referendum vote upon the question of employing a county agent, "the county commissioners shall proceed at once to make appropriation for the employment of such agent."

Also the provision of section 9921-2 to the effect that when the initial arrangement is entered into between the county and the state for co-operation in providing the funds for employment of a county agent, that the commissioners shall "give satisfactory assurance to the trustees of Ohio State University that a like sum shall be raised for a second year;" and the further provision of section 9921-5 which appears to contemplate an undertaking on the part of the county commissioners at the time of establishing the county agent's work, to continue to make provision for it for a period of five years.

In making the initial employment, or in your case, in making your initial provisions for funds at this time in the year, which has been made necessary by the federal and state funds having been discontinued, a strict compliance with the provisions of section 5649-3 by way of appropriation only from a fund levied for this specific purpose would perhaps be impossible, inasmuch as you indicate that no levy has been made for that special purpose.

However, this would seem to be a contingent requirement which may properly be met out of your contingent or general fund of the county, without doing violence

to the intent of the sections of the law we have considered, nor the spirit and purport of the constitutional provision, supra.

In Porter vs. Hopkins, 91 O. S., 74, the supreme court said:

> "The maintenance of contingent and general funds for general purposes is provided for by statutes which are familiar. The municipal and other subdivisions are fully empowered to raise such funds. It would be wholly impracticable to specifically name in the different budgets the amount to be raised for each specific item. There are many incidental charges which are necessarily taken care of out of the funds of the character referred to as the needs arise. The fact that the amount raised does not meet the exact requirements from time to time and that some inconvenience may arise does not affect the validity of the statutory requirements."

While your letter indicates that you have funds perhaps to the credit of the general county fund or a contingent fund, which may be made available for the employment of the county agent, and therefore the question of employment of said agent without funds available does not seem to be involved, yet I may call attention to an opinion of my predecessor, being opinion No. 1212 found at page 690 of the Opinions of the Attorney-General for the year 1918, wherein it was held that by reason of certain provisions of the statutes relative to employment of county agricultural agents being found to be inconsistent with the provision regulating the general scheme of tax levy and expenditure of county funds, particularly section 5660 G. C. restraining the commissioners from incurring obligations except in case funds are available for their payment, the provisions of section 5660 were not applicable to the case of incurring obligations for employment of county agricultural agents in pursuance of the statutes.

I quote from the opinion the following:

> "If, therefore, a statute subsequently passed expressly authorized the making of an agreement by the county commissioners which would bind them to make appropriations in a succeeding year, it is manifest that such statute would be wholly inconsistent with section 5660, because at the time of making the agreement so authorized it could not be certified that the money required to perform the agreement on the part of the county is in the treasury and not appropriated for any other purpose. * * *
>
> The later statute, being inconsistent with the earlier one, must prevail, and to the extent of such inconsistency must be regarded as constituting an exception to the general rule laid down in the earlier law. * * *
>
> The scope of the exception is such that the county commissioners may, in my opinion, enter into the agreement authorized by section 9921-2 of the General Code, whether they have any money in the treasury which can then be appropriated or not."

While this latter phase of procedure is not directly involved, apparently, in your inquiry, I have called your attention to the above ruling, as it may cover questions that will arise in your mind, and from the conclusions I have reached above, I would also be inclined to concur in the opinion of my predecessor relative to the application of section 5660 G. C.

Therefore, I advise that in my opinion your county commissioners are authorized to make appropriation at this time and provide for the continued service of your county agricultural agent.

Respectfully,
JOHN G. PRICE,
Attorney-General.

503

BBOARD OF SCHOOL EXAMINERS—GRANTING OF CERTIFICATES TO HOLDERS OF CERTIFICATES GRANTED BY OTHER COUNTY AND CITY BOARDS OF SCHOOL EXAMINERS IN OHIO AND ALSO BY AUTHORITIES OF OTHER STATES—BOARD OF EDUCATION NOT PERMITTED TO PAY TEACHER UNLESS CERTIFICATE HOLDER—VALIDITY OF CERTIFICATES IN CITY OR COUNTY SCHOOL DISTRICTS.

1. *Boards of school examiners at their discretion may issue certificates, without formal examinations, to holders of certificates granted by other county and city boards of school examiners in Ohio.*

2. *Boards of school examiners at their discretion may issue certificates, without formal examination, to holders of certificates granted by certificating authorities in other states, only upon the approval in each case of the superintendent of public instruction, who also has authority to make regulations for the renewal of such certificates.*

3. *A board of education is not permitted to pay a teacher, unless such teacher holds a certificate valid in the jurisdiction where such teaching is performed. Certificates issued by a board of city school examiners are valid in that city school district. Certificates issued by county school examiners are valid in the county school district, including the villages of such county school district. Certificates issued by the superintendent of public instruction are valid in all school districts in the state.*

4. *A county board of school examiners may at its discretion recognize the certificates of a city board of school examiners in Ohio, and similarly a city board of school examiners may recognize the examinations and certificates of a county board of school examiners in Ohio, and such recognition may be as to one or more certain branches.*

COLUMBUS, OHIO, July 21, 1919.

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

GENTLEMEN:—Acknowledgment is made of your request for an opinion upon the following questions:

> "1. May Ohio county and city boards of school examiners respectively issue a certificate upon a certificate issued by a county or a city board of school examiners of another state?
>
> 2. May an Ohio board of education employ and pay a teacher who holds only a certificate that, although of proper grade, was issued by an out-of-state board of school examiners, or by an Ohio board of school examiners in recognition of an out-of-state board of school examiners?
>
> 3. If so as to the above, how is an Ohio board of school examiners or of education to determine the fact of 'legal jurisdiction?'
>
> 4. As to exclusively Ohio boards of school examiners, must a county or a city board limit recognition of other boards only to certificates issued by county and city boards, respectively? Or may a county board recognize a city board even as to certain branches, and may a city board recognize a county board likewise?"

Bearing upon the first question as to whether county and city boards of school examiners may issue certificates upon certificates issued by a county or city board of school examiners of another state, your attention is invited to house bill No. 317, bearing upon the question of certificates for teachers, which will be effective as law

during and after September, 1919. Section 7824 of the new law, which will be the guide for future questions of this character, reads as follows:

> "Sec. 7824. Boards of school examiners at their discretion may issue certificates without formal examinations to holders of certificates granted by other county and city boards of school examiners in Ohio, and, with the approval in each case of the superintendent of public instruction, to holders of certificates granted by certificating authorities in other states. Such certificates may be renewed under regulations provided by the superintendent of public instruction."

From the amended section 7824 G. C. it will be noted that all boards of school examiners, including city and county boards, may at their discretion grant certificates effective in their jurisdiction upon certificates issued by some other board of school examiners in Ohio, but if the holder of the certificate has a certificate from a board of examiners in another state, a certificate valid in Ohio can be granted by either a county or city board of examiners, but only upon approval of the state superintendent of public instruction, who also has the power of making regulations for the renewal of such certificates.

Relative to your second question as to whether an Ohio board of education may employ and pay a teacher who holds only a certificate which was issued by an out-of-state board of school examiners, it is advised that no teacher is permitted to teach in the public schools of Ohio unless such teacher has a proper certificate from a board which has jurisdiction over the school in which such teaching is done.

You further ask whether an Ohio board of education may employ and pay a teacher who holds only a certificate that was issued by an Ohio board of school examiners in recognition of an out-of-state board of school examiners, and you are advised that under the provisions of section 7824 G. C., newly amended, such certificate is valid, provided that the approval in each case of the superintendent of public instruction has been given upon the question of granting an Ohio certificate upon the certificate of some authority in some other state.

Answering your third question as to how an Ohio board of school examiners or board of education is to determine the fact of "legal jurisdiction," it may be said that this is determined by geographical lines of which the board of school examiners or board of education must have knowledge; that is to say, a certificate granted by a city board of examiners would be valid in the city school district where it was granted, while a certificate granted by a county board of school examiners would be valid in the county school district in which it was granted, including the exempted villages and rural districts of such county district; but a certificate granted under authority of the state superintendent of public instruction, who is the executive head of the school machinery of the state, would be valid in any and all city and county school districts of the state.

As to your fourth question, as to whether the boards of school examiners, either county or city, must limit recognition of other boards only to certificates issued by boards of their same kind, it is advised that it is the clear contemplation of the law that there shall be reciprocal features connected with the administration of the certification of teachers, and this idea is further advanced by the reading of the sections of H. B. No. 317 which is effective in September, 1919, pertinent paragraphs of which are, including section 7824 G. C., above quoted, as follows:

> "Sec. 7847. All provisions of preceding and following sections pertaining to county school examiners and applicants for county teachers' certificates shall apply also to city examiners and applicants for city teachers' certificates unless there are specific provisions of law applying to the latter.

Sec. 7847-1. City boards of examiners shall provide the questions used in the respective city examinations, but may arrange to use questions prepared for county examinations as provided in section 7819, or questions prepared for city examinations under the directions of the superintendent of public instruction for such dates as may be arranged.

Sec. 7848. City and county boards of examiners at their discretion may substitute for the practical teaching test provided by section 7825 such an investigation of the teaching of the applicant as they deem best, and any member of the board of examiners may examine any school in the district when such examination is deemed necessary to ascertain a teacher's qualifications.

Sec. 7852. City boards of examiners at their discretion may require teachers in elementray schools to be examined in drawing, music or physical training if such subjects are a part of the regular work of such teachers; they may also at their discretion relieve applicants for elementary certificates from examination in agriculture or substitute general science or nature study therefor.

Sec. 7852-1. City and county boards of examiners may upon proper examination issue certificates valid to teach special classes for the deaf, feebleminded, backward, and the like, but such applicants must have all necessary and legal qualifications for elementary teachers and in addition such qualifications in such special studies as may be prescribed by the superintendent of public instruction."

It would seem, therefore, that a county board may recognize a city board of examiners, even as to certain branches, and that a city board of examiners could recognize the examination given by a county board of examiners on certain branches.

It may be said that H. B. No. 317 clears up the questions which you ask, but which, under the sections that are now being repealed, have been the cause of more or less doubt prior to this time.

It is therefore the opinion of the Attorney-General:

1. Boards of school examiners at their discretion may issue certificates, without formal examinations, to holders of certificates granted by other county and city boards of school examiners in Ohio.

2. Boards of school examiners at their discretion may issue certificates, without formal examination, to holders of certificates granted by certificating authorities in other states, only upon the approval in each case of the superintendent of public instruction, who also has authority to make regulations for the renewal of such certificates.

3. A board of education is not permitted to pay a teacher, unless such teacher holds a certificate valid in the jurisdiction where such teaching is performed. Certificates issued by a board of city school examiners are valid in that city school district. Certificates issued by the county school examiners are valid in the county school district, including the villages of such county school district. Certificates issued by the superintendent of public instruction are valid in all school districts in the state.

4. A county board of school examiners may at its discretion recognize the certificates of a city board of school examiners in Ohio, and similarly a city board of school examiners may recognize the examinations and certificates of a county board of school examiners in Ohio, and such recognition may be as to one or more certain branches.

In a personal conference you advise that this opinion is requested for a future rule in matters of this kind, rather than to make a finding on the law as it may have existed some months prior thereto, and for that reason the law, which will be in effect after September 7, 1919, has been brought to your attention. It may be said that the holding herein is the proper construction of both the old and the new law on all

the points in question, except that covered in the second branch of the syllabus, which becomes effective on and after September 7, 1919, prior to which date the statutes did not speak upon any approval of the superintendent of public instruction in the matter of recognizing certificates from other states. The new law provides clearly that no certificates shall be issued except under a strict construction of the law, for section 7831 G. C., newly amended, says:

> "* * * and no such certificate shall be issued by such authority except on the specific conditions provided by the statutes."

Respectfully,
JOHN G. PRICE,
Attorney-General.

504.

POLYCLINIC BUILDING — COUNTY COMMISSIONERS WITHOUT AUTHORITY TO CONSTRUCT SUCH A BUILDING—SECTION 3127 G. C. (108 O. L. 255) CONSTRUED.

Under sections 3127 et seq. (108 O. L., Page 255, House Bill 305) county commissioners are not authorized to construct polyclinics the main use and purpose of which is not that of a county hospital.

COLUMBUS, OHIO, July 21, 1919.

HON. C. G. ROETZEL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—Acknowledgement is made of the receipt of your recent request for the opinion of this department as to the question of the authority of Summit county, as stated in your request, "to erect and operate a polyclinic building under the provisions of House Bill No. 305 (108 O. L. 255), which amended sections 3128 et seq."

As indicating the charcter of uses and purposes for which a polyclinic would be built, it is noted that you incorporate in your letter an opinion from a medical standpoint, from which the following is quoted:

> "This polyclinic building would be devoted almost entirely to providing clinical facilities and laboratory equipment and *only such a limited number of hospital beds would be provided as were found to be necessary for the successful operation of the clinics.* It is also desired to provide office rooms and committee rooms for various civic, social, and charitable agencies. It is proposed to incorporate in the construction of this building such memorial features as are outlined in section 3128 of this bill. * * * The limited number of hospital beds maintained in this building would be devoted to emergency uses arising from the work of the clinics, *and it is not contemplated to conduct a regular hospital in this building, but to send the patients needing hospital care to existing hospitals.* * * * * * *
>
> "It is further desired, however, to take an advanced step in hospital work by making this memorial hospital the headquarters for all charitable, civic and social agencies dealing with the problems of disease, ignorance, poverty and delinquency and to marshal in this way all the educational and curative agencies in a great movement to remove all conditions which are prejudicial to public health, morals, and civic efficiency."

Without quoting further it is contemplated that a social service department shall function in connection with the hospital, both in and outside of the hospital, carrying with it the idea of extension work in the home, as shown by some of the outlined activities, such as "social history." * * * necessary aftercare for children discharged from hospital, * * * care for neglected children."

Sections 5, Article 10, and 5, Article 12, of the constitution of Ohio, and sections 3127 to 3138-2 of the General Code are pertinent to your inquiry. Section 5, Article 10, provides:

> "No money shall be drawn from the county * * * treasury, except by authority of law."

Section 5, Article 12, provides:

> "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to *which only*, it shall be applied."

It is not deemed necessary to quote at length from all the sections relating to county hospitals, but sections 3127 and 3128, as amended by House Bill 305, April 6, 1919, may be quoted.

Section 3127 is the section wherein authority is given to the county commissioners upon certain conditions to erect county hospitals. That section in part provides:

> "When two hundred or more tax payers of a county petition the county commissioners for the privilege of having submitted to a vote of the electors of such county the issue of county bonds or notes to provide funds for the purchase of a site and erection thereon of county hospital buildings, and the support thereof, such commissioners shall order a special election * * * to determine the question of issuing bonds or notes for the county hospital, to purchase a site therefor, erect the buildings thereon and to maintain them."

Section 3128, either in its original form or as amended, in no way added anything new to the character of the enterprise which section 3127 authorized, as will be shown by further reference to and quotation from amended section 3128.

It is to be noted that the thing authorized in section 3127 is a county hospital, which is to say, a hospital for the use of the people of the county.

A hospital is defined in the second edition of Black's Law Dictionary as follows:

> "Hospital. An institution for the reception and care of sick, wounded, infirm or aged persons; generally incorporated, and then of the class of corporations called 'eleemosynary' or 'charitable.' "

In 21 Cyc. 1105:

> "A hospital is an institution for the reception and care of sick, wounded, infirm or aged persons; generally incorporated, and then of the class of corporations called 'eleemosynary,' and for the perpetual distribution of the free alms of their founders."

As held by my predecessor in 1912 (Vol. 2, Annual Report of the Attorney-General, 1348):

> "In order to constitute a hospital, the institution must be prepared to

receive and take care of the sick, infirm or aged. It must have rooms for receiving the patients and also the means of giving them the proper attention."

From these definitions the term "hospital," as used in section 3127, would seem to have a definite meaning and it may be suggested that nothing else appears in section 3127 and other related sections to indicate that the legislature used or intended the word to be understood in any sense other than its ordinary meaning, and this department is of the opinion that authority to build a county hospital does not carry with it authority to build a polyclinic building, the main purpose of which would be not for the purpose of conducting a hospital, as understood in the ordinary sense of the word, but, as stated in your letter, "would be devoted to emergency uses arising from the work of the clinic," and it is not contemplated to conduct a regular hospital in this building, but to send the patients needing hospital care to existing hospitals.

The other lines of activity whereby it is proposed "to marshal all the educational and curative agencies in a great movement to remove all conditions which are prejudicial to public health, morals and civic efficiency," while commendable, are outside the scope of a county's function as now defined by the laws of Ohio. It might be claimed, however, that the very recent amendment of these sections extends the commissioners' authority in the matter of such hospitals by reason of the fact that section 3128, as amended, provides that such hospital may be "designated as a memorial to commemorate the services of soldiers, sailors, marines and pioneers of the county." But an examination of the act, as amended, shows that if the memorial feature is petitioned for and voted upon in the election for such a county hospital, the only different result which obtains is that "such buildings, tablets, busts, statues and other memorials and equipment as the board of county hospital trustees hereinafter provided for *shall deem fit to properly accomplish and reserve the memorial feature in such hospital,* shall be incorporated in its construction."

Examination of the amendment will disclose that this is the only change with reference to making the county hospital also a memorial, and section 3137, being the one as before stated which contains the direct grant of authority, is unchanged in any way by the amendment.

It cannot properly be claimed that the legislative desire to thus provide a memorial to its soldiers and pioneers shows any legislative intention to change the character of the enterprise which it had theretofore authorized under the term "county hospital."

In conclusion, this department is of the opinion that neither original section 3127 nor its amendments referred to in your letter, warrant or authorize the county commissioners to erect such a polyclinic building as described in your letter.

Respectfully,
JOHN G. PRICE,
Attorney-General.

505.

DISCHARGED SOLDIERS NOT SUBJECT TO MILITARY LAW—PERSONS IN MILITARY SERVICE NOT EXEMPT FROM ARREST AND PROSECUTION BY CIVIL AUTHORITIES FOR VIOLATION OF STATE LAWS.

1. *Under article II of the articles of war, discharged soldiers are not subject to martial law.*

2. *Persons in the military service of the United States are not exempt from arrest and prosecution by civil authorities for offenses under state laws.*

COLUMBUS, OHIO, July 21, 1919.

HON. JOHN P. PHILLIPS, JR., *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

> "Camp Sherman, a United States military training camp, located in this city, is traversed by one state highway designated as Columbus avenue and bounded by another state highway known as the Frankfort pike.
>
> The commanding general thereof has monopolized the business of the transporting of soldiers to and from said camp and has restricted the use by soldiers of any automobiles except those licensed by him.
>
> It has been the custom of a number of automobile drivers to transport in automobiles over said public highways civilians and discharged soldiers. Military police have been stationed on said highways and within the corporate limits of Chillicothe, Ohio, and outside of the boundaries of Camp Sherman with instructions to stop all automobiles, the owners of which are not so licensed, and compel all persons in military uniform, whether discharged or not, to be removed therefrom. The order further specifies that in case a driver does not stop when ordered, the military policemen are ordered to shoot.
>
> Considerable friction has naturally resulted and on June 11, 1919, one Steve Genin stopped his automobile on said Frankfort pike, outside of the limit of the said camp. He was ordered to move and upon his failure to obey immediately, was assaulted and beaten and two shots were discharged into his automobile, which were evidently aimed at him.
>
> Complaints have been filed before a local magistrate against two military officers, charged with assault and battery, and against two other military officers, charged with shooting with intent to kill.
>
> I have been advised by the judge advocate of Camp Sherman that these defendants will resort to their weapons if any attempt be made to serve the warrants.
>
> *Query:*
>
> 1. To what extent has a military authority jurisdiction over discharged soldiers?
>
> 2. Are persons in the military service of the United States exempt from arrest by civil authorities under the above circumstances?
>
> For the reason that violence may result in effecting said arrests, I would appreciate your consideration hereof at your earliest convenience."

It is noted that your first question is, "To what extent has a military authority jurisdiction over discharged soldiers?"

It may be suggested that an answer to your question lies in the consideration of article 2, of the articles of war. That article defines the persons who are subject to the articles of war and it will be quite apparent from reading that article that a discharged soldier is not subject to martial law; and it follows that upon obtaining a final discharge from the military service the discharged soldier is not affected by or subject to the articles of war and the military authorities have no jurisdiction over such discharged soldier.

Your second question is, "Are persons in the military service of the United States exempt from arrest by civil authorities under the above circumstances (as stated in

your letter)?" Articles 12, 74, 93 and 117 of the articles of war are pertinent to your inquiry.

Article 12, relating to the jurisdiction of general courts martial, in part provides that they shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals.

Article 93 in part provides:

> "Any person subject to military law who commits manslaughter * * *, assault with intent to commit any felony or assault with intent to do bodily harm, shall be punished as court martial shall direct."

It is to be observed that the courts martial are vested with jurisdiction to try offenses as above referred to.

Article 74 makes it obligatory upon the commanding officer, except in time of war, to assist in the apprehension of a person accused of a crime and to deliver such person over to the civil authorities.

Article 117 provides in part:

> "When any * * * criminal prosecution is commenced in any court of the state against any * * * soldier * * * on account of any act done under color of his office or status, or in respect to which he claims any right * * * under any law of the United States respecting the military forces thereof * * *, such suit or prosecution may * * * be removed for trial into the district court of the United States."

In 6, Opinions of the Attorney-General (U. S.) page 413, in Steiner's Case, the syllabus is:

> "An officer or soldier of the army, who does an act criminal both by the military and the general law, is subject to be tried by the latter in preference to the former under certain conditions and limitations."

In the opinion of the then Attorney-General (1854), it is stated:

> "The military law, as it exists in the United States, and in Great Britain, from which country the substance of our jurisprudence was derived, is an exceptional code, applicable to a class of persons in given relations, but not abrogating or derogating from the general law of the land. By the general doctrine of America as well as of British law, an officer or soldier of the army, who does an act which is criminal both by the military and by the general law, is subject to trial by the latter, in preference to the former, under certain conditions and limitations."

In Coleman vs. Tennessee, 97 U. S., 509, the syllabus reads:

> "By the 30th section of the enrollment act, exclusive jurisdiction is not vested in the military tribunals therein mentioned, over offenses committed by persons in the military service of the United States, when the offense was committed in a loyal state where the civil courts were open."

Section 30 of the act referred to in the syllabus is similar in effect to the provisions of articles 12 and 93, supra.

In the Tennessee case the court concluded that conferring such jurisdiction on the court martial does not disturb or destroy the jurisdiction of the state's courts, as stated in the opinion:

> "But the section does not make the jurisdiction of the military tribunals exclusive of that of the state courts. It does not declare that soldiers committing the offenses named shall not be amenable to punishment by the state courts. It simply declares that the offenses shall be 'punishable,' not that they shall be punished by the military courts; and this is merely saying that they may be thus punished.
>
> Previous to its enactment, the offenses designated were punishable by the state courts and persons in the military service who committed them were delivered over to those courts for trial; and it contains no words indicating an intention on the part of congress to take from them the jurisdiction in this respect which they had always exercised. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to congress in the absence of clear and direct language to that effect."

In Franklin vs. United States, 216 U. S., 559, the syllabus is:

> "The contention that under U. S. Rev. Stat., section 1342, article 62, U. S. Comp. Stat., 1901, p. 957, a court martial has exclusive jurisdiction over crimes committed by a military officer which are cognizable by courts martial under the provisions of that article, is too clearly unfounded to serve as the basis of a writ of error from the federal supreme court, to review a conviction in a circuit court."

The provisions of Article 62, referred to in the syllabus, are similar to the present articles of war above quoted. The syllabus is supported by the opinion rendered by Mr. Chief Justice Fuller, which in part is:

> "It is well settled that the 62d article of war does not vest, nor purport to vest, exclusive jurisdiction in courts-martial, and that civil courts have concurrent jurisdiction over all offenses committed by a military officer which may be punished by a court-martial under the provisions of that article.
>
> In Grafton vs. United States, 206 U. S. 333, 348, 51 L. ed. 1084, 1089, 27 Sup. Ct. Rep. 749, 11 A. & E. Ann. Cas., 640, it was expressly declared that the jurisdiction of courts-martial is not exclusive. Undoubtedly the general rule that the jurisdiction of civil courts is concurrent as to offenses triable before courts-martial. See opinion of Attorney-General Cushing, 6 Ops. Atty. Gen. 413, 419; United States vs. Clark, 31 Fed. 710."

In Opinions of the Attorney-General (U. S.) Vol. 21, page 88 (1894), the question was raised as to the liability of a soldier for violation of a city ordinance and the opinion of the Attorney-General, as shown at page 89, was:

> "If the first question is answered affirmatively (that such ordinance was part of the law of the land), I see no escape from the conclusion that a soldier may be arrested, tried and punished by the proper civil authority for the violation of a city ordinance."

In view of the conclusions reached by the United States Supreme Court, as in-

dicated above, this department is of the opinion that the jurisdiction conferred upon courts-martial is not exclusive.

Respectfully,
JOHN G. PRICE,
Attorney-General.

506.

INHERITANCE TAX—FEES OF PROBATE JUDGES AND SHERIFFS—OTHER COSTS DISCUSSED.

Probate judges are entitled to tax as fees, in proceedings to determine inheritance taxes, such fees as are allowed under sections 2900 *and* 2901 *G. C., which are the same fees allowed to the clerk of courts for similar services.*

Sheriffs are entitled to fees for services performed in inheritance tax cases, whether in the service of subpoenas issued by the inheritance tax appraiser, or in the service of process issued by the court.

No appraiser' fees are allowable in inheritance tax cases.

No costs may be taxed for services rendered in connection with the hearing of exceptions in the initial determination of the tax by the probate court.

COLUMBUS, OHIO, July 22, 1919.

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

GENTLEMEN:—I acknowledge receipt of your letter requesting the opinion of this department as follows:

> "We are enclosing you herewith copy of cost bill prescribed by this bureau for use by probate judges in taxing their fees under the old collateral inheritance tax laws, said bill being prescribed to conform with the opinion of the Attorney-General to be found in Opinions for 1917, Vol. 2, page 1061.
>
> Question: Can this same cost bill be used by probate judges under the new inheritance tax law, known as Amended Senate Bill 175, by merely eliminating the word 'collateral' in the heading and caption?
>
> We would ask you to review this bill with the view of approving or disapproving same in whole or in part."

The cost bill, referring to General Code sections 1603, 2900 and 2901, specifies fees for the following services:

PROBATE JUDGE'S FEES.	SHERIFF'S FEES.
1. Filing (____) praecipes, pleadings, subpoenas, cost bill and other necessary documents.	On subpoena.
2. Noting the filing of same, except subpoena and praecipe therefor, on the docket (____).	
3. Taking (____) affidavits, including certificates and seal, (includes verifications to pleadings).	
4. Taking (____) undertakings or bonds.	

5.	Issuing (____) writs, orders or notices, except subpoenas.	
6.	Noting the issue of same on docket (____)	
7.	Recording return of same on docket (____).	
		Total Sheriff's Fees_____
8.	Certificate of deposit on foreign writ.	
9.	Certificate of opening deposition.	
10.	Issuing subpoenas, (____) names.	
11.	Swearing (____) witnesses.	
12.	Each entry (____ entries) on journal—per 100 words or fraction thereof.	
13.	Indexing same (____).	
14.	Posting same on docket (____).	
15.	Making (____) copies of pleadings, process, record or files, inc. certf. and seal, (____ words), per 100 words.	
16.	Making complete record in cause, (____ words), per 100 words.	
17.	Indexing same, each cause.	
18.	Making cost bill, taxed but once.	Sheriff_____Co.
19.	Entering on cash book costs received in each cause.	On subpoena.

This cost bill, as you state, was prescribed for the old collateral inheritance tax law. The only mention in that law of fees and costs was in old section 5346 G. C., which provided that:

> "The fees of officers having duties to perform under the provisions of this subdivision of this chapter, shall be paid by the county from the county expense fund thereof, and shall be the same as allowed by law for similar services * * *."

In the new inheritance tax law the following provisions appear, relating to costs in the probate court:

> "Sec. 5348-10. Such fees as are allowed by law to the probate judge for services performed under the provisions of this subdivision of this chapter, shall be fixed in each case and certified by him on the order fixing the taxes, together with the fees of the sheriff or other officers and the expenses of the county auditor. The county auditor shall allow such fees and expenses out of said taxes when paid and credit the same to such fee funds, and draw his warrants on the treasurer in favor of the officers personally entitled thereto, payable from such taxes, as the case may require.
>
> Sec. 5346. * * * No costs shall be allowed by the probate court on such exceptions" (to the initial determination of taxes made by the probate court).

These sections assume that fees are taxable as in other cases, but do not expressly provide that such fees shall be the same as those allowed for similar services in other cases.

As the bureau is advised in another opinion of even date herewith, the proceeding in the probate court for the assessment of the tax is a judicial proceeding.

Section 1603 G. C. provides as follows:

> "For other services for which compensation is not otherwise provided

by law, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services."

It will be observed that this section is broad enough to entitle the probate judge to charge for services similar to those rendered by the clerk of the common pleas court, wherever such services are required of him and no compensation is otherwise provided by law, the same fees as are allowed the clerk of the courts for such services.

The inheritance tax law will require of the probate court some services at least for which compensation is not otherwise provided by law. Therefore section 1603 G. C. by its own terms applies to the services rendered under the inheritance tax law and refers us to the schedule of fees payable to the clerk of courts. These are found in section 2900 and 2901, as follows:

"Sec. 2900. For the services hereinafter specified, when rendered, the clerk shall charge and collect the fees provided in this and the next following section and no more:" (Then follow in the two sections detailed fees for various services).

The cost bill submitted is in the opinion of this department correct, in that the services mentioned therein, for which fees may be charged, are all services that may conceivably be rendered by the probate judge acting as the clerk of his own court in an inheritance tax proceeding. This statement applies to the probate judge's fees.

The cost bill also carries a column for sheriff's fees, depositions and appraiser's fee. No appraisers are allowable, as the work of appraisement is done through the county auditor, under the new statute. The sheriff may conceivably render services in the service of subpoenas, and it is possible that depositions may be used before the probate court, although most of the testimony that will be adduced in the ordinary case will be that taken before the county auditor in his capacity of inheritance tax appraiser.

These possibilities raise the further question as to the interpretation of section 5348-10 G. C., quoted supra. When it speaks of the certificate of the probate judge, it includes "the fees of the sheriff or other officers and the expense of the county auditor." This might refer back to the provisions of section 5341, which deals specifically with the fees "of the sheriff or other officer serving such subpoenas" issued by a county auditor in his capacity as inheritance tax appraiser. However, it is the opinion of this department that such is not the case and that the sheriff is entitled to fees for any services which he may render in an inheritance tax proceeding, whether in the service of subpoenas issued by the county auditor as inheritance tax appraiser, or in the service of subpoenas issued by the probate judge in the making of an original order fixing the tax.

Section 5346 G. C. specifically provides that "no costs shall be allowed by the probate court" in connection with exceptions to the original appraisement and determination of taxes. The object of this seems to be to encourage parties to bring out all their evidence before the original order is made and to discourage the possible practice of allowing the original order to be made *pro forma* and then reopening the matter by the filing of exceptions.

In case any services are rendered by the sheriff or other officer, including the probate court, at the instance of a party who files exceptions, such party must pay the fees without having them taxed as costs. Subject to this statement, however, the cost bill, in so far as it allows fees for the sheriff, is proper.

In passing, it is to be noted that the fees of the sheriff or other officer serving subpoenas issued by the county auditor are to be certified by the county auditor upon

his report to the probate judge, and audited and allowed by the probate judge (section 5341 G. C.)

Respectfully,
JOHN G. PRICE,
Attorney-General.

507.

AUDITOR OF STATE—CORRECT ERRORS IN LIQUOR TAX ASSESSMENTS SINCE PROHIBITION AMENDMENT EFFECTIVE.

Since the state liquor licensing board has been abolished by force of the prohibition amendment to the constitution, the provision of section 6091 *for the consent of the state liquor licensing board in the correction of errors in assessments of the liquor tax is to be disregarded, and the auditor of state is now empowered to correct errors and remit assessments or increased assessments and penalties when found by him to be erroneously or illegally certified.*

COLUMBUS, OHIO, July 22, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You recently requested my written opinion on the question of authority for correcting errors in assessments of liquor tax, your communication being as follows:

> "Section 6091 G. C. provides that the auditor of state, with the consent and approval of the state liquor licensing board, may correct any errors or remit any assessments charged against dealers in intoxicating liquors under the Cain law provisions amendatory to the Dow-Aiken tax law.
>
> Statements accompanied by affidavits have been submitted to this department from certain dealers charged under the provisions aforesaid which indicate that there was both error and illegality in the charge made upon the certification of the state liquor licensing board. The evidence is so conclusive that this department would not hesitate to act under section 6091 G. C.; but we are in doubt as to our power to act inasmuch as there is no board which can give consent to that action.
>
> Will you kindly give us an opinion as to whether or not we may act without consent in view of the fact that the board is now non-existent?"

Section 6091 relating to the matter involved in your inquiry, is as follows:

> "The auditor of state, with the consent and approval of the state liquor licensing board, may correct any errors or remit any such assessment or increased assessment, together with the penalty thereon, if it is found to have been erroneously or illegally certified."

Since the prohibition amendment to the constitution has become effective, resulting in the repeal of the statutes creating the state liquor licensing board, as determined by the supreme court in the recent case of State ex rel. vs. Donahey, it follows that the provisions of the statutes providing functions to be performed by that board have likewise been annulled.

The statute in question therefore is to be construed and applied without regard to such of its provisions as relate to the state liquor licensing board, or functions to be

performed thereby, and so construed, the statute authorizes the auditor of state to act in the matter of correcting errors and remitting assessments or increased assessments and penalties when found to be erroneously or illegally certified.

I therefore advise that the authority so conferred upon the auditor of state under section 6091 may be exercised in accordance with the statute, eliminating therefrom the provision relating to the state liquor licensing board.

Respectfully,
JOHN G. PRICE,
Attorney-General.

508.

APPROVAL OF FINAL RESOLUTIONS FOR CERTAIN ROAD IMPROVEMENT IN MIAMI, HAMILTON AND SUMMIT COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, July 22, 1919.

509.

APPROVAL OF FINAL RESOLUTIONS FOR CERTAIN ROAD IMPROVEMENTS IN SUMMIT COUNTY.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, July 22 ,1919.

510.

ROADS AND HIGHWAYS—UNDER PROVISIONS OF 6911 G. C. COUNTY SURVEYOR AND COUNTY COMMISSIONERS MUST AGREE WHEN ALTERNATE PLANS SUBMITTED.

If, under section 6911 *G. C. the county surveyor has prepared alternate plans, etc., the vote of the three county commissioners is without effect to adopt plans, etc., if the surveyor does not agree to such adoption.*

COLUMBUS, OHIO, July 23, 1919.

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

GENTLEMEN:—In a communication of recent date, you call attention to section 6911 G. C. (107 O. L. 96), reading as follows:

> "When the board of commissioners has determined that any road shall be constructed, reconstructed, improved or repaired, as herein provided for,

such board shall determine by resolution by unanimous vote, if acting without a petition, and by a majority vote, if acting upon a petition, the route and termini of such road, the kind and extent of the improvement, and at the same time shall order the county surveyor to make such surveys, plans, profiles, cross-sections, estimates and specifications as may be required for such improvement. The county commissioners may order the county surveyor to make alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, different materials or other similar variations, and approve all or any number of such alternate surveys, plans, profiles, cross-sections, estimates and specifications. The county surveyor may, without instructions from the county commissioners, prepare alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, different materials, or other similar variations. Where alternate surveys, plans, profiles, cross-sections, estimates and specifications are approved by the county commissioners or submitted by the county surveyor on his own motion the county commissioners and county surveyor shall after the opening of the bids agree which of such surveys, plans, profiles, cross-sections, estimates and specifications shall be finally adopted for the construction of the improvement."

And, referring to the agreement mentioned in the last sentence of the section, you make the following inquiry:

> "In such agreement, will the votes of three commissioners be considered a majority or is it necessary that at least two of the commissioners and the surveyor vote together to constitute a majority?"

Your inquiry may be briefly answered by the statement that the county surveyor is an elective officer (section 2782), chosen by the voters independently of any action by the commissioners, and that, among his other duties, he "shall have charge of the construction, maintenance and repair of all bridges and highways within his county under the jurisdiction of the county commissioners" (section 7184). Assuredly the very purpose of section 6911 was to give the surveyor a voice in the matter of final adoption of plans, etc., when alternate plans have been prepared—a purpose entirely consistent with the duties devolving upon the surveyor.

It follows, therefore, that the answer to your inquiry is that when alternate plans, etc., have been prepared, the vote of the three commissioners is without effect to adopt plans, etc., if the surveyor does not agree to such adoption.

Very respectfully,

JOHN G. PRICE,
Attornry-General.

511.

SCHOOLS—PRESIDENTS OF RURAL AND VILLAGE BOARDS OF EDUCATION—EXPENSES HOW PAID—COUNTY BOARD OF EDUCATION THROUGH ITS SUPERINTENDENT HAS AUTHORITY TO ARRANGE ANNUAL MEETING OF MEMBERS OF BOARDS OF EDUCATION OF VARIOUS VILLAGE AND RURAL SCHOOL DISTRICTS—COUNTY BOARD OF EDUCATION DISBURSES ONLY COUNTY BOARD OF EDUCATION FUND.

1. *The actual and necessary expenses of the presidents of the rural and village boards of education of a county, incurred while in attendance at a meeting for the election of a member of a county board of education, as provided for in section* 4729 *G. C., shall be paid out of the general fund in the county treasury.*

2. *A county board of education, through its superintendent, has full authority to arrange for the time and place of holding the annual meeting of the members of the boards of education of the various village and rural school districts of the county, including the rental of a proper place for such meeting if necessary.*

3. *The county board of education has authority under the statutes to disburse but one fund, viz., the county board of education fund.*

COLUMBUS, OHIO, July 23, 1919.

HON. FRANK CARPENTER, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion of the Attorney-General upon the following statement of facts:

> "1. Out of what fund should the actual and necessary expenses of the presidents of the rural and village boards of education of the county, incurred while in attendance at a meeting for the election of a member of the county board of education, as provided for in section 4729 General Code of Ohio, be paid?
>
> 2. Has the county board of education the right to pay for a hall and other incidental expenses in connection with holding an annual meeting of the members of the various rural and village boards of education of a county school district, as provided for under section 4747-1 General Code of Ohio?
>
> 3. Has the county board of education the right to act as custodian of moneys paid into the county board of education fund from entertainments given by the county normal school, and teachers' contributions made by registration fees at the annual teachers' institute of the county, and pay the same out for the purposes designated by the county board of education and approved by those who have paid said moneys into said county board of education fund, said expenses including the purchase of supplies for said normal school and the payment of a secretary of said teachers' institute, etc.?"

Bearing upon your first question from what fund the actual and necessary expenses of the presidents of rural and village boards of education should be paid, where such presidents have met for the purpose of electing a member of the county board of education, section 4729 G. C. reads in part:

> "* * * Such expense shall be allowed by the county auditor and paid out of the county treasury upon the order of the chairman and clerk of the meeting."

It will be noted that the statement of the section in question is that such expenses shall be paid out of the county treasury, which means the general fund, and in the absence of any stipulation in the section as to fund such expenses should be paid from, the intent of the law is that the general fund is the one from which this payment for expenses that are actual and necessary should be made.

In reply to your second question, as to whether a county board of education has the right to pay for a hall and other incidental expenses in connection with holding annual meetings of the members of the various rural and village boards of education of the county school district, section 4747-1 G. C., reads as follows:

> "Once each year all the members of the boards of education of the various village and rural school districts within any county school district shall hold a meeting for the purpose of discussing matters relating to the schools of such county school district. The county superintendent *shall arrange* for the time and *place* of holding such meeting and shall also act as chairman."

Under the statutes the county superintendent indicated in section 4747-1 G. C. is the executive officer of the county board of education and therefore has full power to act as the agent of the county board of education in the matter of securing a place for the annual meeting of all members of the village and rural school districts of the county, which the law contemplates shall be held once each year for the discussion of matters pertaining to the public schools of the county. It must be remembered that this is not a meeting of merely the presidents of the various village and rural district school boards, as is held for the election of a member of the county board of education, but it is a much larger meeting because all the members of all the boards of education of the village and rural school districts are directed to attend and inasmuch as there are five members on each local school board, it will be seen that the meeting would be one that might require a room of some size for the proper accommodation of these members who are directed by law to attend such meeting once each year, and a room which the county board of education could control might not be located in the county seat where it was desired that such meeting should be held, and the school rooms in such county seat are very frequently under the control of the city board of education and not the county board of education. It is true that a court room in the court house might be used for this meeting, but even in that case the board of county commissioners would have to be consulted. It is the clear intent of the law that a proper place shall be provided for this meeting, and where it is necessary, in order to properly hold the meetings and accommodate the members who are directed by law to attend, the county superintendent, as the agent of the county board of education, has full authority to arrange for a place for holding such meeting, which would include rent for such place for that occasion, if it was necessary that rent should be paid, and this would not necessarily include "other incidental expenses" unless such expenses were absolutely necessary in the proper holding of the meeting and attending to the business for which such meeting was called.

Replying to your third question, as to whether a county board of education has the right to act as custodian of moneys paid into the county board of education fund from entertainments given by the county normal school and teachers' contributions made by registration fees at the annual teachers' institute of the county, and to pay the same out for the purposes designated by the county board of education and *approved by those who have paid said moneys into said county board of education fund,* said expenses, including the purchase of supplies for said normal school, the payment of said teachers' institute, etc., it is advised that the county board of education is a trustee of public moneys; that in its routine of business it must follow the language of the statutes the same as any other board of education in the paying out of money. It has full power to receive bequests and grants of money and when they are accepted

absolute title to the same rests in the board of education. You indicate here that certain expenditures of the county board of education would have to first be approved by those who have paid the moneys in, which is contrary to public policy in that the board of education has full control of its own expenditures and is not presumed to consult a private authority as to how and when it shall vote its funds, provided that it always remains within the authority granted by law.

It is therefore the opinion of the Attorney-General that:

1. The actual and necessary expenses of the presidents of the rural and village boards of education of a county, incurred while in attendance at a meeting for the election of a member of a county board of education, as provided for in section 4729 G. C., shall be paid out of the general fund in the county treasury.
2. A county board of education, through its superintendent, has full authority to arrange for the time and place of holding the annual meeting of the members of the boards of education of the various village and rural school districts of the county, including the rental of a proper place for such meeting if necessary.
3. The county board of education cannot act as custodian of moneys where some private authority must first approve an expenditure by such board of education.

Respectfully,
JOHN G. PRICE.
Attorney-General.

512.

COUNTY BOARD OF EDUCATION—UNDER SECTION 4747-3a G. C. CAN PAY EXPENSE OF MEETING OF MEMBERS OF BOARDS OF EDUCATION OF COUNTY—WHAT SUCH EXPENSE MAY INCLUDE—MEMBERS OF VILLAGE AND RURAL BOARDS OF EDUCATION RECEIVE PAY FOR ATTENDANCE AT ABOVE MEETING—SEE 108 O. L. 704.

1. *Under section* 4747-3a *the county board of education can pay the actual necessary expense of the annual educational meeting of the members of the boards of education of the county school unit, provided for in section* 4747-1 *G. C. Such expense may include printing, sending notice to members and rental of place for meeting if such rental is absolutely necessary.*

2. *Under section* 4747-1, *as amended in* 108 *O. L.* 704, *and effective after September,* 1919, *members of village and rural boards of education who attend the annual educational meeting may be paid two dollars by their local board for such attendance, upon filing proper certificate with his local board.*

COLUMBUS, OHIO, July 23, 1919.

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

GENTLEMEN:—Acknowledgment is made of your letter of recent date requesting a written opinion as indicated in the following statement and question:

We hereby call your attention to an opinion of Attorney-General Joseph McGhee, construing section 4747-1 G. C., as published in the Opinions of the Attorney-General for 1917, Vol. 1, page 254, and would respect-

fully ask for your written opinion as to whether the enactment of supplementary section 4744-3a, as found in 107 O. L., 622, nullifies the opinion cited above?"

It is found that the opinion to which you refer, appearing at page 254, Vol. 1, Opinions of the Attorney-General for 1917, makes the following holding in its syllabus:

"No expenses, fees or salaries can be paid from the county board of education fund or any other fund, by reason of a meeting held under the provisions of section 4747-1 G. C."

Section 4747-1 G. C. provides:

"Once each year all the members of the boards of education of the various village and rural school districts within any county school district shall hold a meeting for the purpose of discussing the matters relating to the schools of such county school district. The county superintendent shall arrange for the time and place of holding such meeting and shall also act as chairman."

You now ask whether the supplementary section 4744-3a, as found in 107 O. L., 622, nullifies the opinion cited above.

Section 4744-3a, added in 107 O. L., after such opinion was issued, reads as follows:

"The county board of education is authorized to pay for the printing of programs, examinations and other necessary *printing* supplies for the use of the county superintendent and the superintendents and teachers of the county school unit. The county board of education is authorized to pay the expenses of its educational meetings required by law."

It is therefore necessary to analyze the meaning of the last sentence of such supplementary section 4744-3a, as to what is meant by the words "its educational meetings required by law," as it refers to the county board of education. This section was enacted after the opinion of the Attorney-General was rendered that there could be no expenses paid by the county board for the annual meeting of the school boards of the county district. There is nothing in the section which indicates that the county board of education members are not presumed to be present, for they usually are, having general charge of the village and rural schools of the county. The members of the county board of education are vitally interested in such meeting and it could properly be called an educational meeting of the county school unit mentioned in section 4744-3a and of which unit the county board is the head.

It is not entirely clear what the general assembly may have meant in saying that the county board of education is authorized to pay the expenses of "its educational meetings" required by law, for the reason that while the county board is directed to have a number of business meetings throughout the year, nowhere in the statutes is there found any mandate or authority for an educational meeting or meetings other than the one required in section 4747-1 G. C., and the county teachers' institute, which is under the control of the county board of education and the expenses of which are provided for in section 7860 G. C., which reads in part:

"The expenses of conducting such institute shall be paid out of the county board of education fund upon the order of the presidents of the county board of education."

It has been held in prior opinions of the Attorney-General that there can be in a county

but one teachers' institute each year and that is the one that is provided for in sections 7859-7874 G. C. It is noted that section 4744-3a authorizes the payment of the expenses of the educational meetings of the county board of education that must be held as "required by law." It is entirely possible that the members of the county board of education do attend the annual meeting of all the members of the various village and rural school boards, for the law provides that this meeting shall be under the supervision of the county superintendent, who is also the executive officer of the county board.

As the executive officer of the county board has charge of the matter in full, it could logically be considered as being a county educational meeting required by law, and the county board has charge of educational affairs in the county school unit.

Attention is invited to the fact that while supplemental section 4744-3a, enacted in 107 O. L., 622, does nullify the opinion heretofore issued by the Attorney-General on March 13, 1917, for the reason that such section provides for expenses of the educational meetings of the county board of education, such opinion will be further nullified after September, 1919, because there will appear in 108 O. L. 704 the new amended section 4747-1, reading as follows:

> "Once each year all the members of the boards of education of the various village and rural school districts within any county school district, shall hold a meeting for the purpose of discussing matters relating to the schools of such county school district. The county superintendent shall arrange for the time and place of holding such meeting and shall act as chairman thereof. Each member of a rural and village board of education may receive the amount of $2.00 for attending such meeting, upon filing a certificate for attendance thereof with the board of which he is a member, this to be in addition to the allowance made by rural board of education members under authority of section 4715."

The new matter in section 4747-1 is the last sentence, which provides that $2.00 may be paid to the members attending such annual meeting, but it is noted that such $2.00 shall come from the funds of the board of education of which the attending person is a member and not from any county board of education fund. The county superintendent, as agent of the county board of education, shall arrange for the time and place of holding such meeting and shall act as chairman thereof, for a general discussion of school matters in the various boards of the county school unit. Seemingly, therefore, by the amendment added in 108 O. L. 704, section 4747-1, it was the belief of the general assembly that there would be some expense that such meeting could have, and it was necessary, therefore, to provide by supplemental sections 4747-1 and 4747-3a G. C. for such additional expense.

Taking this view of the question, it would seem, therefore, that while the county superintendent shall arrange for the time and place of holding such a meeting, the word "place" must be taken in its literal sense, that is, the building in the county where such annual meeting shall be held and not merely the town or district within the county for which location the meeting has been called, and it might be necessary to rent a suitable hall, under unusual circumstances, but this is not to be encouraged.

It is therefore the opinion of the Attorney-General that no expenses, fees or salaries can be paid from the county board of education fund or any other fund, for the annual meeting of the members of the various village and rural boards of education in a county school district, except those actual necessary expenses provided for in section 4747-3a G. C., and, after September, 1919, the two dollar fee allowed attending members of rural and village boards, which fee shall be paid by their local board of education.

Respectfully,

JOHN G. PRICE,

Attorney-General.

513.

COUNTY BOARD OF EDUCATION—NEW SCHOOL DISTRICT CREATED UNDER SECTION 4736 G. C.—ONE FROM VILLAGE AND CONTIGUOUS RURAL SCHOOL DISTRICT—OTHER FROM TWO CONTIGUOUS VILLAGE DISTRICTS—NEW CREATED DISTRICT IS A VILLAGE SCHOOL DISTRICT.

1. *Where the county board of education, under authority of section* 4736 *G. C., has created a new school district out of a village school district, containing a tax valuation of not less than $500,000.00, and a rural school district contiguous thereto, under the provisions of section* 4681 *G. C., such newly created district shall be a village school district.*

2. *Where a county board of education, under authority of section* 4736 *G. C., has created a new school district from the territory of two contiguous village school districts, each with a tax valuation of $500,000.00 or more, under the provisions of section* 4681 *G. C., such newly created district is a village school district.*

COLUMBUS, OHIO, July 23, 1919.

HON. MERVIN DAY, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following two questions:

"1. Where the county board of education, under the authority of section 4736 G. C. has created a new school district out of a village school district containing a tax valuation of not less than $500,000.00, and a rural school district contiguous thereto, it being understood that the board of education had previously abolished both districts in order that they might create one new school district, then by what name or designation shall the newly created district be known; shall it be called a village school district or a rural school district, under section 4681 G. C.?

2. Having reference to the same sections, and where there are two contiguous village school districts, each with a tax valuation of $500,000.00 or more, and the board of education abolishes both village districts and creates from their territory one new district, then in that case, what shall the name or designation of the newly created district be, as to whether it shall be called a village district or a rural district?"

Section 4679 G. C. reads as follows:

"The school districts of the state shall be styled respectively, city school districts, village school districts, rural school districts and county school districts.

Section 4681 G. C. provides:

"Each village, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, and having in the district thus formed a total tax valuation of not less than five hundred thousand dollars, shall constitute a village school district."

Section 4736 G. C. provides in part:

"The county board of education shall arrange the school districts accord-

ing to topography and population in order that the schools may be most easily accessible to the pupils, and shall file with the board or boards of education in the territory affected, a written notice of such proposed arrangement. * * * The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof."

From your statement of facts it is assumed that the creation of the new districts mentioned in both of your questions has been made in regular manner, in compliance with law, and the question now arises as to whether, under your question 1, a new school district created out of a village district and a rural district contiguous thereto, and having a tax valuation of not less than $500,000.00, is either a village school district or a rural school district.

Your special attention is invited to section 4681, which clearly provides that each village, together with the territory attached to it for school purposes, and having in the district thus formed a total tax valuation of not less than $500,000.00, *shall constitute a village school district.* From your statement of facts it is noted that such village school district, prior to the creation of the new district, had a tax valuation of not less than $500,000.00, and of course with the added territory from the rural school district to the new district, the figures of $500,000.00, as a tax valuation in such new district, would be augmented, and having a tax valuation in the enlarged district in excess of the figures given in section 4681 G. C., which defines a village school district, it must follow that such enlarged new district, with a tax valuation which you indicate, and containing a village school district, could not be a rural school district, but would be a village school district under section 4681 G. C.

Coming to your second question, which indicates that two contiguous village school districts, each with a tax valuation of $500,000.00 or more, have been legally abolished by the county board of education, attention is invited again to section 4681, and the same reasoning would prevail, viz.: that under section 4781 a village, together with the territory attached to it for school purposes, and having in the district thus formed a total tax valuation of not less than $500,000.00, shall constitute a village school district and cannot be a rural school district.

It is, therefore, the opinion of the Attorney-General:

(1) Where the county board of education, under authority of section 4736 G. C., has created a new school district out of a village school district, containing a tax valuation of not less than $500,000.00, and a rural school district contiguous thereto, under the provisions of section 4681 G. C., such newly created district shall be a village school district.

(2) Where a county board of education, under authority of section 4736 G. C., has created a new school district from the territory of two contiguous village school districts, each with a tax valuation of $500,000.00 or more, under the provisions of section 4681 G. C., such newly created district is a village school district.

Respectfully,

JOHN G. PRICE,

Attorney-General.

514.

SCHOOLHOUSES—RENTAL OF TEMPORARY ROOM DOES NOT CONSTITUTE SCHOOL BUILDING—WHEN ORDER OF CHIEF DEPUTY INSPECTOR OF WORKSHOPS AND FACTORIES MUST BE OBEYED—SUCH OFFICER WITHOUT AUTHORITY TO ORDER ERECTION OF NEW BUILDING—WHEN BOARD REQUIRED TO PROVIDE SUITABLE SPACE—HOW BOARD CAN PROVIDE FOR SUCH EMERGENCY.

1. *Where a board of education under section 7620 G. C. rents or leases rooms for temporary school purposes, such rooms do not constitute a school building within the meaning of section 7630-1 G. C.*

2. *An order placed by the chief deputy inspector of workshops and factories against a school building as being inadequate in space, air and light, or unsafe for pupils greater than a designated number, and prohibiting the use of such building if overcrowded, must be obeyed.*

3. *The chief deputy inspector of workshops and factories has full authority to prohibit the use of a public building and order changes, alterations, additions, repairs and installations of appliances on such buildings, but has no authority to order the erection of a new building and thereby deprive an official or board of its right to rent or lease other space.*

4. *Where the chief deputy inspector of workshops and factories issues an order against a public school building, that it is inadequate or unsafe for an overflow of pupils, and such excess number of pupils is thereby without proper school facilities, the board of education must provide suitable space, and an emergency is created.*

5. *Such board of education can meet such emergency by renting or leasing rooms for school purposes under section 7620 G. C., and if none are available in the district, the board can issue bonds for a new school building, upon vote of the electors, to meet such emergency, without regard to the limitations of the Smith One Per Cent. Law, but such bond issue regularly made as provided in section 7630-1 G. C. can be only on the erecting of a new building and provision for the purpose of a site and the furnishing of the building must be made in accordance with section 7625 G. C., which provides that levy for interest and sinking funds must be within the fifteen mill limitation.*

COLUMBUS, OHIO, July 23, 1919.

HON. HARRY A. SMITH, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter in which you request an opinion on the following statement of facts:

"1. The board of education of Caldwell village school district has two school buildings which are inadequate to accommodate its pupils, necessitating the leasing of additional room for about 75 pupils. These leased rooms comprise the second floor of a private business block in this village and have been used for school purposes for a number of years. If the use of these rooms for school purposes be prohibited by the inspector of workshops and factories, would an emergency be created such as would permit the budget commission of this county to exceed the maximum tax rate in levying taxes to meet the interest and sinking fund on an issue of bonds authorized by a vote of the electors of the district under sections 7630-1 and 5649-4 of our General Code? In other words, would the word 'schoolhouse,' as found in the second clause of section 7630-1 of the General Code, include rooms as above referred to?

2. Could the proceeds of said bond issue be used by said board in purchasing a new site, erecting a school building thereon and equipping and

furnishing the same, or would the money for a new site and furnishing and equipping of building have to be raised by a separate bond issue, the levy for interest and sinking fund of which would have to be within the 15 mills."

Attention is first invited to section 7620 G. C., which reads in part as follows:

> "The board of education of a district *may build*, enlarge, repair *and furnish the necessary school houses, purchase or lease sites* therefor, or rights of way thereto or purchase or lease real estate to be used as playgrounds for children, or *rent suitable school rooms*, provide the necessary apparatus and *make all other necessary* provisions for the schools under its control. It also shall * * *make all other provisions necessary for the convenience and prosperity* of the schools within the subdistricts." (102 O. L., 419).

It will be noted from the above section that the powers of the board of education are rather sweeping on the question of providing school facilities, the fundamental idea being that the schools must be kept going, for after enumerating various powers in detail, the section says in two places that "the board * * * shall make all *other necessary* provisions" for the convenience and prosperity of the schools. It follows, however, that in the making of all other necessary provisions by the board, those statutes which speak in detail on certain matters must be adhered to.

You say that for a number of years the Caldwell village board of education has leased additional rooms on the second floor of a business block, for school purposes, the two regular school buildings being inadequate for present needs. This was entirely regular under section 7620 G. C., above quoted, for boards of education have power to rent or lease buildings for school purposes at any time, and under said section 7620 G. C. it is for the board of education in a district to say whether they will rent or lease suitable school rooms or whether they will erect a new building where buildings or rooms now used are not in compliance with law. The board of education of a district knows the condition of the finances of the district and is responsible for the same in their proper expenditure.

Your statement of facts says the chief deputy inspector of workshops and factories, in the discharge of his duties, has prohibited the use after the present term of school ends, of the rooms located on the second floor of the Shafer building in Caldwell, and which rooms have been leased by the board of education for school purposes in the past and used therefor. You further say that these rooms accommodate about seventy-five pupils of the Caldwell village school district placed therein because the two *regular* school buildings are *inadequate* for the number of pupils and that such condition has obtained for some time; and desire to know if such temporary leased location is a "school-house," within the meaning of the statutes. It is clear that the word "school-house" as used in the law, contemplates a degree of permanence that does not obtain in the case of rented rooms where the title to the property is always in a private party. Thus the overflow of pupils might be in one rented building one year and in another building the next year. A board of education in its power under section 7620 G. C. could rent temporary rooms for school purposes knowing they would not pass a rigid inspection of the division of workshops and factories; when such inspection is made and an order issued against the further use of such temporary rooms for school purposes, the board could plead an emergency for a bond issue for a new "school house" because such rooms had been condemned; but the board has not been deprived of the use of one of its school houses, but merely forbidden to use such leased rooms for further school purposes and still has the leeway of renting or leasing similar space in another building (if available) that might pass the inspection of the state officials. Beyond the degree of *prohibiting the use* of present school rooms, if they can not be repaired as he may require, the chief deputy of workshops and factories cannot

go. He has full power to direct that suitable accommodations of all necessary kinds be furnished by the board of education and take proper steps to see that they are furnished by prohibiting the use of any school building that is over-crowded or unsafe and cannot be used as intended, without violating the law. But the choice of renting or leasing other rooms that might be satisfactory cannot be taken from the board of education by any official; the board *must provide* suitable facilities for every pupil in the district in some form or other, but such facilities are not limited to new buildings necessarily. A board might have sufficient funds in its treasury to cover a lease, but would hardly have a fund sufficient to erect a new building, and in the latter event a bond issue would be necessary and the statutes governing school bond issues and school taxation would operate. But such bond issue cannot be predicated upon the fact that temporary school rooms have been condemned by the chief deputy inspector of workshops and factories, for the board still has the privilege of leasing or renting other rooms and such privilege cannot be taken from the board by any other authority, but such rooms must conform to the requirements of the division of workshops and factories.

In this particular case the order of the chief deputy inspector of workshops and factories reads in full:

> "School Order No. 221—(1)
>
> These rooms are without adequate air space or sufficient light. Light being at a ratio of one square foot of glass to about 18 square feet of floor area and more cannot be obtained. Is without proper ventilation, without sufficient heat and without the proper means of ingress and egress, without proper number of water closets for accommodation of school; therefore the use of these rooms for school purposes after the present term of school is forbidden. New and adequate school room must be erected for the accommodation of the school, before the school year of 1919-20.
>
> Plans and specifications for same must be submitted in duplicate to this department before the work is begun.
>
> I refer you to sections 4648-4657, 1031-1037, Ohio General Code.
>
> Awaiting notification immediately upon compliance."

Here the chief deputy inspector of workshops and factories orders that a *"new* and adequate *school room must be erected* for the accommodation of the school before the school year of 1919-20" and that *"plans and specifications* for same must be submitted in duplicate to this department before the *work is begun,"* basing such new building order on these temporary school rooms. Such order takes from the board of education its privileges granted in section 7620 G. C., *to lease or rent other rooms* in the district. The decision as to whether it shall lease or rent, or erect a new building, rests first with the board of education. The chief deputy inspector of workshops and factories *can prohibit the use* of any school building or other public building where persons assemble, if it has not the "proper fire protection, fire escapes, exits, emergency exits, hallways, *air space, light* and such *other matters* which relate to the health and safety of those assembled in such structures." (Section 1031 G. C.) Such official can forbid the use of a school building, theater or other building for the use or occupancy of *more than a designated number* measured by the law and regulations which govern his activities, and if an inspection of the regular school houses in a district shows that any of them are crowded beyond the regulations set by law, he can forbid their use for any greater than a designated number, where air space, light, seating arrangements and toilet facilities, or any of them, are inadequate or would be inadequate for a greater number.

And if the chief deputy inspector of workshops and factories orders that no greater number than he designates shall use a school building and its use by a greater number

is prohibited by him, and such order leaves a group of pupils without school facilities as required by law, an emergency is created which the board of education *must meet* by providing other school space by renting, leasing or erecting a building, but it is for the board to decide which will be done; and if the *board decides* to erect a building or alter any rooms, *then* must the plans and specifications be submitted to the inspector of workshops and factories, as required in section 1035 G. C.

Section 1037 G. C. says in part:

> "Whoever, being a * * * member of a board and * * * in control of any building mentioned in section ten hundred and thirty-one of this chapter * * * permits the use of such building in violation of *any order* prohibiting its use issued as provided by law, or fails to comply with an order so issued relating to the change, improvement or repair of such building shall be fined not less than ten dollars, nor more than one hundred dollars, and each day that such use or failure continues shall constitute a separate offense."

So it is mandatory upon a board to furnish space that is satisfactory to the requirements of the law, and if one of their regular school buildings has been pronounced *inadequate* for the number of pupils entitled to attend such school, an emergency is created, for the whole number of pupils must have equal and sufficient school facilities, and any school district that does not furnish its pupils with ample facilities as to space, seating, air and light, as well as physical safety, is derelict under the law.

That an order against a school building by the chief inspector of workshops and factories creates an emergency, is amply sustained by the preceding attorneys-general as follows:

In opinion found in Vol. I of Annual Report of Attorney-General for 1914, at p. 548, it is held:

> "Where the inspector of workshops and factories *prohibits the use of a school house until certain repairs are made,* but the *board of education decides to erect a new school building instead,* and the electors vote for a $25,000 bond issue for the construction thereof, but cannot levy sufficient taxes to pay bonds and maintain school, there would be an emergency within the meaning of section 5649-4 General Code, and the necessary taxes for the retirement of bonds required for the purpose might be levied outside of all limitations of law."

Again, on p. 1715 of Vol. II, Annual Report of Attorney-General for 1913, it was held:

> "Where the industrial commission and its deputy in charge of workshops, factories and public buildings condemn *the use of a public school building for school purposes, the order must be complied with and an emergency is created.*
>
> If bonds are issued by the board of education, with the approval of the majority of the electors, at a special election, the tax levies necessary to carry these bonds may be made outside of the limitations of the Smith one per cent law. Such is the effect of the amendment to section 5649-4, General Code."

Bearing directly on the powers granted to boards of education under section 7630-1 G. C., and section 5649-4 G. C., in cases where school buildings have been condemned by state authority, the following excerpts from prior opinions of this department are here given:

"In case of *the condemnation of a school building* by the state building inspector, levies for the necessary repairs are not entitled to exemption from all limitations under sections 7630-1 and 5649-4, General Code, unless bonds are issued by a vote of the people, in which event the interest and sinking fund levies will be exempt from the limitation. Simple repair levies made under these circumstances are subject to all the limitations of law."

Vol. II, Annual Report of Attorney-General for 1914, p. 1328:

"Under section 7630-1 General Code, a school building condemned by the chief inspector of workshops and factories may be rebuilt or repaired. The money may be borrowed therefor, regardless of the Smith law limitations."

Vol. I, Annual Report Attorney-General for 1913, p. 14.

"Where under authority of section 7603-1 G. C. bonds are issued by a board of education for the purpose of constructing a new school building, in compliance with the order of the state inspector of workshops and factories, and thereafter a sinking fund levy cannot be made for the purpose of paying the interest on said bonds and retiring the same at maturity without exceeding the fifteen mill limitation provided by law, said board of education may make said levy under authority of said section 7630-1 G. C., and section 5649-4 G. C., irrespective of the limits provided by sections 5649-2 to 5649-5b G. C., and referred to in said section 5649-4 G. C."

Vol. II, Opinions of Attorney-General for 1915, p. 1263.

"A levy for the payment of principal and interest on bonds issued to erect or repair school buildings, rendered necessary as a compliance with the orders of the chief inspector of workshops and factories or by the destruction of school buildings by fire or other casualty, said bonds being issued pursuant to a vote of the people, is not within the five mill limitation or any of the other limitations of the Smith one per cent law.

A board of education not having fully exercised the authority conferred by law to levy taxes for sinking fund and interest on bonds falling due, is not authorized to borrow money or issue bonds for the purpose of extending or refunding said indebtedness under the provisions of section 5656 G. C."

Vol. I, Opinions of Attorney-General for 1915, p. 523.

"Following the above opinions, then, I advise you that where the chief deputy of the department of inspection, division of workshops, factories and public buildings, *prohibits the use of school houses for their intended purpose*, and the board of education is without funds to rebuild or repair same, or to build a new school house for the proper accommodation of the school youth, and that the funds for said purpose cannot be raised under the provisions of sections 7625, 7626, 7627, 7628 and 7629 G. C., because of the limits of taxation applicable to such school district, then if under the provisions of section 7625, 7626 and 7627 G. C. bonds are sold, such *an emergency exists as will permit the levy of taxes to pay the bonds, and the interest thereon*, outside of any limitations of the Smith one per cent law."

(Vol. III, Opinions of Attorney-General for 1917, p. 2355, p. 2357.)

Coming to your second query, as to whether the proceeds of such bond issue could be used by the board in purchasing a new site and equipping and furnishing the school building erected thereon, attention is invited to Opinion No. 1110 of the Attorney-General, appearing in Vol. II, Ann. Rep. of Atty. Gen., 1914, p. 1128, wherein he says:

> "It is clear that this section (7630-1) confers authority to issue bonds only for the purpose of rebuilding, repairing and constructing school houses. The authority to issue bonds for the purpose of acquiring a site for a school house is to be found in section 7625, General Code. Interest and sinking fund levies for the retirement of bonds issued for the purpose of securing a site for a school house must be made within the limitations of the Smith law.
>
> Upon the approval of the electors, as provided in section 7625, then, to the extent that they involve the acquisition of a site, at least, they are subject to the fifteen mill limitation as imposed by section 5649-5b, as amended 103 O. L., 57; and this limitation cannot be exceeded, as you suggest, by a vote of the people taken under authority of sections 5649-5b and 5649-5a, General Code.
>
> In short, then, I am of the opinion that in no way can bonds be issued for the acquisition of a school house site so as to take out of the fifteen mill limitation of the Smith law the interest and sinking fund levies necessary to retire such bonds, but that under the circumstances mentioned by you a separate issue of bonds for the construction of a new school house on a new site, when the necessity for having a new school house arises from the condemnation of the old one by the state authorities, and the other conditions of section 7631 have been satisfied, the interest and sinking fund levies to retire such bonds are outside of the fifteen mill limitation."

In this latter view the present Attorney-General fully concurs, for section 7625 G. C. clearly provides for the purchasing of a site and the furnishing of the building after it is erected.

It is, therefore, the opinion of the Attorney-General:

(1) Where a board of education under section 7620 G. C. rents or leases rooms for temporary school purposes, such rooms do not constitute a school building within the meaning of section 7630-1 G. C.

(2) An order placed by the chief deputy inspector of workshops and factories against a school building as being inadequate in space, air and light, or unsafe for pupils greater than a designated number, and prohibiting the use of such building if overcrowded, must be obeyed.

(3) The chief deputy inspector of workshops and factories has full authority to prohibit the use of a public building and order changes, alterations, additions, repairs and installation of appliances on such building, but has no authority to order the erection of a new building and thereby deprive an official or board of its right to rent or lease other space.

(4) Where the chief deputy inspector of workshops and factories issues an order against a public school building, that it is inadequate or unsafe for an overflow of pupils, and such excess number of pupils is thereby without proper school facilities, the board of education must provide suitable space, and an emergency is created.

(5) Such board of education can meet such emergency by leasing or renting rooms for school purposes under section 7620 G. C., and if none are available in the district, the board can issue bonds for a new school building, upon vote of the electors, to meet such emergency, without regard to the limitations of the Smith one per cent. law, but such bond issue regularly made as provided in section 7630-1 G. C. can be only on the erecting of a new building and provision for the purchase of a site and the furnishing of the building must be made in accordance with section 7625 G. C.,

which provides that levy for interest and sinking funds must be within the fifteen mill limitation.

Respectfully,
JOHN G. PRICE,
Attorney-General.

515.

COUNTY BOARD OF EDUCATION—ELECTION TO MEMBERSHIP IN SUCH BOARD—WHERE PRESIDENTS OF VILLAGE AND RURAL BOARDS OF EDUCATION HAVE FAILED TO ELECT MEMBER WHOSE TERM EXPIRED—HOLDS UNTIL SUCCESSOR ELECTED—PROCEDURE WHEN COUNTY SUPERINTENDENT NEGLECTS TO CALL MEETING OF PRESIDENTS OF VILLAGE AND RURAL BOARDS OF EDUCATION TO ELECT MEMBER—COUNTY BOARD CAN NOT FILL VACANCY AT SAME MEETING MEMBER'S RESIGNATION ACCEPTED.

1. *Where the presidents of village and rural boards of education have failed to elect a member of the county board of education in January, the member of the county board, whose term has expired, holds over until his successor is elected by the presidents of the village and rural boards, and the member-elect has qualified.*

2. *Where the county superintendent of schools has neglected and refused to call a meeting of the presidents of the village and rural boards of education after January, for the purpose of electing the successor of a county board member whose term has expired, such district presidents can issue their own call for a meeting, giving reasonable notice to all district presidents in the county school district, and a person receiving a majority vote of all the village and rural districts of the county school district, for the office of member of the county board of education, is a legally elected member of such county board of education.*

3. *Under section 4748 G. C. a board of education cannot fill a vacancy in such boards at the same meeting in which it accepts a resignation.*

COLUMBUS, OHIO, July 23, 1919.

HON. WALTER S. RUFF, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following statement of facts·

> "Mr. Moulton was elected by the presidents of the various village and rural school boards of Stark county in December, 1916. Mr. Moulton was ousted by quo warranto proceedings in the supreme court on the ground that the member of the county board of education should have been elected by the presidents of the various village and rural school districts which met on the third Monday of January, 1917. Mr. Moulton was elected to take the place of A. B. Wingate whose term expired the third Saturday of January, 1917. A. B. Wingate was therefore the legal member of the county board of education until his successor was elected and qualified. However, January 17, 1918, and before Mr. Moulton was ousted by the supreme court of Ohio, A. B. Wingate tendered his resignation to the county board of education. There were, therefore, only four legal members of the county board of education, no person having been elected by the presidents of the various village and rural school boards in January, 1917, as provided by law. However, after Mr. Wingate

resigned the presidents of the various village and rural school boards of Stark county requested the county superintendent to call a meeting of said presidents for the purpose of electing a member of the county board of education for five years beginning on the third Saturday of January, 1917, there having been no election. Said county superintendent neglected and refused to issue said call and in January, 1918, several of the presidents of the various village and rural school boards issued a written call according to law to all of the village and rural school board presidents of Stark county to meet in the office of the county board of education for the purpose of electing a county board member for a term of five years commencing on the third Saturday of January, 1917. In pursuance to said call a majority of said board presidents met and elected A. A. Kurtz as a member of the Stark county board of education for a term of five years commencing on the third Saturday of January, 1917. The Stark county board of education claimed there was a vacancy and attempted to fill the vacancy by appointing Amos C. Myers for a term of five years beginning on the third Saturday of January, 1917.

Question: Whether or not Amos C. Myers or A. A. Kurtz is a legal member of the county board of education?

After going into these facts more fully we are of the opinion that there was not a vacancy under section 4748 of the General Code and that Amos C. Myers is therefore not a legal member of the county board of education, but that A. A. Kurtz who was elected by the presidents of the various village and rural school boards is the legal member. We were formerly of the opinion that Mr. Myers was the legal member but after getting more facts in the matter and studying opinion No. 177 issued by the Attorney-General April 8, 1919, we are now of the opinion that there was no vacancy as provided in section 4748, but there was simply a non-election which, of course, should be filled by election of the presidents of the various village and rural school boards."

The facts herein are similar in a degree to those in opinion No. 177 issued by this department April 8, 1919, copy of which you have at hand. In that opinion the matter of filling positions in county boards of education since their creation by the new School Code in 1914 is treated at length, citing court decisions and former opinions of the Attorney-General that were in point. It was held in opinion No. 177 (1919) that a member of the county board of education elected in December, 1916, for the term beginning the third Saturday in January, 1917, had no title to such office because he was chosen by the wrong personnel of presidents of village and rural boards, that is, those in office in 1916 rather than the new personnel of 1917 which had the power to fill the 1917 vacancy; that where the 1917 group of presidents failed to elect, the member whose term was to expire in Janauary, 1917, would hold over until his successor was elected and qualified; that based upon the decision in the case of Scott vs. Ryan, 95 O. S., 405, wherein Scott was elected a member of the county board of education by the presidents of the village and district boards on April 3, 1916 and seated by the court, for the term ending in January, 1921, it was held that the presidents could be called together at a later time to make the election which they had failed to make in January.

Appearing under the head of "County School Districts." section 4728 G. C. reads in part:

"Each county school district shall be under the supervision and control of a county board of education composed of five members who *shall be elected by the presidents* of the various village and rural boards of education in such

county school district. Each district shall have one vote in the election of members of the county board of education * * *."

The above section is part of the new school code, establishing county boards of education which did not exist in Ohio prior to 1914. The clear intent of the section is that the members of the county board shall get their grant of power from the action of all the districts through the presidents of each, for "each district shall have one vote." The group of presidents is a continuing body that can be called into action on short notice, and the presidents come direct from the districts, that is, the people themselves.

Section 4729 G. C., passed February 17, 1914, reads in part:

> "On the second Saturday in June, 1914, the presidents of the boards of education of the various village and rural school districts in each county school district shall meet and elect the five members of the county board of education, one for one year, one for two years, one for three years, one for four years and one for five years, and until their successors are elected and qualified. The terms of office of such members shall begin on the fifteenth of July, 1914, and each year thereafter on the third Saturday of January. Each year thereafter one member of the county board of education shall be elected in the same manner for a term of five years. * * *"

It is noted in the above section that members of county boards of education are to serve until their successors are *elected and qualified.* It would seem therefore that regardless of any resignation a member would continue as such until his successor was not only elected but had qualified.

In the case before us Mr. Moulton was elected in the place of A. B. Wingate, a member of the Stark county board of education whose term expired the third Saturday in January, 1917, but Moulton was elected in December, 1916, by the wrong personnel of presidents, which changes just prior to the third Saturday in each January. On the point of being elected by the wrong group of presidents and at the wrong time Moulton was ousted by the supreme court of Ohio, and thus Mr. Wingate was the legal member of the county board until his successor was elected and *qualified,* for Moulton had been disqualified by the court, and Moulton was not a successor of Wingate and one who had qualified as his successor.

It is found that following the election of Moulton in December, 1916, for the term beginning the third Saturday in January, 1917, and which was irregular, the matter was taken to the supreme court in case No. 15888, State of Ohio, ex rel. William E. Moulton vs. Amos C. Myers, in quo warranto. This case was pending in the supreme court practically all through the year 1918, the decision dismissing the contention of the relator Moulton being rendered November 19, 1918. The point decided by the supreme court was that Moulton had no title, being elected by presidents of village and district boards who themselves retired before Moulton's supposed term began, the third Saturday in January, 1918. The decision does not go into the title of Amos C. Myers to the office, but treats of the contention of William E. Moulton. The decision of the court reads in full:

> "The statute which confers upon the presidents of the boards of education of the various village and rural school districts of each county authority to elect a member of the county board of education each year, does not authorize the election of a member of such board for a term which does not begin until after the expiration of the term of office of such presidents. The general rule of law, well established, which is recognized and applied in the case of State, ex rel. Morris vs. Sullivan, 81 Ohio St., 79, is applicable, and

precludes the election of members of the county board of education, whose terms of office do not begin until the third Saturday of Janauary, by presidents of village and rural school districts of the county, whose own terms and power to appoint expire on the preceding first Monday of Janauary. The election of each of the relators was therefore invalid and they are not entitled to the relief sought."

(Ohio Law Reporter, March 3, 1919, p. 526.)

It is noted that the decision says the right to elect members of the county board of education is *conferred* upon the presidents of the village and district boards, but they cannot elect for a term which begins after they themselves retire. In the case at hand the presidents of the rural and village districts of Stark county never had the opportunity of exercising the right which the supreme court says was conferred upon them, for the question was in the supreme court until November 19, 1918; it could not be expected that during 1918 and prior to November 19th, the presidents of the rural and district boards would act in a matter which the supreme court was deciding. But when that decision was known, in November, 1918, it was the clear duty of the presidents of the village and rural boards to proceed with an election which had never legally taken place before, for the group of presidents is a continuing body that can be called into session at any time. But section 4730 G. C., after providing for the very first meeting of the presidents in June, 1914, says:

"The call for all future meetings shall be issued by the county superintendent."

You say that after Mr. Wingate (whose term on the county board expired the third Saturday in January, 1917) signified his desire to no longer hold the office, as his term had expired, and he had not served for a year, that is, during 1917, for Mr. Moulton was acting, he submitted a resignation on January 17, 1918, as he had been pronounced the legal member by the Attorney-General by virtue of an opinion on the same kind of a question rendered to Hon. C. M. Caldwell, Prosecuting Attorney, Waverly, Ohio, December 17, 1917, and which opinion, along with the later one of June 16, 1918 (No. 1259), was sustained by the Supreme Court in the decision here, deciding that the presidents of village and rural boards cannot elect in December for an office which begins the third Saturday in January following and after they are out as an electing body.

The Attorney-General has examined the bulky evidence in the Supreme Court in the Stark county school cases of 1918 (decided November 19th), such cases being as follows:

No. 15888—State of Ohio ex rel. Wm. E. Moulton vs. Amos C. Myers.
No. 15889—State of Ohio ex rel. Franklin Schott vs. John W. Myers.
No. 15890—State of Ohio ex rel. Elmer E. Leighley vs. David F. Eikenberry.

The evidence in these cases was taken before Special Master Commissioner Ralph S. Ambler at Canton, he having been named as such by the Chief Justice of the Supreme Court, and the evidence is all in stenographic form. From this long array of evidence is gleaned certain details not fully covered in your statement of facts. The decision of November 19, 1918, by the Supreme Court covers the first two of the cases, the same point of law being at issue, that the presidents could not elect in December for a term beginning the next January.

The evidence shows that A. B. Wingate was called in suddenly and told that he was a member of the county board of education by a ruling of the Attorney-General,

that he had been out for a year while Moulton was acting, that he still felt Moulton was a member; that he had "nothing to resign" in his evidence; that he was told that if he did not care to serve to resign; that he did not approve what the controlling element in the board had been doing, did not care to be a member with them and did submit a paper to the county board purporting to be a resignation brought about in a hurry; that thereupon the controlling element in the board *immedictely* elected Amos C. Myers to the fifth place in the county board of education. You say that the presidents of the village and rural boards requested the county superintendent to call a meeting to elect in place of A. B. Wingate, whose term expired in January, 1917, upon its being ascertained from the Attorny-General that Wingate was still the member until his successor qualified; that the county superintendent "neglected and refused" to issue said call, whereupon the presidents met pursuant to a call of their own and elected A. A. Kurtz as a member of the county board of education to succeed A. B. Wingate whose term expired in January, 1917, such election being by a majority of such presidents held in regular manner in the office of the county board of education in January, 1918, after the county superintendent had "neglected and refused" to issue the call for a long time before.

It is important to note that while the power to elect the county board members is *conferred* upon the presidents of the village and rural boards, the errors and litigation occurring in Stark county during 1917 and 1918, prevented such presidents from exercising the right conferred on them to elect in regular manner, the successor of A. B. Wingate whose term as a member of the county board expired in January, 1917. Hence, there never was a regular election of Wingate's successor, or an opportunity for one until the presidents called themselves together *after the decision of the Supreme Court.* Every opportunity should be given to these district presidents to elect the members of the county board rather than to retard them, for they come direct from the people, far more so than a county board which, coming down from 1914, seeks to create and fill vacancies under guise of section 4748 G. C., which reads in part as follows:

> "Any such vacancy shall be filled by the board at its *next regular or special meeting,* or as soon *thereafter* as possible, by election for the unexpired term."

It is again necessary to refer to the evidence in the Supreme Court in the Moulton vs. Myers case in order to bring out important details not in your statement of facts. In such evidence is a correct copy of the minutes of the Stark county board of education for *the date of January,* 17, 1918. These minutes show that the three old members of the county board of education created two vacancies on January 17th and filled the two vacancies on the same day. They sought to throw out Elmer E. Leighley as a member of the county board by a resolution showing said Leighley had been absent ninety days from board meetings from October 8, 1917, to January 7, 1918, and did throw him out and elected David F. Eikenberry as his successor on the same day the resolution ousting Leighley was passed, or a few hours afterward. This went to the Supreme Court and Eikenberry, chosen by the three remaining members of the county board, was ousted. Second, they secured the resignation of A. B. Wingate and *in the same session* that the resignation was accepted followed with a motion to elect Amos C. Myers vice A. B. Wingate, resigned. The minutes show that the county board met at 9:50 A. M. on January 17, 1918, with all five members present including Moulton and Leighley; the opinion of the Attorney-General reinstating Wingate in place of Moulton was read after Moulton had left the room at 12:03 P. M. The board then directed the clerk to notify A. B. Wingate to appear and Mr. Wingate soon arrived and was entered as present in the minutes by a resolution reinstating him; but he must not have stayed for on the next motion to oust Leighley, the fourth member, because of absence (later not sustained in the Supreme Court) Wingate was not marked as

voting at all. From that point we will quote briefly the minutes of the Stark county board of education for January 18, 1917, as follows:

"It was then moved by Mr. Myers and seconded by Dr. Temple that the meeting adjourn at 1:45 P. M.

Motion carried.

The above is a correct record of the proceedings of the Stark county board of education on January 17, 1918.

Read and approved. W. J. PONTIUS, President.
2-12-18. J. J. ARMSTRONG, Clerk.

Special Meeting of the Stark County Board of Education, Canton, Ohio, January 17, 1918.

The Stark county board of education met in special session in their office at 2:00 p. m., January 17, 1918, pursuant to written call of the president delivered personally to each member—W. J. Pontius, R. T. Temple, J. W. Myers and A. B. Wingate.

The roll call showed the following members present: W. J. Pontius, R. T. Temple, J. W. Myers.

Mr. Pontius, the chairman, stated that the purpose of the meeting, as specified in the call, was to fill any vacancies in the county board and to transact any business that might be necessary.

It was then moved by Dr. Temple and seconded by Mr. Myers that D. F. Eikenberry be and he is hereby appointed to fill out the unexpired term of Elmer E. Leighley, as a member of this board.

The roll call on the above motion stood as follows: Pontius, yea; Myers, yea; Temple, yea. All three members voting yea, the president declared the motion carried.

The resignation of A. B. Wingate as a member of this board, was received and presented to the board.

It was moved by Dr. Temple and seconded by Mr. Myers that the resignation of A. B. Wingate, as county board member, be accepted.

Roll call on above motion stood as follows: Pontius, yea; Myers, yea; Temple, yea.

All three members voting yea, the president declared the motion carried.

It was then moved by Mr. Myers and seconded by Dr. Temple that *A. C. Myers* of Greentown be and he is hereby appointed to fill the unexpired term of A. B. Wingate, resigned.

Roll call on the above motion stood as follows: Pontius, yea; Myers, yea; Temple, yea.

All three members voting yea, the president declared the motion carried.

* * * * * * * * * * * * *

On motion of Mr. Myers, seconded by Dr. Temple, the board adjourned at 3:00 p. m.

The above is a correct record of the proceedings of the Stark county board of education on Januray 17, 1918.

Read and approved. W. J. PONTIUS, President.
2-12-18. J. J. ARMSTRONG, Clerk.

It will be noted that at 10 o'clock the board had five members on its roll and at a certain time a few hours later this was reduced to three by action of that particular three; that the county board adjourned at 1:45 p. m. and met *fifteen minutes later*, at 2:00 p. m. in a so-called special meeting to fill vacancies they had brought about prior to 1:45 p. m., for the minutes show the last business transacted before adjournment

at 1:45 p. m. to have been the ousting of Leighley and the first business after 2:00 p. m. was electing a successor to Leighley, which action was afterward nullified in the supreme court in its ouster of Eikenberry; that in the fifteen minutes between the sessions the members were notified of the 2:00 p. m. meeting, as was A. B. Wingate who was a member by the board's action until after 2:00 p. m., January 17, 1918; the clerk and president sign the minutes of both sessions as *the "proceedings* of the Stark county board of education on January 17, 1918;" the minutes of the first session were not approved at the afternoon session, but were approved along with the second session's minutes on February 12, 1918, as "the proceedings of January 17, 1918," which would go far toward indicating that the 2:00 p. m. meeting was not a special meeting at all but the afternoon session of "the proceedings of January 17, 1918." If it was a special meeting then the board should have obeyed section 4754 G. C., which reads in part:

> "* * * The record of proceedings at each meeting of the board shall be read at its *next succeeding meeting,* corrected, if necessary, and approved, which approval shall *be noted in the proceedings.*"
>
> Here none were approved until both were on February 12, 1918.

But aside from this oversight in failing to approve the minutes of the morning session at its afternoon session *specially called* by the president, would fifteen minutes be a proper notice to Mr. Wingate to attend when an hour or more might be needed to find him? The law will not look with favor on a fifteen minute notice even though there is no stipulated time of notice in section 4751 G. C., which reads:

> "A special meeting of a board of education may be called by the president or clerk thereof or by any two members, by serving a written notice of the time and place of such meeting upon each member of the board either personally or at his residence or usual place of business. Such notice must be signed by the official or members calling the meeting."

This means a *reasonable* notice of a special meeting, and not one of minutes, for section 4742 G. C. provides ten days' notice for the meeting to elect a district superintendent.

But the election of Amos C. Myers as a member of the county board of education falls completely upon an examination of the minutes above quoted. The county board at its "special" session at 2:00 p. m. on January 17, 1918, with three members present, accepted the resignation of A. B. Wingate and elected A. C. Myers as his successor in a succeeding motion, all within ten minutes by the record, a clear violation of section 4748 G. C., which says in part:

> "Any such vacancy shall be filled by the board at its *next regular or special meeting,* or as soon *thereafter* as possible, by election for the unexpired term."

The word "thereafter" means after one special or regular meeting has passed, and a vacancy, *if existing,* cannot be filled at the meeting when a resignation was accepted. Hence the election of A. C. Myers was illegal for two reasons, viz.:

> (1) Myers was not elected at a meeting following the creation of a vacancy.
>
> (2) The county board of education could not call a non-election by the presidents to be a vacancy.

On the second proposition the district presidents were for a long time denied

the right to elect in place of Wingate, but by such delay, (which they could not help, not being called together) they were prevented from exercising a power *conferred on them by the statute.* They then called themselves together, and by a majority vote in the county, village and rural districts, exercised the power conferred, in electing A. A. Kurtz as the successor of A. B. Wingate who must "serve until his successor is legally elected and qualified."

As the right to meet later than January to make an election by the district presidents who had neglected, or were prevented from doing so, see the following:

Opinion No. 177—Attorney General, April 8, 1919;
Opinion No. 877—Opinions of Attorney-General, 1917, Vol. III, page 2399;
Opinion No. 1496—Opinions of Attorney-General, 1916, Vol. I, page 696;
Opinion No. 1259—Opinions of Attorney-General, 1918, Vol. I, page 783;
State ex rel. Scott vs. Ryan, 95 O. S., 405.

It is therefore the opinion of the Attorney-General based upon the facts submitted and the stenographic evidence, including the minutes of the Stark county board of education for January 17, 1918, at hand, that Amos C. Myers was never legally elected the successor of A. B. Wingate on the county board of education and that A. A. Kurtz who was chosen to be such successor of Wingate by a majority of the district presidents of village and rural boards of education at their first legal opportunity, is the successor of A. B. Wingate as such county board member for the term ending the third Saturday in January, 1922.

Respectfully,
JOHN G. PRICE,
Attorney-General.

516.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN DARKE, MERCER, TRUMBULL AND WOOD COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus Ohio.*

COLUMBUS, OHIO, July 23, 1919.

517.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF NEVADA IN THE SUM OF $7,820.12.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 24, 1919.

518.

MUNICIPAL CORPORATIONS—BONDS ISSUED UNDER SECTION 3916 G. C. TO PAY SALARIES OR LONG TIME CONTRACTS FOR LIGHTING STREETS, ETC.—HELD SECTIONS 3931 AND 3916 G. C. NOT INCONSISTENT—SECTION 5649-3d G. C. NOT INCONSISTENT WITH EITHER 3916 OR 3931 G. C.—WHEN SECTION 5649-3d G. C. IS NOT APPLICABLE TO SECTION 3797 G. C.—EXAMPLES OF "DEFICIENCY" IN CURRENT REVENUES OF MUNICIPAL CORPORATIONS FOR WHICH MONEY MAY BE BORROWED UNDER SECTION 3931 G. C.

Sections 3931 *and* 3916 *G. C. are not inconsistent. Money may be borrowed under section* 3916 *to pay accrued legal obligations, floating in character, though such obligations, are properly chargeable to the current expense account of the municipality.*

Section 5649-3d, *in so far as it applies to municipal corporations, is not inconsistent with either section* 3916 *or* 3931 *G. C. That part of said section* 5649-3d *which by inference prohibits the appropriation of moneys estimated to come into the treasury during the fiscal h .lf year, from various sources of revenue, is not to be regarded as applicable to municipal corporations which are governed by the similar but in this respect different provisions of section* 3797 *G. C.*

In spite of the provisions of sections 5649-3d *and* 3797 *G. C. a "deficiency" in the current revenues of a municipal corporation for which money may be borrowed under section,* 3931 *G. C. may arise under circumstances of which the following are examples:*

(a) The occurrence of a shortage in the col'ection of taxes and other revenues cs compared with the amount of such co!'ections in good foith estimated by the budget commission and appropriated at the beginning of the fisca' period.

(b) The imposition of any paramount fixed charge upon the municipa'ity otherwise than through the agency or under the authority of the 'egis'ative body thereof having the power to appropriate, ind not fu''y provided for in the appropriation for the fiscal period.

COLUMBUS, OHIO, July 24, 1919.

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

GENTLEMEN:—I am in receipt of two seperate inquiries from the bureau, both of which involve an interpretation of section 3931 of the General Code. In the one case the question is as to whether that section, the legislative history of which is such as to make it prevail as a later enactment over section 3916 of the General Code to the extent of any irreconcilable inconsistency between the two sections, has the effect of limiting the natural application of the last named section. Specifically, the question is whether or not bonds may be issued under section 3916 to pay accrued obligations of a municipal corporation, such as for salaries fixed by ordinance or on long time contracts for lighting the streets, alleys and public places, to which the provisions of sections 3806 et seq. of the General Code, familiarly known as the Burns law, do not apply.

The second question in turn arises out of another suspected implied repeal, and may be stated as follows:

> Do the provisions of section 5649-3d of the General Code, requiring in substance that no expenditure within a fiscal half-year shall be made except from and within the amounts fixed by the budget commission and appropriated for such purpose, exclusive of receipts and balances, impliedly repeal because of its later enactment the provisions of section 3931 G. C., authorizing the issuance of bonds to supply deficiencies in current revenues?

The statutes necessary to be considered in connection with these two inquiries are as follows, in the order of their respective enactments:

"Section 3916. For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually.

Section 3917. No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof. * * *

Section 3931. Council may issue deficiency bonds in such amount and denominations, for such periods of time, not to exceed fifty years and at such rate of interest not to exceed six per cent. as it deems best when in the opinion of council it is necessary to supply a deficiency in the revenues of the corporation. The total amount of deficiency bonds issued by a corporation, outstanding at any time, shall not exceed one per cent. of the total value of all property in the corporation as listed and assessed for taxation. The issuance of such bonds shall be approved by the votes of two-thirds of all the members elected to council, and approved by the votes of two-thirds of all the electors of the corporation voting upon such question at a regular or special election to be provided for by council.

Section 5649-3d. At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

The line of reasoning necessary to be considered in dealing with the combined effect of these three sections is as follows:

In so far as obligations properly payable out of current revenues, such as the compensation of officers and salaries of employes fixed by ordinance and the payment of sums due on lighting contracts, might be considered, such obligations could not arise and become "indebtedness" of the municipality "which from its limits of taxation the corporation is unable to pay at maturity" except through the occurrence of a deficiency in current revenues.

Section 3931 provides the conditions under which bonds shall be issued "to supply a deficiency in the revenues of the corporation." It could not have been the intention of the general assembly to permit any deficiencies to be supplied on less stringent conditions than those set forth in that section. Therefore, to the extent that indebtedness might arise which under ordinary circumstances would be payable out of current revenues, the subsequent enactment of section 3931 G. C. must be regarded as having limited the application of section 3916 G. C. But when the revenues of a municipality are deficient, not because of any unexpected failure to collect taxes or other income, but because the program of municipal activities as established by ordinance and long time contracts is such that the revenues which might have been

anticipated at the beginning of a fiscal period are insufficient to finance such program, then to borrow money for the purpose of supplying such a deficiency at least and to expend the money so borrowed, in addition to the appropriations and balances and in addition to the amount fixed by the budget commissioners and the revenues from other sources than property taxation, would be to violate section 5649-3d, which is of enactment later than section 3931. Therefore, to this extent section 5649-3d impliedly repeals section 3931.

In other words, what has just been outlined is the argument for implied repeal, first, of section 3916 by section 3931, and second, of section 3931 in turn by section 5649-3d. It will of course be understood that the process thus suggested is not really a repeal but rather an amendment, as it would be impossible upon such reasoning to say that section 3916 was wholly destroyed by the enactment of section 3931 or that the latter section was wholly destroyed by the enactment of section 5649-3d. If in either of these cases the latter section had any effect upon the former, such effect was one of limitation rather than one of destruction. Thus, indebtedness arising in the course of some transaction not properly and naturally comprehended within the current expenditures of a municipal corporation would not amount to a deficiency in the current revenues; so also a deficiency in current revenues might arise not from the enlargement of the expenditures contemplated by the budget and the estimated receipts other than from taxation, but from the failure of revenues, such for example as that occurring in the municipalities of this state during the present year through the adoption of prohibition and the consequent reduction in number or presumed total extinction of places where the business of trafficking in intoxicating liquors is carried on. To borrow money to supply such a deficiency would not be violative either of the letter or spirit of section 5649-3d, however construed. Therefore, I repeat that we are rather dealing with implied limitation or amendment than with implied repeal in testing out the correctness of the line of reasoning above outlined.

The principles applicable to the question at hand are, however, the same whether the effect of the two steps in legislation now under discussion be called implied repeal or implied amendment. The fundamental rule to be applied is that a later statute prevails over and *pro tanto* destroys the effect of an earlier statute to the extent only that such later statute is irreconcilably inconsistent with the former statute. This rule is sometimes put as a statement that implied repeals and amendments are presumed against.

A subordinate principle is also to be taken into consideration, viz.: that where both of the two statutes the combined effect of which is to be considered are affirmative, the presumption against an implied repeal is greatly strengthened; so that unless it is clear that the later statute is intended to cover the entire field of the common application of the two and to operate as a substitute *pro tanto* for the former, it will be presumed that the two are cumulative.

Authorities need not be cited upon these rather elementary principles. Let them now be applied to the first of the two legislative processes under consideration. We have it then, with a statute providing that

> "for the purpose of extending the time of payment of any indebtedness * * * council * * * may issue bonds of the corporation"

in effect, another statute was passed providing that

> "council may issue deficiency bonds * * * when * * * it is necessary to supply a deficiency in the revenues of the corporation. The total amount of deficiency bonds issued by a corporation * * * shall not exceed one per cent. of the total value of all property in the corporation. * * *

> The issuance of such bonds shall be approved by the votes of two-thirds of all the members elected to council, and approved by the votes of two-thirds of all the electors of the corporation * * *."

If this were the exact situation a difficult question of legislative intent would exist. On the one hand, both sections are affirmative in form and therefore the presumption that the powers granted in each of them were intended o be cumulative arises. On the other hand, it is easy to get a negative inference out of section 3931 to the effect that no bonds to supply deficiencies in current revenues, however arising, shall be issued without the approval of two-thirds of the members of the council and two-thirds of the electors of the corporation; nor shall such bonds be outstanding in an amount to exceed one per cent. of the total value of all property in the corporation. This would make a statute negative out of section 3931 and make it clearly more potent to modify by implication the provisions of section 3916, thus far assumed to be an earlier statute. In the same connection one might point, as Messrs. Squire, Sanders & Dempsey, a copy of whose opinion on this question is before me, have pointed to section 3931 of the General Code, which limits loans in anticipation of the general revenue fund to six months in duration. From both these sections (3916 and 3931) one might argue that the legislative policy is very strong against the issuance of deficiency bonds or notes without stringent limitations.

However, it is not strictly true that the relation of section 3931 to section 3916 can be worked out in the theory that they are respectively a later and an earlier statute. It is true that section 3916 was originally section 2701 of the Revised Statutes, and as such antedated in point of enactment the Municipal Code of 1902. It is also true that section 3931 became a law of general operation throughout the state by virtue of being enacted as section 99 of the Municipal Code of 1902 (96 O. L. 53); but the general assembly in enacting the Municipal Code of 1902 was not content merely to leave section 2701 of the Revised Statutes unimpaired and to leave to inference the effect upon it of any of the provisions then inserted in the Municipal Code of 1902, but in section 96 of that act it provided expressly as follows:

> "Sec. 96. Municipal corporations shall have power to issue bonds in the manner and for the purposes authorized by section 2701, Revised Statutes of Ohio, and the form and requisites of all bonds shall be such as are required by sections 2703, 2706, 2707 and 2708 of the Revised Statutes of Ohio."

Here is an expression of intent speaking from the date of the enactment of the Municipal Code of 1902 that the power to issue bonds for the purposes authorized in section 2701 R. S. shall continue to exist. It is the opinion of this department that this provision is just as strong in section 96 as it would be if added as a proviso to section 99. Therefore it cannot be argued that section 99 in any way cut down or limited section 2701 because section 96 expressly declared that the power granted in section 2701 should continue unimpaired.

This bit of legislative history is really enough to dispose of the question of implied repeal arising in connection with the joint operations of sections 3916 and 3931 of the General Code as they now stand. However, it may not be out of place to call attention to a few considerations which at least tend to show that the supposed inconsistency in policy between the two sections does not really exist. Under section 3916 money cannot be brought into the treasury to be expended through the creation of obligations in the future. That is to say, if a municipal treasury is empty, section 3916 of the General Code cannot be so employed as to fill it up. This is exactly what can be done under either section 3916 or section 3931. Section 3916 is available in a municipality only in that very limited class of cases to which the provisions of the Burns Law, so-called, being sections 3806 et seq. of the General Code, do not apply—those

cases, in short, in which the municipality is actually bound by an obligation created without reference to the adequacy of the revenues through which it is to be discharged The money borrowed under section 3916 passes through the treasury of the municipality immediately into the hands of the municipality's creditors—the holders of claims of this character. The money derived from the issuance of bonds under section 3931 may remain in the treasury and be used to finance enterprises contemplated but not contracted for at the time of the borrowing. To be sure, the two sections do overlap in the limited sense that under section 3931 floating indebtedness already incurred may undoubtedly be considered as a part of the deficiency for which bonds may be issued; but insofar as they do overlap they must be regarded, in the opinion of this department, as cumulative and not exclusive. The elaborate and stringent safeguards thrown about the issuance of bonds under section 3931 would not be appropriate were the principal office or function of the issuance of such bonds to provide means for paying debts already incurred. It would be very unusual to find a permanent statute preventing the immediate payment of floating obligations already incurred by the issuance of bonds save upon the approval of two-thirds of the electors. These safeguards point to an intent to curb municipal extravagance in the making of additional expenditures rather than toward the hampering of an effort on the part of the municipality to fund a debt which already exists as a floating obligation.

For these reasons it is concluded that there is no inconsistency between section 3931 and section 3916, and that the two sections may therefore stand together; so that bonds may be issued under section 3916 to pay any valid indebtedness of the municipality when the other conditions of that section are satisfied, though such indebtedness may have arisen with respect to matters and things which constitute enterprises which are a charge upon the current revenues of the municipality.

The case as regards the joint operation of section 3916 and 3931 considered together, on the one hand, and section 5649-3d of the General Code, on the other hand, is entirely different from that which has been discussed. Here there is no doubt as to the later enactment of section 5649-3d as compared with the other two sections. Here also the language of the latter section is entirely negative rather than affirmative in any sense, so that from what surface evidence we have it would seem to be arguable that in so far as section 5649-3d might be inconsistent with any and all provisions relating to the securing of money to care for deficiencies in current revenues it would impliedly repeal such provisions. Certainly, too, section 5649-3d is inconsistent in at least one important sense with such other provisions. The very policy of section 5649-3d is that no deficiencies shall occur. This is, of course, inconsistent with the funding of such deficiencies when they do occur.

However, the implied repealing effect of section 5649-3d cannot go beyond its words. The unavoidable repugnance which must be found to exist between two sections in order to justify the application of the principle of implied repeal certainly requires that there be found in the later section, the potency of which to repeal is in question, language clearly inconsistent with anything found in the earlier section. The only language in section 5649-3d which is negative in form and evinces any policy inconsistent with that of sections like the ones under discussion is the following:

> "all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but no appropriations shall be made * * * for a greater amount * * * than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

This language cannot be taken literally. If it could be the repealing effect of the section would extend not only to sections like sections 3916 and 5656 G. C., but also to sections like section 3939, which authorizes a municipal corporation to issue bonds for numerous distinct specific purposes, some of which, such as the repair, mainten-

ance and extension of existing improvements, are quite properly considered to be matters of current expense. There is no possible middle ground between holding that section 5649-3d makes it impossible to borrow money at all and holding that the section relates only to the making and expenditure of appropriations out of the proceeds of taxes and other current revenues, and does not extend at all to expenditures made from the proceeds of borrowed money. The section governs the making of appropriations, and only by remote inference does it prohibit the incurring of any expense that is not met by appropriation. As pointed out by Hon. Timothy S. Hogan, who first considered this question in an opinion to the city solicitor of Middletown under date of February 15, 1912, (Annual Report of Attorney-General for 1912, page 1614), this inference is not reconcilable with the fact that when the Smith Law was passed all the sections relating to both counties and to municipal corporations and authorizing the borrowing of money were left unrepealed; nor is it reconcilable with the fact that section 5649-3d is modeled after and in large measure a paraphrase of section 3797 G. C., previously in effect as a part of the Municipal Code, which section was enacted in 1902 by the same law to which reference has previously been made. In other words, in 1902 the general assembly did not apparently consider it inconsistent to provide in the language of section 3797 that "all expenditures within the following six months shall be made from and within such appropriations and balances thereof" and at the same time to provide for the issuance of deficiency bonds, and to provide also for the continuing power to borrow money under section 2701 of the Revised Statutes. The scope and application of section 3797 being thus disclosed by the legislative history of that section, and section 5649-3d being closely modeled after section 3797, we must give to said section 5649-3d the meaning thus indicated and hold that it relates only to the expenditure of moneys raised by taxation and other current revenues, and does not prevent the borrowing of money under other sections that remain unimpaired and in terms authorizing such borrowing, nor the expenditure of the proceeds of such loans.

It is possible that the opposite interpretation, if made and adhered to in 1911 when the Smith Law went into effect, would have prevented the accumulation of deficiencies; it is possible also that this very idea may have been in the mind of the legislature when it passed the Smith One Per Cent. Law; but in fact the above interpretation was given to the section by the administrative officers of the state and has been acted upon through the years within which the Smith Law has been in effect. The legislature has met repeatedly during that time and has considered these sections, amending some of them. If it had been the intention to do away with the power of borrowing money to meet current obligations fastened upon a subdivision by law, and not subject to the Burns Law as applied to the subdivision, the legislature in the the face of what was going on in the state could have taken appropriate action by expressly repealing sections like section 5656 and 3916 of the General Code, or at least amending section 5649-3d so as to make it more explicit in that regard.

Thus far, the only substantial difference between section 3797 G. C. and section 5649-3d has not been considered. Section 3797 G. C provides that the appropriation shall be made at the beginning of each semi-annual period "from the moneys known to be in the treasury, *or estimated to come into it during the six months next ensuing from the collection of taxes and all other soucces of revenue.*" Section 5649-3d requires that appropriation be made "from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue." There is also another difference, in that the amount fixed by the budget commissioners is a limitation on the appropriating power under section 5649-3d, which is lacking under section 3797. This latter feature of the section, however, has already, been considered.

From the requirement that appropriations shall be limited to moneys actually in the treasury it may be argued that a deficiency in revenues could never occur. I am very reluctant to express an opinion upon the point thus raised, but necessity

requires me to do so. I feel obliged to hold that the feature of section 5649-3d now under consideration should be absolutely ignored so far as municipal corporations are concerned. My information is that it has been so ignored at all times since it was supposed to be in force. The reason for this course of conduct can be appreciated by any one familiar with municipal finance. Prior to the date when the Smith law took effect municipalities had been operating on estimated revenues. That is to say, their budgets of expenditures were made up and their appropriation ordinances were predicated upon the anticipated revenues of the incoming six months. This law became effective on June 2, 1911. Under it the next semi-annual appropriation as to municipal corporations would take place in the month of July (for the Smith law did not change the fiscal year as to municipal corporations, which was fixed by section 3796 of the General Code, still in force). Acting on July 1, 1911, the council of a city, if proceding strictly in accordance with section 5649-3d, would have had no money at all to have appropriated, excepting so much of the proceeds of the February distribution as remained unexpended at that time. A literal application of section 5649-3d at the time the Smith law went into effect would have put a stop to municipal government in every city in this state. Face to face with such an emergency and protected by unrepealed section 3797, the municipalities of the state continued to operate under the latter section. Indeed, without deciding the question on its original merits it may be observed that there is much to be said in favor of reading section 3797 as a particular statute, to be considered as an exception to section 5649-3d even in the face of the later enactment of that section. There is some authority for such a holding. I express no view as to such a question, contenting myself with the statement that the cities have actually continued to operate under section 3797, so far as the anticipation of receipts during the fiscal half year as a basis for the appropriations made at the beginning thereof was concerned. Such long continued action on their part must be regarded as a contemporaneous administrative interpretation of the cumulative effect of the two sections of sufficient weight to be binding at this time. For this reason alone, then, it is stated as the opinion of this department that estimated receipts to accrue during the period for which appropriations are to be made by the council of a municipal corporation may be anticipated in making such appropriations, as well as the amount on hand at the beginning of the fiscal half year for which appropriations are made.

From this it follows that the section is not to be taken literally but, as you put in your letter of inquiry respecting this phase of the question, the thing which cannot be exceeded is the sum of the following items:

(1) Balance on hand.
(2) Budget tax allowance.
(3) Other revenues.

In fact your letter shows that you have been giving the identical practical interpretation to the section which has just been discussed.

But without exceeding this sum there may arise a deficiency in the revenues of a corporation through failure to collect the amount of taxes allowed by the budget commission or through failure of other revenues. That is to say, at the time of making the appropriations the revenues to accrue during the six months' period were estimated at a certain sum; collections failed to produce the amount thus estimated; a "deficiency" thus arises.

But this is not the only way in which a deficiency may arise. While the section under consideration provides that all expenditures shall be made from and within the semi-annual appropriations, there may conceivably be certain expenditures over which council has no immediate control. An example of such a contingency has occurred in the city of Cleveland, where the people by direct initiative have recently

adopted the eight-hour day for firemen and policemen, thus increasing largely the fixed charges of the city in the safety department without any action on the part of council. Without holding that the sections under consideration apply to charter cities like Cleveland in their entirety, the possibility of such an occurrence in a non-charter city cannot be overlooked. Such an ordinance so initiated and adopted is valid and imposes on the city the obligation of incurring the additional expense. If it should become effective during a fiscal period it would necessarily result in the creation of charges for which no appropriation had been made. That is to say, there would be a clash between the policy of section 5649-3d and the policy of the initiative and referendum as applied to municipal corporations. Now section 5649-3d applies to the appropriating body; it does not in terms, as heretofore stated, relate to expenditures of the character now under discussion; it does not prohibit the proper expenditure of moneys raised by bond issue. It must therefore follow that under circumstances like those last imagined a deficiency would arise which could be met either by borrowing money under section 3931 or by borrowing under section 3916, when the obligations had actually accrued and were payable.

A variety of cases might be imagined, and I am not so sure that any comprehensive definition of the phrase in section 3931 to which you call attention can be satisfactorily framed. The following is an attempt to construct such a definition:

By "a deficiency in revenues" in section 3931 of the General Code is meant:

(a) Any shortage in the actual collections from taxes and other sources of revenue for a given fund, as compared with the amount of the income of such fund during the fiscal half year reasonably and lawfully estimated at the beginning thereof and appropriated at such time, pertaining to such fund.

(b) The amount of any paramount fixed charges, i. e., charges imposed upon the municipality otherwise than through the agency or under the authority of the council or other legislative body thereof, and not fully covered or provided for in the appropriation for the fiscal period.

At this time I would not care to extend the definition beyond that which has been framed. For example, the necessary work of repairing streets and other contract service of the municipality might because of rise in price of labor and commodities largely exceed in cost the amount anticipated at the beginning of a fiscal period; but this fact would not justify the borrowing of money under section 3931 for the purpose of bringing enough into the treasury to finance the enterprises of this character originally contemplated. As at present advised, I would also hold that council is without authority to borrow money under section 3931 for the purpose of providing funds in excess of appropriations for the fiscal period to meet salary and wage increases provided for by its own action. This would be directly violative of sections 3797 and 5649-3d, and though those sections, as previously stated, do not have the effect of modifying the natural scope and import of section 3931, yet they do reflect upon what that natural scope and import is, to the extent of denying the application of the latter section to such cases.

In short, one may say that a deficiency is always arrived at by comparing one amount with another. It is obvious that one of the amounts in question is the actual income of the municipality during the period for which funds have to be provided and appropriated. The question is as to what the other figure which may be compared with this is. Another way of phrasing the definition which I have attempted would be to say that this other figure consists of the following items:

"(1) The amounts actually appropriated for contract service.

(2) The amounts actually appropriated for fixed charges determined

by standing ordinances, such as for salaries, wages, and the like, in effect at the time of making the appropriation.

(3) The amount of any paramount fixed charges fastened upon the municipality by action of any authority other than the appropriating body itself and effective during the fiscal period."

In conclusion it may be said that it would be much more satisfactory from the viewpoint of this department to deal with a question like that submitted in your letter of June 16th in the light of specific facts, rather than as a general proposition. Much difficulty has been encountered in attempting to deal with it in the latter way.

Respectfully,
JOHN G. PRICE,
Attorney-General.

519.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN SUMMIT AND MONTGOMERY COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, July 24, 1919.

520.

APPROVAL OF LEASE OF CANAL LANDS TO C. L. McLAIN CO., MASSILON, OHIO.

COLUMBUS, OHIO, July 24, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of July 24, 1919, enclosing for my approval lease (in triplicate) for Ohio Canal lands, as follows:

Valuation.

To C. L. McLain Company, Massillon, Ohio, Ohio Canal land in the city of Massillon, Ohio..... $8,000.00."

I have carefully examined said lease, find it correct in form and legal, and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

521.

APPROVAL OF CERTAIN LEASES TO THE CHILLICOTHE PAPER CO., B. C. SCHMITT, GEORGE E. KALB AND WHARTON & OREBAUGH.

COLUMBUS, OHIO, July 24, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of July 23, 1919, in which you enclose leases, in triplicate, for my approval, as follows:

	Valuation.
To the Chillicothe Paper Company, railway right-of-way purposes near south corporation line of Chillicothe	$3,000 00
To B. C. Schmitt, Columbus, Ohio, cottage site at Buckeye Lake	400 00
To George Elmo Kalb, cottage site at Buckeye Lake	400 00
To Wharton & Orebaugh, Columbus, Ohio, cottage site	400 00

I have carefully examined said leases, find them correct in form and legal, and am, therefore, returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

522.

APPROVAL OF BOND ISSUE OF THE CITY OF CANTON IN THE SUM OF $990.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 24, 1919.

523.

APPROVAL OF BOND ISSUE OF THE CITY OF CANTON IN THE SUM OF $48,100.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 24, 1919.

524.

APPROVAL OF BONDS OF THE CITY OF CANTON IN THE SUM OF $4,650.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 24, 1919.

525.

APPROVAL OF BOND ISSUE OF DOVER TOWNSHIP RURAL SCHOOL DISTRICT IN THE SUM OF $6,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, July 24, 1919.

526.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN COLUMBIANA, DARKE, HAMILTON, MAHONING, PICKAWAY SHELBY, SUMMIT AND TRUMBULL COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, July 26, 1919.

527.

BANKS AND BANKING—FOREIGN TRUST COMPANY—RIGHT TO EXECUTE A TRUST IN THIS STATE CREATED UNDER FOREIGN WILL.

1. *A foreign trust company which has been appointed as executor or administrator by the courts of some other state, as provided by law, when the decedent was a resident of such state at the time of his death, may qualify as executor or administrator of property in this state, acquire, hold or transfer title to lands or other property therein, as trustees to secure any bond, note or other obligation, or certify thereto without making a deposit with the treasurer of state, paying a fee, complying with the general laws as to admissions of foreign corporations to do business, making reports to the tax commission, securing a certificate from the superintendent of banks, provided the laws of such state (where the decedent resided at the time of his death), give equal privileges to trust companies organized and doing business under the laws of this state.*

2. *With the above exceptions, foreign trust companies which have not been admitted to do business in Ohio, in accordance with the provisions of law in force, prior to the taking effect of house bill* 200, *must comply with the general laws relating to the admission of foreign corporations (sections* 178 *et seq. and* 183 *et seq.); must have a paid-in capital of at least* $100,000.00; *must deposit with the treasurer of state that sum in cash or in the approved designated securities; must secure from the secretary of state a certificate of admission to do business, and file it, with a certified copy of the last published statement made by it and filed with the proper department of state in which it is organized and doing business, with the superintendent of banks; must secure his approval of such bonds and securities and his certificate of that fact to the treasurer of state; and must pay him a license fee of $100.00 for the privilege of transacting business for a period of one year.*

To obtain a renewal of its certificate, it must make the required annual report to the tax commission, provided by section 5499, *obtain its certificate that such report has been filed and the franchise tax calculated thereon paid, file this certificate with a copy of its*

last published statement, with the superintendent of banks, and pay him a fee of $100.00

3. *Foreign trust companies not comprehended in paragraph* (1) *admitted to do business in the state prior to the taking effect of house bill* 200, *are subject to all the above requirements mentioned in paragraph* (2), *excepting the compliance with the general laws relating to the admission of foreign corporations, the obtaining of a certificate to that effect, filing it with the superintendent of banks, the securing of a further certificate of his approval, of its deposit, and the payment of an initial license fee of one hundred dollars. At the expiration of the period for which it is now licensed, such fee of* $100.00 *is payable for the privilege of doing business for another year.*

COLUMBUS, OHIO, July 28, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have addressed to me a letter containing the following inquiries:

"1. What is necessary in the case of a foreign trust company desiring to execute a trust in this state created under a foreign will, in which foreign will said trust company is named as trustee, for me to issue a certificate as provided in the new banking act?

2. Do you understand that the new banking act, especially section 710-152, applies to a foreign trust company already doing business in Ohio as trustee under a foreign will?

3. In section 710-151 of the new banking law it is provided that 'every foreign trust company shall, upon being admitted to do business within this state as otherwise provided by law, file a certified copy, etc., etc.

4. What do the words 'otherwise provided by law,' refer to? Do the words 'otherwise provided by law' refer to section 710-150, or to some other section?"

Your questions make necessary a consideration of sections 710-17c, 710-150, 710-151, 710-152, 710-153 and 710-154 G. C., which are a part of H. B. No. 200 (108 O.L. 80), revising and codifying the banking laws of the state. They are as follows.

"Sec. 710-17. * * * (c) Each foreign trust company desiring and intending to do business in this state shall annually pay to the superintendent of banks a fee of one hundred dollars for issuance to it of a certificate authorizing it to transact business in this state, and such fees shall be paid before such certificate is issued. * * *."

"Sec. 710-150. No trust company, or corporation, either foreign or domestic, doing a trust business shall accept trusts which may be vested in, transferred to or committed to it by a person, firm, association, corporation, court or other authority, of property within this state, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash the sum of one hundred thousand dollars, except that the full amount of such deposit by such corporation may be in bonds of the United States, or of this state or any municipality or county therein, or of any other state or any municipality or county therein, or in the first mortgage bonds of any railroad corporation that for five years last past has earned at least five per cent. net on its issued and outstanding capital stock, which securities and the sufficiency thereof shall be approved by the superintendent of banks. From time to time said treasurer shall, with the approval of the superintendent of banks, permit withdrawals of such securities or cash, or part thereof, upon deposit with him and approval of the superintendent of banks, of cash or other securities of the kind heretofore named, so as to maintain the value of such deposits as heretofore provided, and so long as it

continues solvent he shall permit it to collect the interest on its securities so deposited."

"Sec. 710-151. Every foreign trust company shall, upon being admitted to do business within this state as otherwise provided by law, file a certified copy of its certificate of admission with the superintendent of banks, together with a certified copy of the last published statement made by it and filed with the proper department of the state in which it is organized and doing business, and upon approval thereof and of the funds and securities to be deposited as in the preceding section provided, he shall certify that fact to the treasurer of state, and upon deposit of such funds and securities with the treausrer of state the superintendent of banks shall thereupon, and upon the payment of a license fee of one hundred dollars therefor, license said trust company to transact business within this state for the period of one year thereafter."

"Sec. 710-152. Every foreign trust company doing a trust business in this state shall annually within thirty days after complying with all the provisions of law in relation to foreign corporations transacting business within this state, file with the superintendent of banks a certificate of the tax commission of Ohio as to such compliance together with a copy of the last published statement of said corporation, and if such trust company is not in default as to any trust matter or estate within this state, the superintendent of banks shall thereupon, and upon payment of a fee of one hundred dollars therefor, license said corporation to transact business within this state for a further period of one year."

"Sec. 710-153. The superintendent of banks shall have the right to examine, by any deputy, examiner or person especially appointed for that purpose, the books or affairs of any foreign trust company, or any corporation doing a trust business, as to any and all matters relating to any trust, estate or property within this state and concerning which such trust company is acting in a trust or representative capacity, the expense of which shall be charged to and paid by such trust company."

"Sec. 710-154. No such trust company, foreign or domestic, authorized to accept and execute trusts, either directly or indirectly through any officer, agent or employe thereof, shall certify to any bond, note or other obligation to evidence debt, secured by any trust deed or mortgage upon or accept any trust concerning property located wholly or in part in this state, without complying with the provisions of sections 150, 151 and 152 of this act. But nothing herein contained shall prevent a foreign corporation from qualifying as executor or administrator of property in this state, after appointment as executor or administrator by the courts of any other state as provided by law, when the decedent was a resident of such state at the time of his death, or from acquiring, holding or transferring title to lands or other property within this state as trustee to secure any bond, note or other obligation aforesaid, or from certifying thereto, but provided always, that by the laws of such other state a trust company organized and doing business under the laws of this state shall have equal privileges as to any similar estate, deed or trust of property in such other state."

I have given an unusual amount of consideration to the above provisions of law and other statutes which may shed light on their construction, not only because the state is interested in the proper regulation of institutions with which its citizens transact business and in the revenues provided, but for the further reason that a mistaken interpretation of the act might in the future result in controversies between foreign trust companies and their clients, and litigation between others with whom they may

have dealt; cloud the title to real estate which they may have administered, and jeopardize the claims of those who may have acquired property through proceedings to which they were parties.

In other words, trust companies, on account of the obligations which they may incur and their responsibility to their clients, and for the sake of the security of titles derived from or through them, are as vitally concerned as the state and its citizens in its proper compliance with the provisions of these laws. For example, if a foreign trust company is subject to the provisions of section 178 G. C. and fails to comply therewith, it can not maintain an action on its contracts in Ohio. What rights those in privity with it or with whom it had dealt would have, is a question prolific of litigation. Illustrations of the types of questions arising from the diverse views of courts are afforded by the following cases copiously annotated:

Edison Gen. Elec. Co. vs. Canadian Pacific Navigation Co., 24 L. R. A. 315.

Tri-State Amusement Co. vs. Forest Park Highlands Amusement Co., 4 L. R. A. (N. S.) 688.

Fruin-Colnon Contracting Co. vs. Chatterson, 40 L. R. A. (N. S.) 857.

Tarr vs. Western Loan & Sav. Co., 21 L. R. A. (N. S.) 707.

Strampe vs. Minn. Farmers' Mut. Ins. Co., 26 L. R. A. (N. S.) 999.

Mahar vs. Harrington Park Villa Sites, 38 L. R. A. (N. S.) 211.

Model Heating Co. vs. Magarity, L. R. A. 1915B, p. 665.

Palm Vacuum Cleaner Co. vs. Bjornstad, L. R. A. 1917C, p. 1012.

Having the consequences of a wrong interpretation of these statutes fully in view, I shall proceed to give you what I consider to be a safe conclusion, so that there will be no risk to the state or its citizens or to the trust companies in following it.

It must be frankly stated that the law upon the question as to how a foreign trust company should qualify to do business in Ohio is now in a state of great uncertainty Prior to the enactment of H. B. No. 200 it had been held, and I think properly, that such trust companies, to be qualified, must have had a paid-in capital of at least one hundred thousand dollars; must have deposited witht the treasurer of state, in cash or designated bonds, not less than fifty thousand nor more than one hundred thousand dollars, and must have paid a fee of fifty dollars to the superintendent of banks for the issuance to it of a certificate authorizing it to transact business. The provisions as to the amount of its capital and required deposits were found in sections 9778 and 9779 G. C. These two sections have been repealed by H. B. No. 200.

Section 736, paragraph (c), as amended May 20, 1915, was as follows:

> "Each foreign trust company desiring and intending to do business in this state shall pay to the superintendent of banks a fee of fifty dollars for issuance to it of a certificate authorizing it to transact business in this state. Such fee to be paid before such certificate is issued."

This section has also been repealed.

My predecessor, in Opinions of Attorney-General, 1917, Vol. II, p. 1296, held that it was not necessary for a foreign trust company to comply with section 178 or 183 G. C., which are the general statutes appplicable to the admission of foreign corporations to do business in the state. The Attorney-General reached that conclusion because of the special provision of section 736, paragraph (c), above quoted. He suggested the query as to what would constitute doing business by a foreign trust company, but refrained from expressing an opinion on it.

In Vol. II of Ann. Rep. of Atty.-Gen. for 1914, p. 1636, the following syllabus appears:

"Where a foreign trust company has been appointed trustee under a foreign will and under a deed of trust made by a non-resident, and has been appointed by an Ohio court as trustee to fill a vacancy caused by the death of a trustee named in the will, all that is necessary for such a trust company to qualify in Ohio, so that it may pass title to real estate, is to make a deposit in the manner provided under section 9778, General Code, and pay the fees required under section 736, General Code, paragraph c."

In the opinion the Attorney-General refers to section 178 G. C., which reads as follows

"Sec. 178. Before a foreign corporation for profit transacts business in this state, it shall procure from the secretary of state a certificate that it has complied with the requirements of law to authorize it to do business in this state, and that the business of such corporation to be transacted in this state, is such as may be lawfully carried on by a corporation organized under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business exclusively. No such foreign corporation doing business in this state without such certificate shall maintain an action in this state upon a contract made by it in this state until it has procured such certificate. This section shall not apply to foreign banking, insurance, building and loan, or bond investment corporations."

He states that the facts presented to him did not show the trust company to be "doing business" in the state, and further observes that a foreign trust company is a banking corporation and within the exception in the statute. A similar conclusion might be drawn from a reading of section 710-2, which provides that unless the context otherwise requires, the term "bank" as used in the act, shall include trust companies.

Section 178 G. C., as quoted above, has not been amended. Therefore we must still consider the exception to which attention was called, along with the classification of trust companies with banks.

Section 183 G. C. provides for the filing of a statement by a foreign corporation of:

"1. The number of shares of authorized capital stock of the corporation and the par value of each share.

2. The name and location of the office or officers of the corporation in Ohio and the names and addresses of the officers or agents of the corporation in charge of its business in Ohio.

3. The value of the property owned and used by the corporation in Ohio, where situated, and the value of the property of the corporation owned and used outside of Ohio.

4. The proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio."

Upon this statement and other facts coming to his knowledge, the secretary of state calculates a franchise fee.

By section 188 G. C., a foreign banking company is excepted from the provisions of sections 183 to 187 inclusive.

What we have to consider now is, have those exceptions been modified or repealed in part by H. B. No. 200. so that foreign trust companies must comply with sections 178 and 183 G. C.?

Section 710-17, paragraph (c), is unambiguous and provides that a foreign trust company shall pay to the superintendent of banks one hundred dollars for a certificate authorizing it to transact business in the state.

Section 710-150 G. C. provides that no trust company "doing a trust business shall accept trusts in the state until its paid-up capital is at least one hundred thousand dollars and it has made the required deposit with the treasurer of state. Observe that this provision runs against a trust company "doing business." It does not say doing business within the state. Therefore I conclude that (disregarding for the present an exception hereinafter to be referred to) section 710-150 G. C. must be complied with by a foreign trust company accepting a trust, whether the transaction in which it is engaged amounts to doing business or not.

Section 710-151 provides that every foreign trust company shall, upon being admitted to do business in this state "as otherwise provided by law," file a certified copy of its certificates of admission with the superintendent of banks. The latter must examine its certificate and statement, approve the funds and securities deposited and certify the fact of such approval to the treasurer of state, and, upon the payment to him of a fee of one hundred dollars, license said company to transact business within the state for a period of one year.

What is the force of the language "upon being admitted to do business within this state as otherwise provided by law," as appearing in section 710-151 G. C.? This question must be determined because the right of a trust company to accept and execute trusts or certify to any obligation to evidence debt is made dependent in section 710-154 upon a compliance with the provisions of section 710-151.

As I said above, prior to the enactment of the statutes in question, a foreign trust company received its certificate of admission from the superintendent of banks. Now, however, in presenting itself for a license to that officer, it must submit to him a certified copy of its certificate of admission to do business.

Unless we are to construe the language quoted out of the statute entirely, it must have reference to a certificate obtained from the secretary of state. There could be no other source from which such certificate could be obtained prior to the application to the banking department for a license.

If, then, it is necessary to obtain a certificate of admission from the secretary of state, manifestly there must be compliance with the provisions of sections 178, 179 180 and 183 G. C. To reach this conclusion, the exemptions of sections 178 an 188 G. C., to which reference was made above, of foreign banking corporations, must be disregarded. I am of the opinion that this view must be accepted. To hold otherwise, would be to eliminate from consideration entirely the portion of section 710-151 above quoted. That section seems to provide, then, that a foreign trust company must (1) comply with the general laws relating to the admission of foreign corporations to do business in Ohio and obtain a certificate to that effect from the secretary of state; (2) file this certificate, with a certified copy of its last published statement with the superintendent of banks; and (3) pay the latter a license fee of one hundred dollars when he has approved the securities deposited with the treasurer of state and certify the fact of such approval to that officer.

Section 710-152 G. C. relates to the procedure necessary on the part of a foreign trust company subsequent to its admission to do business in the state. It is required to "annually within thirty days after complying with all the provisions of law in regulation to foreign corporations transacting business within this state, file with the superintendent of banks a certificate of the tax commission of Ohio as to such compliance," etc. If the superintendent finds that there has been no default upon its part as trustee, he is to license it to transact business within the state for a further period of one year, upon payment of a fee of one hundred dollars.

What is meant by complying with "all the provisions of law in relation to foreign corporations transacting business within this state? And what certificate shall the tax commission make as to such compliance? Heretofore the latter has exercised no such function. In my opinion this section brings these foreign trust companies within the provisions of sections 5499, et seq. G. C., which requires each foreign corpora-

tion for profit, doing business in the state, to make a report to the tax commission during the month of July, containing the information specified in section 5501 G. C. From this report and other facts coming to its knowledge, the commission must on the first Monday of September determine the proportion of the authorized capital stock of the company represented by its property and business in this state. Using this calculation, the auditor must charge a franchise fee of three-twentieths of one per cent upon the proportion of the authorized capital stock of the corporation represented by the property owned and used in business transacted in the state. Such fees shall not be less than ten dollars in any case, and shall be payable to the treasurer of state on or before the first day of the following December.

If we are not to adopt this view, we must disregard the provision of section 710-152 G. C., which requires compliance with all the provisions of law in relation to foreign corporations transacting business within the state and a certificate of the tax commission as to such compliance. Here we ought to consider for a moment section 5508 G. C., which has not been directly repealed.

> "Section 5508. All foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities and restrictions that are, or may be imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater powers. Every contract made by or on behalf of any such foreign corporation, affecting the liability thereof or relating to its property within this state, before it shall have complied with the provisions of section one hundred and seventy-eight of the General Code, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them. Nothing contained in this section shall be held or construed to apply to insurance corporations, fraternal beneficiary associations, or building and loan associations required by law to report to the superintendent of insurance, nor to repeal, change or modify the provisions of section one hundred and eighty-eight of the General Code."

This section is to be considered in two aspects: (1) It makes the contracts, of a company wrongfully failing to comply with section 178 G. C., wholly void on behalf of itself and its assigns. (2) By reference to section 188 G. C., it would seem to bear the construction that foreign banking companies are not within its provisions As a matter of fact, foreign trust companies have not been filing reports with the tax commission.

The prohibition as to business is found in section 710-154. There it is provided that no trust company, foreign or domestic shall certify to any note, bond or other obligation to evidence debt, or accept any trust concerning property located wholly or partly in the state, without complying with the provisions of sections 150, 151 and 152 of the act. Therefore, we may not disregard the two provisions above considered, however inconsistent they may be with older statutes. If sections 710-151 and 710-152 require a compliance with the general laws relating to foreign corporations, then such compliance must be had before the trust company can certify to any obligation or accept any trust concerning property located wholly or in part in this state.

The arguments against the view that there is such requirement, as I have said, are numerous. There are express exceptions of foreign banking companies in sections 179 and 188 G. C. The course of this department and of the officers of the state has been in effect a holding that compliance with sections 5499 et seq. G. C. was unnecessary. Beside the initial license fee, the initial franchise and the yearly franchise fees, such trust company will be required to pay one hundred dollars for its original certificates from the superintendent of banks and one hundred dollars annually for

the renewal of such certificate. The only requirement, prior to the enactment of this law, was a fifty dollar fee annually. True, the initial franchise fee and the annual franchise fee, which the present law seems to exact, would in most cases be nominal because a foreign trust company would transact a very small portion of its business and employ only an inconsiderable amount of its capital in this state.

A trust company organized under the laws of Ohio must not only pay the fee required of domestic corporations upon the filing of its articles with the secretary of state, but an initial fee of seventy-five dollars. Such institution is further subject to the payment of a yearly sum of twenty dollars and in addition thereto one-ninetieth of one per cent of its total aggregate resources in excess of fifty thousand dollars (such total fee not to exceed the sum of two thousand dollars in any one year). It is also required to make a report to the tax commission and to pay annually a fee of three-twentieths of one per cent upon its subscribed or issued and outstanding capital stock. So it can not be said that there is any substantial discrimination against foreign trust companies. But be that as it may, foreign corporations can exercise none of their powers or franchises within this state except by comity or under legislative consent which may be granted on such terms and conditions as the state may impose.

Western Union Telegraph Co. vs. Mayer.
Treas., 28 O. S., 521.
Humphreys vs. State, 70 O. S., 67.

It might be urged that sections 710-151 and 710-152 G. C. are not applicable to foreign trust companies unless their activity in the state is such as to constitute doing business. But section 710-154 G. C. contains an absolute provision against trust companies, foreign and domestic, and requires on the part of all compliance with sections 150, 151 and 152 G. C. "No such trust company" I do not believe can be limited to trust companies "doing business" in Ohio, because domestic companies are formed for the transaction of such business. On the other hand I think this phrase refers to any corporation doing a trust business anywhere and attempting to certify to obligations or accept trusts in Ohio.

Section 710-151 is applicable, however, only on the application of a foreign trust company for admission to do business within the state. Certain of such companies have already complied with the provisions of old sections 736c, 9778 and 9779 and have received from the superintendent of banks certificates authorizing them to carry on business in the state for one year. In my judgment such companies need not comply with the provisions of section 710-151 or with 178 and 183, because they have already paid a fee of $50.00, and here complied with the laws in force at the time of their applications for admission and received the certificate authorizing them to transact business in Ohio for a year. They must, however, when their present certificates expire, pay a fee of $100.00 for a renewal. It is true that section 710-154 provides that no trust company shall perform certain functions without complying with section 710-151, but nothing is contemplated under the latter section unless it is necessary for the company to be admitted to do business.

I now direct your attention to the following exception in section 710-154;

> "But nothing herein contained shall prevent a foreign corporation from qualifying as executor or administrator of property in this state, after appointment as executor or administrator by the courts of any other state as provided by law, when the decedent was a resident of such state, at the time of his death, or from acquiring, holding or transferring title to lands or other property within this state as trustee to secure any bond, note or other obligation aforesaid, or from certifying thereto, but provided always, that by the

laws of such other state a trust company organized and doing business under the laws of this state shall have equal privileges as to any similar estate, deed or trust of property in such other state."

How broad is this exception? Are such favored trust companies excused from compliance with sections 710-17c, 710-150, 710-151 and 710-152? In my judgment they are. Whatever may be the force of the word "herein," whether it comprehends the entire act or simply section 710-154, it is to be noted that specific reference is made therein to sections 710-150, 710-151 and 710-152. True, section 710-17c does not contain any exception in favor of such trust companies, nor does section 710-150. The latter does contain a prohibition against certain transactions until compliance is made with its provisions. Sections 710-151 and 710-152 contain no words of prohibition. There is therefore room for the argument that the exception in 710-154 goes only to 710-151 and 710-152, but I do not believe such to be the fair interpretation of the language. The reference to section 710-150 in 710-154 is particularly significant.

Summing up my conclusions so as to answer your inquiries, it is my opinion:

(1) That a foreign trust company which has been appointed as executor or administrator by the courts of some other state, as provided by law, when the decedent was a resident of such state at the time of his death, may qualify as executor or administrator of property in this state, acquire, hold or transfer title to lands or other property therein, as trustee, to secure any bond, note or other obligation, or certify thereto without making a deposit with the treasurer of state, paying a fee, complying with the general laws as to admission of foreign corporations to do business, making reports to the tax commission, securing a certificate from the superintendent of banks, provided the laws of such state (where the decedent resided at the time of his death) give equal privileges to trust companies organized and doing business under the laws of this state.

(2) That with the above exceptions, foreign trust companies which have not been admitted to do business in Ohio, in accordance with the provisions of law in force, prior to the taking effect of house bill 200, must comply with the general laws relating to the admission of foreign corporations (sections 178 et seq. and 183 et seq.); must have a paid-in capital of at least $100,000; must deposit with the treasurer of state that sum in cash or in the approved designated securities; must secure from the secretary of state a certificate of admission to do business, and file it, with a certified copy of the last published statement made by it and filed with the proper department of state in which it is organized and doing business, with the superintendent of banks; must secure his approval of such bonds and securities and his certificate of that fact to the treasurer of state; and must pay him a license fee of $100.00 for the privilege of transacting business for a period of one year.

To obtain a renewal of its certificate, it must make the required annual report to the tax commission, provided by section 5499, obtain its certificate that such report has been filed and the franchise tax calculated thereon paid, file this certificate with a copy of its last published statement, with the superintendent of banks, and pay a fee of $100.00.

(3) That foreign trust companies not comprehended in paragraph (1), admitted to do business in the state prior to the taking effect of house bill 200, are subject to all the above requirements mentioned in paragraph (2), excepting the compliance with the general laws relating to the admission of foreign corporations, the obtaining of a certificate to that effect, filing it with the superintendent of banks, the securing of a further certificate of his approval of its deposit, and the payment of an initial license fee of one hundred dollars. At the expiration of the period for which it is now licensed, such fee of $100.00 is payable for the privilege of doing business for another year.

It will be apparent from this discussion, and from the difficulties encountered in trying to reconcile or choose among various statutes, that there is room for much diversity of opinion in their construction. The questions involved are of so much importance and the consequences of a mistaken construction of the law so grave, that these ambiguities should be removed in some authoritative manner, and this is especially so since neither the opinion of the department or the manner of the law's administration by the state's officers will be binding on those who may acquire property interest and rights under and through the proceedings of these foreign trust companies.

Respectfully,
JOHN G. PRICE,
Attorney-General.

528.

INTOXICATING LIQUORS—ASSESSMENT OF TAX ON DUPLICATE—COUNTY COMMISSIONERS EXTEND TIME FOR PAYMENT OF TAXES ALSO APPLICABLE TO LIQUOR TAX—PENALTY DOES NOT ACCRUE UNTIL EXPIRATION OF TIME LIMIT AUTHORIZED BY COUNTY COMMISSIONERS.

Where an assessment of one the thousand dollar liquor tax has been entered upon the duplicate by the county auditor at the time of making up the original duplicate, but the first installment of $500 *was not paid or tendered until about the first of July, the county commissioners having extended the time for payment of installments of taxes to the* 20*th of July and January respectively, pursuant to the provisions of section* 2657 *G. C. such extension of time is applicable to the liquor tax as well as the general property tax, and the twenty per cent prnalty prcvided in case of non-payment of the liquor tax does not accrue until the expiration of such extension.*

COLUMBUS, OHIO, July 29, 1919.

HON. JOSEPH W. BAGBY, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—You recently requested my written opinion as follows:

> "Under section 6071 General Code, the sum of one thousand dollars is assessed yearly, to be paid to the county treasurer by each person engaged in the business of trafficking in intoxicating liquors. This assessment becomes a lien on the real property on and in which the business is conducted, on the fourth Monday in May of each year; and section 6072 provides that the same 'shall be paid at the times provided by law for the payment of taxes on real or personal property and one half of it on or before the 20th day of June and one half of it on or before the 20th day of December of each year.'
>
> Section 6073 provides that when such business is commenced after the fourth Monday in May in any year, that the assessment shall be proportionate in amount to the remainder of the assessment, except that it shall not be less than two hundred dollars.
>
> Section 6082 provides that if such assessment is not paid when due, there shall be added a penalty thereto of twenty per cent. which shall be collected therewith.
>
> The county commissioners of Brown county, at the October meeting, 1918, passed a resolution extending the time for the payment of taxes on

real and personal property to the 20th day of January and July, and the collections have been made accordingly, without penalty.

Mr. Clarence Rosselot, who was engaged in trafficking in intoxicating liquors, paid the assessments up to the fourth Monday of May, 1919, continued in the business on Monday, the 26th day of May, 1919, under a new license issued for that one day and paid $105.00 therefor. He did not, however, pay the one thousand dollars or any part thereof, and after the 20th day of June and on or about the first of July, the county auditor and treasurer notified him that payments were due, as provided in section 6071 et seq.

In response to this notice he tenders payment of the sum of $200.00 and is willing to pay $500.00 with the understanding that $300.00 thereof be remitted or returned to him.

The auditor and treasurer are in doubt as to their right and duty to impose a penalty and, if penalty should be imposed, on what basis the twenty per cent should be computed; that is to say whether or not they should collect or retain $300.00, computing the penalty on $500.00, or whether they should collect and retain $240.00, computing the penalty on $200.00, the minimum payment, or whether or not they should not collect any penalty, since the commissioners have extended the time for the payment of real and personal taxes to the 20th day of July.

This inquiry is made and you may answer the same on the assumption that all parties, including Mr. Rosselot, acted in absolute good faith. As evidence of the good faith of Rosselot, the treasurer in writing the receipt for the payment made by Rosselot December 19, 1918, of $500.00, stated in the receipt that the same was 'one half payment of the assessment charged on the business of trafficking in spirituous, malt and vinous liquors from the 28th day of December, 1918, to May 28th, 1919.'

The fact that the receipt stated the 28th day of May, 1919, led Mr. Rosselot to believe that he had paid his assessment covering the 26th day of May, 1919."

The matter involved in your inquiry invites attention to the provisions of section 6071 G. C. et seq. Section 6071 provides for a tax of $1,000 upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors.

Section 6072 provides that the tax shall attach and operate as a lien on the property in which the business is conducted as of the fourth Monday of May of each year and shall be paid at the time provided for the payment of taxes on real or personal property within this state, to-wit, one-half on or before the 20th day of June, and one-half on or before the 20th day of December of each year.

Section 6081 provides that each assessor shall return to the county auditor with his other returns, a statement showing each place where such business is conducted, with the name of the person conducting the business, etc.

Section 6085 provides that the county auditor shall make and preserve duplicates of the assessments; and also upon receiving satisfactory information of such business liable to assessment or increased assessment not returned by the assessor, he shall forthwith enter an assessment upon the duplicate.

Also that not later than the first Monday of June of each year he shall make out and deliver to the county treasurer a copy of such assessment duplicate.

From the provisions of the statutes so far noted, the method of making up the duplicate, charging the assessment and placing the same into the hands of the county treasurer is provided, and also the time for payment of the tax is stipulated.

In section 6082 it is provided:

"If such assessment is not paid when due there shall be added a penalty thereto of twenty per cent which shall be collected therewith."

The provisions of section 6072 G. C. noted above, that the liquor tax shall be paid at the time provided for the payment of taxes on real or personal property, in my opinion amounts to an adoption of the entire statutory provision relative to the time of payment of property tax, which is governed by the provisions of sections 2653 and 2657 G. C. which sections, so far as pertinent here, are as follows:

> "Sec. 2653. Each person charged with taxes on a tax duplicate in the hands of a county treasurer may pay the full amount thereof on or before the twentieth day of December, or one-half thereof before such date, and the remaining half thereof on or before the twentieth day of June next ensuing, but all road taxes so charged shall be paid prior to the twentieth day of December.
>
> Sec. 2657. The county commissioners of any county by resolution spread upon their journal may extend the time of payment of taxes from June twentieth to July twentieth of the same year and from December twentieth to January twentieth of the following year. * * *"

Thus the time for payment of real and personal property tax, though provided by statute as of December 20, and June 20, is subject to the further provision of section 2657 by which such dates may lawfully be extended for a period of one month respectively.

I am influenced in my conclusion that the provision for extension of time for payment of tax is intended to be applicable to the payment of liquor tax by the consideration that it is reasonably apparent that the purpose and policy in the legislation was to authorize the payment of the entire tax or installment of tax charged on the duplicate against the particular taxpayer at one and the same time, and the two classes of tax have thus been so intimately associated together with respect to the provision for payment thereof that it is calculated to so impress the taxpayer.

In the case you have submitted, it appears not only that the commissioners did extend the time for payment of taxes to the twentieth of July and January respectively but that there is the further extenuating circumstance in this particular case that the treasurer had issued a receipt for the liquor tax for the year 1918 purporting to be for the period from May 28, 1918, to May 28, 1919.

While this circumstance could not influence the proper construction of the law and the receipt was erroneous with respect to the dates involved in the taxing year yet the fact of the extension of time for payment of taxes by the county commissioners in my opinion applied to the liquor tax as well as the general property tax, and I therefore, hold that the payment of the tax in pursuance of the tender made on or about the first of July should be accepted without the imposition of the twenty per cent. penalty.

This leads me then to the question of the amount of refunder to which the taxpayer may be entitled, and the procedure to be pursued in the payment of the tax and securing a refunder.

This question of course only arises upon the application of the taxpayer and his representation that he has discontinued the business of trafficking in intoxicating liquors. The statutes relative to refunder upon discontinuance of the business are as follows:

> "Section 6074. When a person, company, corporation or co-partnership, engaged in such business, has been assessed and has paid the full amount of such assessment and afterward discontinues such business, the county auditor, upon being satisfied thereof, shall issue to such person, corporation or co-partnership a refunding order for a proportionate amount of such assessment so paid, but the amount of such assessment so retained shall not be less than two hundred dollars, unless, etc."

It is also provided in section 6072 (104 O. L. 166):

"Any person who traffics in intoxicating liquors as a beverage at retail shall not be entitled to any rebate or refunder under the liquor tax without giving a bond in amount equal to twice the amount of such rebate or refunder, with securities acceptable to the county clerk that he will not traffic in intoxicating liquors without paying the liquor taxes provided by law; * * *."

Pursuant to the provisions of the statutes just noted, I advise that if the party in question pays or has paid the $500.00 in pursuance of his tender as of July 1st, and satisfies the auditor that he has discontinued the business of trafficking in intoxicating liquor, and enters into the proper bond as prescribed by said sections, then upon his application, the auditor would be entitled to make him a refunder of a proportionate amount of the payment corresponding to the remainder of the assessment year, subject to the provision that in no case shall the amount of the assessment retained be less than $200.00; and in the present case upon the auditor being satisfied of the discontinuance of the business on May 26th, the taxpayer would be entitled to a refunder of that portion of the $500.00 installment due and payable above the minimum $200.00 to be retained.

Thus on the payment of the $500.00 installment in full, which is required by the terms of section 6074, and the compliance with the other provisions of the sections quoted, a refunder for $300.00 should be issued and a remittur of the second installment of $500.00 which would be due in December should be entered upon the duplcate.

Respectively,
JOHN G. PRICE,
Attorney-General.

529.

APPROVAL OF SYNOPSIS FOR REFERENDUM ON HOUSE BILL No. 9 (108 O. L. 699)—WOMEN ENTITLED TO VOTE FOR PRESIDENTIAL ELECTOR.

COLUMBUS, OHIO, July 30, 1919.

HON. JOHN H. DRUFFEL, Manager, *The Ohio Anti-Woman's Suffrage League, Cincinnati, Ohio.*

DEAR SIR:—You have submitted to me this day for my certificate under section 5175-29e, a synopsis to be embodied in a referendum petition against the legislative action known as house bill No. 9 (108 O. L. 699), said synopsis being in words and figures as follows:

"The purpose of the act known as house bill No. 9, passed by the general assembly of Ohio, June 16, 1919, approved by the governor June 18, 1919, and filed in the office of the secretary of state June 18, 1919, is to amend sections 4862 and 4940 of the General Code of Ohio to provide that women may vote and be voted for, for presidential elector.

Said act provides that women shall be entitled to vote and be voted for, for presidential elector."

I, John G. Price, Attorney-General of the state of Ohio, do hereby certify that the foregoing synopsis is a truthful statement regarding the contents and purpose of said act.

Respectfully,
JOHN G. PRICE,
Attorney-General.

530.

APPROVAL OF SYNOPSIS FOR REFERENDUM ON HOUSE JOINT RESOLUTION No. 70—RATIFYING AMENDMENT TO FEDERAL CONSTITUTION PROVIDING WOMAN SUFFRAGE.

COLUMBUS, OHIO, July, 30, 1919.

HON. JOHN H. DRUFFEL, Manager, *The Ohio Anti-Woman's Suffrage League, Cincinnati, Ohio.*

DEAR SIR:—You have submitted to me this day for my certificate under section 5175-29e, a synopsis to be embodied in a referendum petition against the legislative action known as house joint resolution No. 70, said synopsis being in words and figures as follows:

> "House joint resolution No. 70 adopted by the general assembly of Ohio on June 16, 1919, is the action of the general assembly ratifying an amendment to the constitution of the United States of America proposed by the sixty-sixth congress. Said amendment provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex."

I, John G. Price, Attorney-General of the state of Ohio, do hereby certify that the foregoing synopsis is a truthful statement regarding the contents and purpose of said joint resolution.

Respectfully,
JOHN G. PRICE,
Attorney-General.

531.

APPROVAL OF CERTAIN LEASES FOR COTTAGE SITES AT BUCKEYE LAKE AND CERTAIN CANAL LANDS AT MASSILLON, OHIO.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

COLUMBUS, OHIO, July 31, 1919.

532.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN COSHOCTON, DARKE, GALLIA AND KNOX COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, July 31, 1919.

533.

MUNICIPAL CORPORATION—AUTHORITY TO ISSUE BONDS UNDER SECTION 3916 AND 3917 G. C. FOR PAYMENT OF SALARIES OF POLICEMEN, FIREMEN AND HEALTH OFFICER—SECTION 5649-3d G. C. NOT APPLICABLE—WHEN SMITH ONE PER CENT LAW DOES APPLY—CLERK OF HOSPITAL COMMISSIONERS APPOINTED UNDER SECTION 4026 G. C.—FAILURE TO PROVIDE COMPENSATION—HOW PAID—WHERE CONTRACT HAS BONUS AND PENALTY CLAUSE IN CONTRACT BETWEEN CITY AND CONTRACTOR —NO AUTHORITY TO REMIT.

1. *Authority to issue bonds in pursuance of the provisions of sections* 3916 *and* 3917 *for payment of salaries of policemen and firemen and a health officer, when such salaries have become binding obligations against the city, is not restricted by the provisions of section* 5649-3d *G. C.; the provisions of the Smith one per cent law, as an entirety are applicable to the authority for issuance of such bonds only with respect to the levy for their retirement and for interest thereon, which must be made within the ten mill tax limitation.*

2. *Where hospital commissioners appointed in pursuance of section* 4023 *have appointed a clerk as authorized in section* 4026, *but failed at the time to fix the compensation of such clerk, who in pursuance of his appointment has performed services for approximately two years, and the commissioners desire now to provide his compensation equal to approximately* $20.00 *a month, the same may be lawfully done.*

3. *Where a contract containing a bonus and penalty provision has been entered into between a municipal corporation and a contractor in pursuance of section* 4330 *G. C and a penalty has accrued by reason of completion of the contract having been delayed beyond the time provided, there is no authority for the remission of such penalty by the officers of such municipality.*

COLUMBUS, OHIO, July 31, 1919.

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

GENTLEMEN:—You recently requested my written opinion, as follows:

"We are calling your attention to opinion No. 785, page 2097 of the Opinions of the Attorney-General for 1917, and would ask:

Question: Does the right to issue bonds as set forth by this opinion covering salaries of policemen and firemen authorize the same to be done where the budgetary provisions of section 5649-3d G. C. have been exceeded by including all obligations thus incurred together with other expenses of a particular fund of a municipality?

To give you a concrete illustration, the city in question has quite recently appointed a health officer, whereas the funds of the health department were not in shape to stand such obligation. In other words, the provisions of section 5649-3d G. C. would be exceeded. Can the compensation of this health officer which is now matured for payment be covered by a bond issue as set forth in the opinion referred to?

Question 2: Some two years ago the city of Alliance, Ohio, established a board of hospital commissioners under section 4023 et seq. G. C., to build a hospital. Such board appointed a clerk, (See section 4026 G. C.) but neither the board nor council took any action whatsoever relative to any compensation for such clerk. Now the work is practically completed and the city is desirous of paying this clerk a compensation equal to approximately $20.00 per month for the past two years' work. Can the same be legally done, and if so, how?

Question 3: Where a contract containing a bonus and penalty provision under authority of section 4330 G. C., has been completed and the contract has been delayed beyond the period of completion and a considerable penalty has accrued, is it within the authority of any board or officer of a municipality to then set aside the penalty?"

I may say at the outset that I do not consider that the particular provisions of section 5649-3d G. C. are at all controlling in the case of the issuance of bonds under authority of sections 3916 and 3917 and the disposition of the proceeds of the sale of such bonds.

Section 5649-3d is an essential part of the general scheme of the Smith one per cent law for bringing about a limitation upon the rate of taxation that may be lawfully levied, but in its terms does not purport to govern all cases of provision for and application of funds by the various sub-divisions of government; it is essentially a limitation upon the power of appropriation of moneys derived from taxes and other original sources of revenue and of the expenditure of such revenues. The conclusion expressed in the opinion to which you refer (Opinion No. 785, page 2097 Opinions of the Attorney-General for 1917) was arrived at under authority of sections 3916 and 3917, which provide as follows:

"Sec. 3916. For the purpose of extending the time of payment of any indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation or borrow money so as to change but not to increase the indebtedness, in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent per annum, payable annually or semi-annually.

"Sec. 3917. No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof. Such resolution shall also state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of maturity, the rate of interest they shall bear, and the place of payment of principal and interest."

The authorization here to issue bonds does not, strictly speaking, create or provide a source of revenue, nor is it a debt-creating authorization, but on the contrary furnishes a means of temporarily providing for existing obligations which cannot be met by the revenues presently available under the limits of taxation.

The case of providing funds for payment of the salary of a health officer, set forth in your inquiry, may invoke action under the provisions of sections 3916 and 3917 with equal propriety to the case of providing for payment of salaries of policemen and firemen as considered in opinion No. 785 to which you refer.

Section 4408 of the General Code provides for appointment of a health officer by the board of health, as follows:

"The board of health shall appoint a health officer, who shall be the executive officer. He shall furnish his name, address and other information required by the state board of health. The board may appoint a clerk, and with the consent of council, as many ward or district physicians, or one ward physician for each ward in the city as it deems necesasry."

Section 4411-1 G. C. as enacted in 103 Ohio Laws, 436, provides:

"The board shall determine the duties and fix the salaries of its employes; but no member of the board of health shall be appointed as health officer or ward physician."

When action is taken by the board of health in pursuance of sections 4408 and 4411-1 G. C., supra, a fixed obligation is imposed upon the city, which the city council is obligated to provide for; it is an obligation imposed by paramount authority, and is, within the purview of section 3917, an existing valid and binding obligation of the corporation.

Then, when from its limits of taxation the corporation is unable to pay such obligation at maturity, by the authorization of section 3916 G. C. to extend the time of liquidation of the obligation the corporation is empowered to issue bonds, and thereby change the indebtedness so that its ultimate payment may be provided for out of future revenues.

Of course, in so providing for the ultimate payment of such obligation, the revenues must be secured within the tax limitations provided in the Smith one per cent law, so-called, and at the time of authorizing the issuance of bonds a levy for their ultimate retirement and for payment of interest must be provided for by virtue of both constitutional and statutory mandate.

Section 2 of article XII of the constitution provides:

"No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

And section 5649-1 G. C. provides:

"In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

In State ex rel. vs. Zangerle, 94 O. S. 447, this constitutional and statutory provision was applied in the holding that the levy for sinking fund and interest purposes must be made in preference to all other levies and without regard to the other needs of the taxing district, the second branch of the syllabus being as follows:

"The provision of section 5649-1, General Code, that the taxing authorities in each taxing district of the state shall levy a tax sufficient to provide for sinking fund and interest purposes, requires the county budget commissioners to certify to the county auditor a tax sufficient for such purposes, regardless of other needs of the taxing district. (Rabe et al. vs. Board of Education, 88 Ohio St., 403, approved and followed.)"

The observation in the Rabe case, to the effect that in determining upon the creation of bonded indebtedness, not only the limits of taxation must be regarded but also the current needs of the political subdivision must be anticipated, is perhaps to the extent of the latter observation not entirely controlling under the present provisions of the constitution and section 5649-1 G. C. as applied in the case in 94th State, supra; and in any event the issuance of bonds for funding an existing obligation, such as that involved in your inquiry, would not be within the spirit of the observation

made in the Rabe case with reference to the incurring of additional indebtedness by the issuance of bonds to an extent that would disable the subdivision to provide for its current expenses, inasmuch as the obligation to be refunded is one which already constitutes a charge upon the current revenues.

The opinion to which you refer announces the conclusion that bonds may be issued under authority of sections 3916 and 3917 for the purpose of funding valid existing indebtedness, and the question which you present relative to issuance of bonds to provide for payment of the salary of a health officer which has accrued as an existing, valid and binding obligation stands upon the same principles as those considered in said opinion, and my conclusion is that such bonds may be issued without regard to the provisions of section 5649-5d, relative to appropriations from collection of taxes and other sources of revenue, for the reason that the moneys realized from the issuance and sale of such bonds are not comprehended by the terms of said section and in the light of the law stand appropriated for the purpose for which the bonds are issued.

Section 5654 G. C. provides:

> "The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. * * *."

It is said in Schieber vs. Village of Edon, 23 C. C., n. s., 378:

> "The debt-creating power which has been conferred upon municipalities is in nowise affected by the tax limitations which have been imposed, and an issue of bonds to meet the cost of street improvements will not be enjoined because not authorized by a vote of the people, where payment thereof can be made without violation of the tax limitation fixed by the Smith one per cent. law."

The specific application of the Smith one per cent law as an entirety to the matter of the issuance of bonds for the payment of accrued salary of policemen, firemen or health officer, under authority of section 3916, has to do only with the matter of tax levy for interest and sinking fund, which must be made within the ten mill limitation.

Your second question relates to the authority for payment of compensation of a clerk appointed by hospital commissioners in pursuance of sections 4023 and 4026 G. C., which sections provide as follows:

> "Section 4023. When the council of a municipality enteres upon and takes possession of grounds purchased, appropriated, or otherwise obtained for hospital purposes, and, by resolution or ordinance, determines to erect thereon or rebuild a hospital, the erection and repair thereof, or any addition thereto, shall be vested in a board of five commissioners, called the 'Board of Hospital Commissioners,'
>
> Section 4026. The board may appoint a clerk, an architect, a superintendent, and other necessary employes, fix their compensation, and adopt a suitable plan for such hospital, and make all contracts for the erection and furnishing thereof. The salary of the appointees, and the plan of the hospital, before any contract for its erection is entered into, shall be submitted to and approved by the council."

While it might appear that the intent of the statute, section 4026 G. C., is that the compensation shall be fixed at the time of the appointment of the clerk, yet the paramount purpose and policy of the statute in that regard is that such compensation shall, at all events, be fixed and its payment provided for in consideration of the services of such clerk, and I see no reason why the board may not now fix the compensa-

tion for the clerk appointed by the board, in consideration of the services rendered by such clerk, which compensation so fixed, of course, shall be submitted to and approved by the council, and when so fixed and approved the same becomes a valid and binding obligation of the corporation.

Your third inquiry raises the question of the authority of any board or officer of a municipality to set aside or remit a penalty which has already accrued in pursuance of a contract entered into between the municipal corporation and a contractor.

There is statutory authority for embodying a provision for bonus for completion of the contract prior to a specified date, and a corresponding penalty for delay in such completion beyond a specified date, and where such provision has been made a part of the contract and the penalty has accrued by the occurrence of the delay stipulated against, I am of the opinion that the officials of the municipal corporation are not authorized to remit such penalty.

The provisions of section 4330 G. C. relative to bonus and penalty are as follows:

> "The contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash. Where a bonus is offered for completion of contract prior to a specified date, the department may exact a prorated penalty in like sum for every day of delay beyond a specified date."

The penalty provision is not only supported by statutory authority but is one of the elements of consideration in said contract, and after the same has accrued its remittitur would be without consideration, and further, the officials of the municipal corporation are not acting with unlimited discretion as in the case of a private enterprise, but represent the public interests and the scope of their authority is determined and limited by the law.

There being no statutory authority for such remittitur without consideration, therefore, I am of the opinion that such an act would be entirely unauthorized and of no effect.

Respectfully,
JOHN G. PRICE,
Attorney-General.

534.

BUREAU OF FISH AND GAME—WHEN STATE DEPUTY WARDENS MAY BE EMPLOYED BY FEDERAL GOVERNMENT TO ASSIST IN ENFORCING FEDERAL MIGRATORY BIRD TREATY ACT.

The state deputy wardens appointed to enforce the Ohio laws relating to the protection, preservation and propagation of birds, fish and game, may be employed by the Federal government to assist in enforcing the federal migratory bird treaty act, provided the work to be undertaken will not interfere with the faithful discharge of their duties under the state law.

COLUMBUS, OHIO, August 2, 1919.

HON. A. C. BAXTER, *Chief Warden, Bureau of Fish and Game, Columbus, Ohio.*

DEAR SIR:—Your letter of July 18, 1919, with which you enclosed a letter received by you from the chief of the United States Bureau of Biological Survey relating to the employment of the state deputy wardens by the federal government to aid in enforcing the provisions of the federal migratory bird treaty act, approved July 3 1918, was duly received.

The purpose and scope of the intended employment and the control to be exercised over the state deputy wardens by the federal authorities are indicated by the letter referred to, which, so far as pertinent, reads as follows:

> "The tentative plans of the bureau for the enforcement of the Migratory Bird Treaty Act and regulations contemplate putting all United States deputy game wardens on the same basis at a nominal salary of $1 per year with additional compensation at the rate of $3.50 per day when actually employed for temporary periods in the enforcement of the law, but not to exceed $300 to any warden in any one fiscal year.
>
> In addition to the per diem for their services we shall pay their actual traveling and subsistence expenses when actually employed in accordance with the regulations of the department. When employed on active duty by the bureau we would expect that all violations of the Migratory Bird Treaty Act which come to their notice would be prosecuted in the Federal courts, but there would be no objection whatever to the wardens in their capacity of state wardens rendering incidental services in the enforcement of the state laws covering offenses not included in the federal game laws, during the time they are rendering active services for the bureau. We would first obtain your specific consent before placing any deputy warden on active duty, and in no event would any deputy warden be assigned to duty outside of the state.
>
> We hope to have a large number of these deputy wardens in the United States and with the present small appropriation for the enforcement of the federal game laws it is obvious that we shall be able to place only a few of the deputy wardens on active duty for periods ranging from a few days to two months and in no case for a period entitling a warden to salary exceeding $300 in any one fiscal year.
>
> We shall be obliged if you will inform the bureau whether you have any objections to placing on this basis such of your deputies as hold the position of United States deputy game warden.
>
> Your department has been kind enough to extend most cordial support and cooperation in the enforcement of federal laws in the past and we trust that you may have no objection to the proposed new arrangement which we believe will be more satisfactory than that now in force."

As I understand it, you desire my opinion as to whether or not the employment and payment of the state deputy wardens by the federal government would be in conflict with the state law.

The appointment, compensation and duties of the state deputy wardens are governed by sections 1390 et seq., G. C.

Section 1390 provides that the state secretary of agriculture shall have authority and control in all matters pertaining to the protection, preservation and propagation of song and insectivorous birds, game birds, game animals and fish within the state, and in and upon the waters thereof, and it is made his duty to enforce by proper legal action or proceeding the laws of this state relative thereto. He is also required to establish fish hatcheries and propagate fish therein, and to adopt and carry into effect, such measures as he deems necessary in the performance of his duties.

For the purpose of carrying into effect the provisions of section 1390, it is provided by section 1391 G. C. that

> "there shall be appointed a chief warden and such number of deputy wardens and special wardens as the board of agriculture may prescribe. The chief warden and each deputy state warden shall hold his office for a term of two years unless sooner removed by the secretary of agriculture. Each spe-

cial warden shall have the same powers and perform the same duties as a deputy state warden."

Before entering upon the discharge of the duties of his office, the chief warden and each deputy state warden and special warden is required by section 1392 to give bond to the state

"conditioned for the faithful discharge of the duties of his office."

The duties of the chief warden, deputy state wardens and special wardens are prescribed by sections 1393, 1395 and 1398, as follows:

Section 1393 reads:

"The chief warden, special wardens and deputy state wardens shall enforce the provisions of this act and the laws relating to the protection, preservation and propagation of birds, fish and game, and shall also enforce the laws against trespassing upon premises, for the purpose of hunting, without the permission of the owner thereof and shall have authority to make arrests upon view and without the issuance of a warrant therefor. Under the direction of the secretary of agriculture, the chief warden shall visit all parts of the state and direct and assist special wardens and deputy state wardens in the discharge of their duties."

By section 1395 authority is conferred upon each warden to serve and execute warrants and other process of law issued in the enforcement of the laws for the protection, preservation or propagation of birds, fish and game in the same manner as a sheriff or constable, and he is authorized to arrest on sight and without warrant any person found violating any such law. He is also authorized to seize without process, birds, fish or game found in the possession of any such person, together with the guns nets, seins, boats, traps or other devises with which they were taken or killed, etc., and forthwith to convey the person so offending before a court or magistrate having jurisdiction of the offense.

By section 1398 it is provided that each warden shall seize and safely keep any gun, net, seine, trap or other device used in the unlawful taking, catching or killing of birds, fish or game, and, unless otherwise ordered, shall institute proceedings in the proper court for its forfeiture, etc.

The compensation of the chief warden, deputy state wardens and special wardens are fixed by the state secretary of agriculture, and such appointees are also entitled to receive from the state their actual and necessary expenses incurred while traveling on the business of the department, etc. See sections 1087 and 1394.

It will be observed from an examination of the several statutes hereinbefore referred to that there is no express provision that the state wardens shall give their entire time in enforcing the provisions of the Ohio law, and that there is no express prohibition against such wardens accepting other employment and compensation from the federal government. The only requirement in this regard is that they shall faithfully discharge the duties of their office.

The purpose of the federal act and one of the purposes of the state law is the protection of birds. The federal act deals with migratory birds exclusively, while the Ohio law treats the subject generally, but this appears to be authorized by section 7 of the federal act which provides that the several states may make and enforce laws and regulations not inconsistent witht the provisions of the federal act and the convention between the United States and Great Britain proclaimed December 8, 1916 and also that state laws and regulation for the further protection of migratory birds may be made and enforced.

It has, I understand, been the practice of the state and federal authorities to confer and co-operate in the enforcement of the bird laws, and this is in harmony with both the state and federal laws (see section 1096 G. C., section 9 of the federal act, and letter from the Chief of U. S. Bureau, supra), and I am of the opinion that unless the rendition of the work require by the federal act and regulations will interfere with the duties of the wardens under the state law, there would be no objection to their employment by the federal department which is authorized by section 9 of the federal act to co-operate with local authorities.

The only objection to the proposed arrangement as outlined in the letter from the chief of the federal bureau of biological survey, and above referred to, is that part which seems to indicate or imply that state wardens entering the employ of the federal department shall render only

> "incidental services in the enforcement of the state laws covering offenses not included in the federal game laws, during the time they are rendering active services for the bureau."

Such an arrangement would be inconsistent with the obligation of the state wardens to faithfully discharge the duties of their offices in enforcing the provisions of the state law. The first duty and obligation of the state wardens is to the state, and it is only such federal work as will not interfere with their duties under the state law that should be undertaken by them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

535.

OHIO UNIVERSITY—APPROPRIATIONS—WHEN ITEMS IN APPROPRIATION BILL CANNOT BE LEGALLY USED TO PAY SALARIES.

Monies appropriated by the legislature to Ohio University by the act known as H. B. No. 536, under the head of "Contract and Open Order, F9 General Plant," cannot legally be used by the university authorities for the purpose of adding to salaries definately fixed by another part of said act, under the head of "Personal Service A1 Salaries."

COLUMBUS, OHIO, August 2, 1919.

HON. ALSTON ELLIS, *President Ohio University, Athens, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of July 22, 1919, reading as follows:

> "H. B. No. 536—state appropriation bill—carries with it appropriations for Ohio University, located at Athens, Ohio. Under the head of 'Personal Service A1 Salaries,' a number of positions are named with definite salaries connected therewith. Under 'Contract and Open Order F9 General Plant' is found the following: 'All endowment monies due Ohio University on account of rents and taxes in Athens and Alexander townships, and $3,700.'
>
> In addition to the rents and taxes named, the university gets interest on its portion of the irreducible debt of Ohio. From all these sources—rents, taxes, and interest—the university has an annual income of between $7,500 and $8,000.

Now, the question for consideration and answer is: Have the university authorities, as such, any legal right to add to the fixed salaries already referred to by making drafts upon said income from rents, taxes, and interest? I request that you favor me, at your earliest convenience, with an answer to the question."

It appears that Ohio University's portion of the interest on the so-called irreducible debt is also a matter of legislative appropriation, being included in sections 2 and 3 of the same act referred to by you, to wit, H. B. No. 536 (General appropriations).

Section 4 of said act reads in part as follows:

"The sums set forth in the columns designated 'items' in sections 2 and 3 of this act, opposite the several classifications of detailed purposes, shall not be expended for any other purposes except as herein provided."

The exception "herein provided" refers to monies expended upon authority granted by the "controlling board' consisting of the governor (or budget commissioner, if appointed by the governor for such purpose), the chairman of the finance committee of the house of representatives, the chairman of the finance committee of the senate, the attorney-general and the auditor of state, which board

"may authorize the expenditure of monies appropriated in said sections 2 and 3 of this act within the purpose for which the appropriation is made, whethe included in the detailed purposes for which such appropriations are distri buted by 'items' in said section, or not."

Specifically answering your question, I advise you that the university authorities have no legal right to add to the fixed salaries in question, by making drafts upon the income from the rents, taxes and interest referred to in your letter.

Respectfully,
JOHN G. PRICE,
Attorney-General.

536.

COUNTY COMMISSIONERS—HAVE CONTINUING AUTHORITY AS TO PROPER ALLOWANCES FOR CLERK HIRE IN SEVERAL COUNTY OFFICES.

Under authority of section 2980-1 *G. C., as effective July* 9, 1919, *the county commissioners are empowered to make reasonable and proper allowances for clerk hire in the several county offices, up to the forty, sixty and eighty-five per cent. limitations prescribed in the amended section, from and after the date it became effective, the jurisdiction of the commissioners in this regard being a continuing one, to be exercised as the needs of the offices may require.*

COLUMBUS, OHIO, August 2, 1919.

HON. JOHN L. CABLE, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—The receipt of the inquiry submitted to this office, in which you join with Hon. Lehr E. Miller, county treasurer of Allen county, is acknowledged.

Your inquiry relates to the authority of county commissioners to make additional allowances for clerk hire to county officers, after having once acted in that matter. You have stated the facts and your inquiry as follows:

> "In November, 1918, I filed with the county commissioners of Allen county, Ohio, a sworn statement of the sums expended by the treasurer's office for deputy, clerk hire and assistants during the year 1917, together with a statement of the probable amount necessary for such purposes during the year 1919. Section 2980 General Code.
>
> On the 18th day of December, 1918, the board of county commissioners fixed the sum to be expended for deputies, clerks and assistants for the year 1919 in the treasurer's office in the sum of $3,383.34; the amount so fixed being 30 per cent on the first two thousand dollars and 40 per cent on the next eight thousand dollars or fractional part thereof of the fees earned by the treasurer's office for the year Oct. 1, 1917, to Sept. 30, 1918, inclusive. Section 2980-1 Gen. Code.
>
> On the 29th day of March, 1919, section 2980-1 of the General Code of Ohio was amended by the legislature of Ohio. On the 8th day of April, 1919, the act amending such section was approved by the governor and on April 9, 1919, the act as enacted and approved, was filed in the office of the secretary of state and became and was in full force and effect on the 9th day of July, 1919. Section 2980-1, as amended, is the same in its provisions as the original section 2980-1, except that the aggregate sum that may be fixed by the commissioners for the compensation of deputies, clerks, etc., shall not exceed 40 per cent on the first two thousand dollars and 60 per cent on the next eight thousand or fractional part thereof.
>
> Quaere: May the commissioners on my application as treasurer make a further allowance for deputy, clerk hire and assistants, for the year 1919, in a sum which shall not exceed the difference between the sum first fixed by the commissioners upon the basis of the original section 2980-1, namely 30 and 40 per cent and the basis fixed by section 2980-1 as amended, namely 40 and 60 per cent computed upon the fees earned by the treasurer's office for the year Oct. 1, 1917, to Sept. 30, 1918, inclusive?"

As set forth in your communication, the amended section 2980-1 G. C., as enacted by the present legislature, increases the percentages which may be allowed by the commissioners from the fee fund for clerk hire, providing forty per cent on the first two thousand dollars or fractional part thereof, and sixty per cent on the next eight thousand dollars or fractional part thereof, in lieu of the original provision for thirty per cent and forty per cent. on said amounts respectively. Said amended section became effective on July 9, 1919. As now in force, it provides:

> "Section 2980-1. The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, bookkeepers, clerks or other employes except court constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office, or office of the clerk of the courts, an aggregate amount to be ascertained by computing forty per cent on the first two thousand dollars or fractional part thereof, sixty per cent. on the next eight thousand dollars or fractional part thereof and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum;

provided, however, that if at any time any one of such officers require additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, bookkeepers, clerks or other employes as may be required, and thereupon the board of county commissioners shall transfer from the general county fund, to such officers' fee fund, such sum of money as may be necessary to pay said salary or salaries.

Notice in writing of such application and the time fixed by such judge for the hearing thereof shall be served by the applicant, five days before said hearing upon the board of county commissioners of such county And said board shall file in said proceeding their approval or disapproval of the allowance asked for and shall have the right to appear at such hearing and be heard thereon; and evidence may be offered.

When the term of an incumbent of any such office shall expire within the year for which such aggregate sum is to be fixed, the county commissioners at the time of fixing the same, shall designate the amount of such aggregate sum which may be expended by his successor for the fractional parts of such year."

I have considered the question of the continuing authority of the commissioners to provide reasonable and proper allowances for clerk hire, within the limitations of the authorization of the statute, in Opinion No. 323 of this department, recently announced, wherein it was said, concerning the statute prior to the recent amendment:

"The statutes under consideration vest in the county commissioners the exclusive power to make allowances from the fee fund, and, in my opinion, their jurisdiction is not exhausted by a single exercise of such power, but is continuing, and not exhausted until they have exercised to the fullest extent the 30, 40 and 85 per cent computations provided for in section 2980-1 G. C."

In that opinion, the question before me was the validity of the exercise of such authority by the adoption of a resolution by the county commissioners amending their original allowance so as to provide additional funds for clerk hire, within the limitations of the statute however, and it was held:

"That the action of the county commissioners was a proper exercise of their power to fix the allowance of the probate judge for the ensuing year, whether it be called an amendment or by some other name, so long as the aggregate amount did not exceed the amount arrived at under the percentage computations above mentioned.

There is no provision in the statute that the commissioners may not at any time increase an allowance made from the fee fund, either by way of amending their original order or by making a new order, so long as they keep within the percentages specified. As already stated, the power of the commisisoners is continuing until they have reached the aggregate amount authorized in the section."

The provision of the statute relative to the time of taking action by the commissioners was regarded as directory, and it was said:

"It must also not be overlooked that section 2980 G. C. clearly and expressly provides that the aggregate sum to be fixed by the commissioners

shall be 'reasonable and proper,' and this, in my opinion, evinces the legislative intent to confer upon the commissioners continuing authority until a reasonable and proper amount has been allowed, subject only to the express limitation imposed by section 2980-1 G. C."

The original allowance by the commissioners is to be made pursuant to the estimate of the several county officers of the probable amount necessary to be expended, and obviously, in exercising the authorization of the statute to provide a "reasonable and proper" allowance, the circumstances and conditions confronting a particular county office at any time within the year will be controlling in the determination of the reasonableness and propriety of the allowances for the assistants in such office, which essentially requires that such conditions be taken into account when they arise, and the duty and authority conferred upon the county commissioners properly exercised in accordance therewith.

The conclusion announced in the previous opinion of this office, above referred to, has the support of the unreported decision of the common pleas court of Noble county, afterwards affirmed by the court of appeals, and a recent decision of the court of common pleas of Franklin county.

Now that the forty and sixty per cent limitations provided in section 2980-1 G. C., as amended, constitute the operative boundaries of the authority of the county commissioners, with reference to allowances for clerk hire in the several county offices, in the exercise of their continuing jurisdiction under the statute as found to be reposed in that board under the ruling above cited, the commissioners may, by proper resolution, increase the amount heretofore provided for clerk hire, when in their judgment such increase is required for the proper performance of the functions of any or all of the several county offices, subject, of course, to the maximum limitation prescribed by the statute in force at the time of taking such action, and the further proviso of the statute that the allowance shall be only such in amount as is reasonable and proper.

Respectfully,
JOHN G. PRICE,
Attorney-General.

537.

COUNTY BOARD OF EDUCATION—CREATION OF NEW DISTRICT UNDER SECTION 4736 G. C. BY TAKING AN ENTIRE EXISTING DISTRICT AND PART OF ANOTHER—REMONSTRANCE SIGNED BY MAJORITY OF ALL ELECTORS IN NEWLY CREATED DISTRICT.

Where a county board of education creates a new school district under section 4736 G. C. by taking an entire existing district and a part only of another existing district and joining the district and part district together as a new district, the remonstrance against such creation of the new district must be signed by a majority of all the qualified male electors in the newly created district.

COLUMBUS, OHIO, August 2, 1919.

HON. SUMNER E. WALTERS, *Prosecuting Attorney, Van Wert, Ohio.*

DEAR SIR:—Acknowledgement is made of your request for an opinion upon the following statement of facts:

"Calling your attention to section 4736 of the General Code, particularly the following words:

'The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof.'

Also,

'a majority of the qualified electors of the territory affected by such order of the county board,'

I desire your answer to the following questions:

May the county board by taking an entire existing district and a part only of another existing district, and by joining the whole district and the part district together, create by virtue of this section a new district; or would that simply be transferring territory from one district to another, as provided in section 4692. If a new district may be thus created who would be the electors qualified to sign a remonstrance, those only of the part district that was added to the whole, or those of both the part district and the whole district joined?"

Section 4736 G. C., which is the law at the present time, covers the creation of new school districts in a county school district, as follows:

"The county board of education shall arrange the school districts according to topography and population in order that the schools may be most easily accessible to the pupils, and shall file with the board or boards of education in the territory affected, a written notice of such proposed arrangement; which said arrangement shall be carried into effect as proposed unless, within thirty days after the filing of such notice with the board or boards of education a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed. The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof. The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division of the funds or indebtedness belonging to the newly created district. Members of the boards of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

Attention is also invited to the new section 4736 G. C., appearing in house bill No. 348, which becomes effective September 22, 1919, and reads as follows:

"The county board of education may create a school district from one or more school districts or parts thereof, and in so doing shall make an equitable division of the funds or indebtedness between the newly created district and any districts from which any portion of such newly created district is taken. Such action of the county board of education shall not take effect if a majority of the qualified electors residing in the territory affected by such order shall within thirty days from the time such action is taken file with the county board of education a written remonstrance against it. Members of the board of education of the newly created district shall be appointed by the county board of education and shall hold their office until the first election for members of a board of education held in such district after such appointment, at which said first election two members shall be elected for two years and three members shall be elected for four years, and thereafter their successors shall be elected in the same manner and for the term as is provided by section 4712 of the General Code. The board so appointed by the county board of education shall organize on the second Monday after their appointment."

The new section 4736 G. C. is herewith quoted because your proceedings to create a new school district might run past the date when the new section is effective;

and again, it clarifies old section 4736 G. C. as to the true intent of the General Assembly as regards the transfer of territory by a county board of education. It must be remembered that the proceeding for the transfer of territory from one school district to another under section 4692 is an entirely distinct transaction from the proceeding necessary under section 4736 G. C., creating a new school district, hence under the law if some prior transfer of territory, initiated under section 4692 G. C., had failed by remonstrance proceedings, such result would not affect proceedings to be had under section 4736 G. C., in the creation of a new school district. It is true that a proceeding under section 4736 G. C. is a transfer of territory, but the fact remains that no new district can ever be created at all unless the element of transfer of territory enters therein.

You ask if a new district is created under section 4736 G. C. who would be the electors qualified to sign a remonstrance, whether only those in the part of the new district or those who constitute the electors of the whole of a new district; and it may be said that where a new school district is created by taking an entire existing district and a part only of another existing district, and joining the old district and the part district together, thus creating a new district, then it follows that every part of the territory in the new district is affected by the creation of such new district.

As an illustration of this: the old district which was entire before, loses its school board as a whole and it is necessary that the county board of education appoint a new school board of five members for such new district, a number of whom might come under the law from the part of the district which was added to the old district in the creation of a newly formed district. Again, the electors in the old district are affected in their taxation rate one way or another for the reason that the whole district, as newly created, must assume the obligations of all of its component parts, as well as receiving not only the funds of one part of the newly created district, but also the funds of every other part of such district created.

The entire school system, even as to the location of schools that were conducted might be wholly changed in a newly created district composed of an old district and a part of another district, because of advantageous arrangements which might follow such joining of interest. It is clear, therefore, that the qualified electors of the territory affected by an order of the county board creating a new district would be all of the qualified electors in such newly created district and the remonstrance provided under section 4736 provides that in order to prevent such creation of a new district, a majority of the qualified electors in the territory affected, which is all of the new district, must file within thirty days a written remonstrance with the county board of eduaction against the arrangement of school districts so proposed.

You will note that the new section 4736 G. C., effective on September 22d, does not materially change this feature appearing in old section 4736 G. C., but rather clarifies the same by providing for the manner and method of the appointment of the new board of education and saying when their successors shall be elected and when such new board must organize.

It is therefore the opinion of the Attorney-General that where a county board of education creates a new school district under section 4736 G. C. by taking an entire existing district and a part only of another existing district and joining the district and part district together as a new district, the remonstrance against such creation of the new district must be signed by a majority of all the qualified male electors in the newly created district.

Respectfully,
JOHN G. PRICE,
Attorney-General.

538.

OHIO STATE BOARD OF EMBALMING EXAMINERS—RECIPROCITY WITH OTHER STATES IN GRANTING OF EMBALMERS' LICENSES DISCUSSED.

Where a duly licensed embalmer of another state has been examined by a regular board of embalming examiners on substantially the same subjects and requirements demanded by the Ohio state board of embalming examiners, and has obtained in such examination an average grade of at least seventy-five per cent, the Ohio state board of embalming examiners may, in its discretion, recognize such examination as a basis of reciprosity between Ohio and such other state. If it does so recognize it and grants reciprocal licenses to qualified persons residing in a certain geographical part of such foreign state, it can not thereafter refuse to grant reciprocal licenses to other similarly qualified persons in such foreign state, on the mere ground that such other persons reside in a part of the state geographically different from that wherein reside the persons first named.

COLUMBUS, OHIO, August 4, 1919.

HON. B. G. JONES, *Secretary-Treasurer of the State Board of Embalming Examiners, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is at hand, reading as follows:

"Section 1343-1 authorizes the issuing of reciprocal licenses by this board under certain conditions.

Inasmuch as a great deal of inconvenience is caused to undertakers and embalmers who are in business along the border towns by reason of not having a license that will give them the authority to cross the border and embalm, the question of granting reciprocal licenses to those who may apply for the same is now being considered by this board.

It is the opinion of the majority of the membership of this board that the requirements of the several bordering states are not the equal of this state and that it would be an injustice to grant embalmers of other states an Ohio license merely by paying the legal fee, thereby placing them in the same position of pre-examination requirements to obtain this license.

And yet those members of our profession who are in business on the border, either on the Ohio or the other side, should receive some consideration as in a great many localities these embalmers are the only ones available for miles around.

Therefore this board respectfully asks for your opinion upon the question as to whether this board has the legal right to grant a reciprocal license to those located on the border and to refuse a similar license to other embalmers who are not so located."

Section 1343-1 G. C., to which you refer, reads as follows:

"The state board of embalming examiners may grant without examination an embalmer's license to a duly licensed embalmer of another state, who shall have been examined by a regular board of embalming examiners on substantially the same subjects and requirements demanded by the board of this state, and shall have obtained an average grade of not less than seventy-five per cent in such examination. Such license shall be known as a reciprocal license, applications for which shall be made on a form containing a certified

statement from the board which granted the original license in the other state, stating the grade and result of examination. Each applicant for a reciprocal license shall pay a license fee of twenty-five dollars, which shall accompany the application for such license. Such reciprocal license shall be renewed annually upon payment of a renewal fee of one dollar as provided above."

This, it seems, is the only section of the embalming license act which deals with the matter of reciprocity with other states.

Construing this section, the Attorney-General, in opinion No. 381, addressed to you as president of the state board of embalming examiners, on June 16, 1917 (Vol. 2, Atty. Gen. Opin. for 1917, p. 1029), said at p. 1034:

> "This section does not make it the duty of your board to issue licenses without examination to embalmers of other states who are within the provisions of this section. The section is not mandatory; it is directory only. It provides that 'the state board of embalming examiners *may* grant without examination * * *.' It does not state that the board shall grant a license to such embalmers, but leaves it to the discretion of the board."

The law contemplates that no reciprocal licenses shall be issued by your board under section 1343-1 G. C., unless and until your board shall have satisfied itself that the examination passed in the foreign state by the applicant for such reciprocal license embraced "substantially the same subjects and requirements" demanded by your board as to Ohio applicants; and further that in such examination the applicant for the reciprocal license obtained an average grade of not less than seventy-five per cent.

In other words, it is for your board to say, in the exercise of its discretion, whether the requirements of foreign states are substantially the same as those prevailing in Ohio.

But having once determined that the requirements of a foreign state are substantially equivalent to those of Ohio, and having decided to enter into reciprocity with such foreign state, is it proper for your board to limit its reciprocity to the residents of some particular geographical part of such foreign state less than the whole area of such state; or did the legislature intend that reciprocity once entered into with a foreign state should extend to every part thereof?

Upon reflection, it is considered that the view last above stated must be taken as the meaning of section 1343-1 G. C. Whether the legislature has the power to effect reciprocity with a foreign state in the limited and discriminating way just referred to, is a question which it is unnecessary here to consider. What is before us now is rather the question whether section 1343-1 G. C. must be so construed as to ascribe to the legislature an intention so to discriminate.

The idea of reciprocity is contained in other statutes of Ohio, for example, the state dental board law (see section 1324 G. C.), the state board of pharmacy law (see section 1305 G. C.), the state medical board law (section 1282 G. C.), etc. In none of these acts is there any attempt made to make reciprocity dependent upon the matter of the geographical location of the applicant in the foreign state. This being true, it seems to me that if the legislature had intended to give authority to your board to make the discrimination referred to in your inquiry, it would have done so in express and unmistakable language.

Hence, you are advised that where a duly licensed embalmer of another state has been examined by a regular board of embalming examiners on substantially the same subjects and requirements demanded by the board of this state, and has obtained in such examination an average grade of not less than seventy-five per cent, your board may in its discretion recognize such examination as a basis of reciprocity.

If it does so recognize it and grants a reciprocal license to qualified persons residing in a certain geographical part of such foreign state, it can not, thereafter, as the law now stands, refuse to grant reciprocal licenses to other similarly qualified persons in such foreign state, on the mere ground that such other persons reside in a part of the state geographically different from that wherein reside the persons first named.

Respectfully,
JOHN G. PRICE,
Attorney-General.

539.

FIRE INSURANCE COMPANIES—WHAT POWERS MAY BE EXERCISED BY EITHER STOCK OR MUTUAL COMPANIES—SECTIONS OF CODE GOVERNING THE INCORPORATION OF BOTH KINDS OF COMPANIES ABOVE NAMED DISCUSSED AND INTERPRETED.

Fire insurance companies, whether stock, or mutual, may have and exercise only such powers as are prescribed by section 9607-2, *paragraph* 1, *G. C.*

Sections 9510, 9511 *and* 9556 *G. C. are supplanted by the subsequently enacted amendment to section* 9607-2. *Powers mentioned in the latter section and not mentioned in the former are available to either class of company, but powers mentioned in the former group of sections but not in the latter may not be exercised by either class of company.*

The powers formerly enjoyed or capable of being enjoyed under sections 9510, 9511 *and* 9556 *G. C. by a fire insurance company but now prohibited to such company are as follows*

(1) *The making of insurance against theft of automobile accessories.*

(2) *The making of insurance on goods in the course of transportation other than inland transportation, whether on land or by water.*

With these exceptions, the powers enumerated in section 9607-2 *are broader than those enumerated in the other sections. A company originally organized under section* 9510 *et seq. G. C. may appropriate such additional powers by amendment to its articles of incorporation.*

COLUMBUS, OHIO, August 4, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have requested the opinion of this department upon the following question:

"The National Fire Insurance Company of Cleveland, Ohio, offers the following amendment to their purpose clause, to-wit:

'Said corporation is formed for the purpose of insuring houses, buildings and all other kinds of property within and without this state against loss or damage to such property and loss of use and occupancy thereto by fire, lightning, tornado, hail, tempest, flood, earthquake, frost or snow, explosion, fire ensuing and explosion fire not ensuing, except explosion by steam boilers or flywheels; against loss or damage by water caused by the breaking or leakage of sprinklers, pump, tanks, water pipes and fixtures connected therewith, erected for extinguishing fires and against accident or injury to such fixtures and other apparatus, water pipe, plumbing or fixtures to make all kinds of insurance on goods, merchandise and other property in the course of

transportation on land, water or on vessel, boat or wherever it may be; to insure against every description of marine risk, which may legally be undertaken, relating to the perils of the sea, fire, war, reprisals, and all other risks of a like nature incidental to the seas, ships, vessels, and water craft of all descriptions, and also the freights, goods, merchandise, cargo, and all property whatsoever in or on board of the same, whether the property of members of the company or not, so far as the same may be effected or made according to law. To insure all other matters and things which lawfully may or can be from time to time insured or be the subject of insurance against perils of the sea; to insure against loss by the theft of automobiles and accessories and against damage thereto from this cause and to write all kinds of insurance upon automobiles whether stationary or operated under their own power, against loss or damage by any of the causes or risks specified above, including also transportation, collision, liability or damage to property resulting from owning, maintaining or using automobiles, but not including loss or damage by risk of bodily injury to the person. To buy, sell, repair, maintain, operate and otherwise acquire manage and dispose of any and all classes of property which are insurable within the meaning of the purpose of this corporation, to invest and reinvest the funds and assets of this company as prescribed by law and in the form and manner provided by law and to buy, sell, or otherwise hold, own and dispose of all real and personal property necessary and convenient to operate and maintain said business and to do all things incident and necessary thereto.'

Kindly give your opinion as to whether or not the said company can assume amendment on the powers given to the company, organized under section 9510 by reason of the subsequent enactment of sections 9556 and 9607-2, paragraph 1.

Would this purpose clause be in conflict with section 9511 of the General Code of Ohio?"

This inquiry invokes consideration of the following provisions of the General Code, all of which are at least nominally in force:

"Sec. 9510. A company may be organized or admitted under this chapter to:

1. Insure houses, buildings and all other kinds of property in and out of the state against loss or damage by fire, lightning, and tornadoes, and make all kinds of insurance on goods, merchandise and other property in the course of transportation, on land, water, or on a vessel, boat or wherever it may be.

2. * * *; make insurance against loss or damage resulting from accident to property, from cause other than fire or lightning; * * * make insurance * * * to indemnify persons and corporations other than employers against loss or damage for personal injury or death resulting from accidents to other persons or corporations. * * *."

"Sec. 9511. No company shall be organized to issue policies of insurance for more than one of the above four mentioned purposes, and no company organized for either one of such purposes shall issue policies of insurance of any other. But companies organized under subdivision two of the preceding section, which do the business of guaranteeing the fidelity of persons, holding places of public or private trust, who are required to or in their trust capacity do receive, hold, control, disburse public or private property, and guaranteeing the performance of contracts other than insurance policies, and executing and guaranteeing bonds and undertakings required or permitted in actions, proceedings or by law allowed, may indemnify bank deposits against loss by reason of bank suspension and failure."

"Section 9556. All companies organized or admitted for the purpose of insuring against loss or damage by fire, may insure against loss or damage by water, caused by the breakage or leakage of sprinklers, pumps, tanks, water pipes and fixtures connected therewith, and by lightning, explosions from gas, dynamite, gunpowder, and other like explosions, and tornadoes; and may also insure against loss by the theft of automobiles and accessories, and against damage thereto from this cause."

"Sec. 9607-2. A domestic mutual company may be organized by a number of persons, not less than twenty, to carry on the business of mutual insurance and to reinsure and to accept reinsurance as authorized by law and its article of incorporation. * * * A mutual or a stock insurance company may transact only the first kind of insurance, or may transact such as it may elect of the other kinds of insurance, following:

1. Fire insurance. Against loss or damage to property and loss of use and occupancy by fire, lightning, hail, tempest, flood, earthquake, frost or snow, explosion, fire ensuing, and explosion, no fire ensuing, except explosion by steam boiler or flywheels; against loss of damage by water caused by the breakage or leakage of sprinklers, pumps or other apparatus, water pipes, plumbing, or their fixtures, erected for extinguishing fires, and against accidental injury to such sprinklers, pumps, other apparatus, water pipes, plumbing and fixtures; against the risks of inland transportation and navigation; upon automobiles, whether stationary or operated under their own power, against loss or damage by any of the causes or risks specified in this subsection, including also transportation, collision, liability for damage to property resulting from owning, maintaining or using automobiles and including burglary and theft, but not including loss or damage by risk of bodily injury to the person. * * * * * * *."

In order to present the problems which arise in graphic form let it be observed that the following portions of the purpose clause of the articles of incorporation of The National Fire Insurance Company, as proposed to be amended, are clearly justified under sections 9510 and 9556 of the General Code, read together:

"Said corporation is formed for the purpose of insuring houses, buildings and all other kinds of property within and without this state against loss or damage to such property * * * by fire, lightning, tornado, * * explosion, fire ensuing and explosion fire not ensuing, except explosion by steam boilers or flywheels; against loss or damage by water, caused by the breaking or leakage of sprinklers, pumps, tanks, water pipes and fixtures connected therewith, erected for extinguishing fires * * * to make all kinds of insurance on goods, merchandise and other property in the course of transportation on land, water or on vessel, boat or wherever it may be; * * * to insure against loss by theft of automobiles and accessories, and against damage thereto from this cause."

The last sentence of the purpose clause, in so far as it authorizes the company "to buy, sell, repair, maintain, operate and otherwise acquire, manage and dispose of any and all classes of property which are insurable within the meaning of the purpose, etc."

is permissible only if interpreted as an incidental power. If interpreted as an independent and co-ordinate power it would, of course, have to be condemned as authorizing the company to engage in various businesses, such as the mercantile business, the business of marine transportation, etc. It should be introduced by the

clause "as incidental thereto;" and if this part of the purpose clause is new in the amendment (which does not appear from your letter), I advise that the amendment be not filed until this change is made.

The recitals omitted from the amended purpose clause as last above quoted are not justified by sections 9510 and 9556 of the General Code, and if these sections stood alone would be forbidden in the clause by the operation of section 9511 of the General Code.

Let us now turn to section 9607-2 G. C. and consider the purpose clause as a compliance with it, regardless of the provisions of sections 9510, 9556 and 9511 of the General Code. The following portions of the purpose clause would be justified under that section:

> "Said corporation is formed for the purpose of insuring houses, buildings and all other kinds of property within and without this state against loss or damage to such property and loss of use and occupancy thereto by fire, lightning, * * * hail, tempest, flood, earthquake, frost or snow, explosion, fire ensuing and explosion, no fire ensuing, except explosion by steam boilers of flywheels; against loss or damage by water, caused by the breakage, or leakage of sprinklers, pumps, tanks, water pipes and fixtures connected therewith, erected for extinguishing fires and against accident * * * to such fixtures and other apparatus, water pipes, plumbing or fixtures; to make all kinds of insurance on goods, merchandise and other property in the course of (inland) transportation on land, water or on vessel, boat or wherever it may be; to insure against every description of marine risk, which may be legally undertaken, relating to the perils of the sea, fire, war, reprisals, and all other risks of a like nature incidental to the * * * (inland navigation), ships, vessels, and water craft of all descriptions, and also the freights, goods, merchandise, cargo, and all property whatsoever in or on board of the same, whether the property of members of the company or not, so far as the same may be effected or made according to law. To insure all other matters and things which lawfully may or can be from time to time insured or be the subject of insurance against perils of the sea; to insure against loss by the theft of automobiles * * * and against damage thereto from this cause and to write all kinds of insurance upon automobiles, whether stationary or operated under their own power, against loss or damage by any of the cause or risks specified above, including also transportation, collision, liability for damage to property resulting from owning, maintaining or using automobiles, but not including loss or damages by risk of bodily injury to the person."

It will be observed that I have made very few omissions for the purpose of fitting the purpose clause of the amended articles to section 9607-2 of the General Code. The first ot them is the omission of the word "tornado." This word is found in section 9556 of the General Code, but not in paragraph 1 of section 9607-2. In all likelihood the word "tempest" in the latter is broad enough to include the species of storm technically known as a "tornado." Assuming this to be so, there is no objection to the inclusion of the word "tornado" in the amended articles.

The next is the omission of the words "or injury" after the word "accident" in connection with the insurance of certain sprinklers, etc. The language of the section 9607-2 in this particular is "accidental injury;" that is, the thing insured must not only be an injury but an accidental injury. This is evidently a typographical error in the amendment, and while it is very slight, if the amendment is to be conformed to section 9607-2 and that section governs, I would advise the use of the words of the statute.

The third omission is that of the words "and accessories" after the word "automobiles." Section 9556 allows insurance against loss by the theft of "automobiles and accessories." Section 9607-2 allows insurance "upon automobiles * * * including burglary and theft." It does not allow insurance against theft of other property than automobiles. For these reasons, if section 9607-2 governs, the words "and accessories" must be stricken out of the articles as amended.

Still looking to the propriety of the amended articles under section 9607-2, I have given some consideration to the clause in the amended articles relating to marine insurance. Though this clause is very much expanded as compared with the language of section 9607-2, already set out, it seems to be justified by the very broad provision of that section, to the effect that a so-called "fire insurance" company may insure "against the risks of inland transportation and navigation." Every known kind of marine insurance would be comprehended within the clause "against the risks of * * * navigation." It will be observed that this part of the section does not deal (as does the remainder of the section) with the kind of property to be insured but with the peril to be insured against. Therefore, *anything* may be insure "against the risks of * * * navigation." Therefore, the conclusion has been reached that all that is recited in the amended articles respecting marine insurance, including "fire, war, reprisals, and all other risks of a like nature incidental to the seas" as descriptive of some of the specific risks of navigation, and "ships, vessels, and water craft of all descriptions, and also the freights, goods, merchandise, cargo, and all property whatsoever in or on board of the same," as descriptive of the thing to be insured, is proper under section 9607-2 G. C.

It will be noted, however, that I have inserted the word "inland" in parenthesis before the word "transportation" in this clause and, striking out the word "seas," have inserted in lieu thereof in parenthesis the words "inland navigation." I have done this because I am satisfied that section 9607-2, paragraph 1, limits the right to write marine insurance to that pertaining to inland navigation. The question is as to the modifying effect of the word "inland" in the phrase "inland navigation and transportation." Much doubt is encountered here. It is possible to read this phrase in two ways, viz.: "inland transportation and all navigation" and "inland transportation and inland navigation." The most natural interpretation to give to the phrase is, however, that last suggested. An adjective preceding two substantives or nouns, connected by the word "and" and not separated by any punctuation naturally modifies both the substantives. There is nothing unnatural about giving to the word "inland" a modifying effect as regards the noun "navigation" because there is such a thing as "inland navigation." (See Standard Dictionary under the word "navigation"). Therefore so far as section 9607-2 is concerned it does not authorize any kind of marine insurance, whether on cargoes or on bottoms, pertaining to the navigation of the ocean, or at least to foreign commerce. It is not necessary to decide in this connection just what is meant by the word "inland," i. e., whether it is to be given the significance of "domestic," as when used in the law of negotiable instruments, or the meaning of "continental" as distinguished from that which would pertain to the ocean. I say it is not necessary to decide this question because if the word "inland" is used as in the statutes the articles of incorporation will be within the law and the question will be common to the statute and to the articles, so that it need not now be decided.

But these conclusions are only preliminary to the statement of the real question involved, which is as to whether or not a corporation may be organized under the laws of Ohio for the purpose of doing the things mentioned in paragraph 1 of section 9607-2 in the teeth of unrepealed sections 9510, 9511 and 9556 G. C.

Attention is called to the fact that section 9510 in terms deals with the organization or admission of corporations. The same is true of the other sections *in par-*

materia with it, aside from section 9607-2. That section begins by dealing with the organization of domestic mutual companies other than life. It then provides in effect that "only the first kind of insurance" mentioned thereafter in the section may be *transacted* by "a mutual or stock insurance company." It would seem that while the section is undoubtedly potent to authorize the organization of a domestic mutual company to transact the first kind of insurance mentioned therein, it could hardly be looked to as authority for the organization of a stock insurance company to carry on all these kinds of business. By its terms it merely states that a stock insurance company may transact only the first kind of insurance or may transact such as it may elect of the other kinds of insurance; but as this is the only mention in section 9607-2 or elsewhere in the act in which that section was amended, or in the act found in 104 Ohio laws, 202, to which it was amendatory, of a "stock insurance company," it is arguable that section 9607-2 cannot be looked to as a grant of power to stock insurance companies; that to do so would make the section virtually wipe out section 9510 G. C. and the other sections referred to, which would be violative of the principle of implied repeal, which is that such repeals are presumed against and that inconsistencies between earlier and later statutes will be reconciled if possible rather than that the result described as "implied repeal" shall be arrived at.

To be sure, section 9607-2 has some effect upon section 9510 even as to stock insurance companies. It prohibits such companies, other than fire companies, from doing what is specified in paragraph 2 of section 9510, viz:

> "guarantee the fidelity of persons holding places of public or private trust, * * *; guarantee the performance of contracts * * * and execute and guarantee bonds and undertakings required or permitted in all actions or proceedings, or by law allowed;"

unless these be held to come within paragraph 7 of section 9607-2, which is as follows:

> "7. Miscellaneous insurance. Against loss or damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting life insurance."

No opinion is expressed upon this point, but the question is at least raised by the peculiar language of section 9607-2

I refer also to paragraph 4 of section 9510, which authorizes companies to

> "receive on deposit and insure the safekeeping of books, papers, moneys, stocks, bonds and all kinds of personal property."

The effect of section 9607-2 upon the conduct of such business by either a mutual or a stock insurance company will afford an interesting study.

You do not inform this department whether the National Fire Insurance Company is a mutual company as further defined by the related provisions of the act found in 104 Ohio Laws, 202, and designated sections 9607-1 to 9607-29 of the General Code, with its amendments, or not. I may say that the distinguishing characteristic of a mutual company seems to be that mentioned in section 9607-6 of the General Code, as follows:

> "Except as otherwise provided by law every policy holder of a domestic mutual company shall be a member while his policy is in force, and entitled to one vote and no more."

In the view which will be taken of the general operation of section 9607-2, however, this question is immaterial.

While, as before stated, section 9607-2 and the related supplemental sections bearing the same general number do not elsewhere deal with "stock insurance companies" at all, and while the first part of the section deals with the organization of "a domestic mutual company," yet this department is unable to reach the conclusion that the effect of section 9607-2 upon section 9510 and the other sections under consideration is different with respect to mutual companies than it is with respect to stock companies. The two are grouped together in the same sentence in section 9607-2 and that sentence has the same meaning with respect to the one as it has with respect to the other.

It has been heretofore intimated that section 9607-2 in and of itself does not purport to authorize the organization of a company empowered to carry on any one or more of the various kinds of business mentioned therein; whereas section 9510 does purport to deal with the charter powers of such companies. The rule against implied repeal would result in a holding to the effect that both sections might be regarded as limitations upon the charter powers of insurance companies other than life, whether mutual or stock; that is to say, that a company might have no larger powers than are comprehended in section 9510 and also in section 9607-2. So that if a given kind of business mentioned in the one were not also mentioned in the other, a corporation could not be organized under section 9510 nor transact business under section 9607-2. This, however, would reduce to absurdity many of the provisions of section 9607-2. In order to give such provisions any meaning at all, therefore, the conclusion that section 9607-2 does enlarge the possible charter powers of insurance companies other than life, where it has that effect at all, must be reached. So also, because it is later in point of enactment than section 9510, it would follow that if it should appear that in any particular the business which may be transacted under section 9607-2 is less comprehensive than that authorized by section 9510, said section 9607-2 would govern and *pro tanto* nullify section 9510.

This conclusion is supported by the legislative history of section 9607-2 G. C., and indeed by the policy of the state with respect to the relation between mutual insurance companies other than life and stock insurance companies other than life. The group of statutes introduced by section 9510 G. C. formerly dealt with all insurance companies other than life, whether stock or mutual, except such mutual companies as are technically known as mutual protective associations. This is made very clear by even the most cursory examination of some of the sections in the chapter in which section 9510 appears, as they formerly existed. Thus, section 9515, dealing with the organization of such companies, provided how the elections of "a mutual company" should be conducted. Sections 9525 to 9528, inclusive, regulated mutual companies. Section 9529 drew the distinction previously mentioned between a mutual company as such and a mutual protective association existing under sections 9593 et seq. Section 9538 dealt with the rights of members of mutual companies. Sections 9550 to 9553, inclusive, and sections 9557 and 9558 also dealt with mutual companies.

In this same connection the distinction between a mutual protective association and a mutual insurance company was and is drawn by section 9604 G. C., providing how a mutual protective association might reorganize into a mutual fire insurance company.

At all times prior to the enactment of section 9607-2 in its present form the possible charter powers of a mutual company and a stock company were exactly the same. In other words, sections 9510, 9511 and 9556 G. C. applied alike to mutual companies and stock companies. So that it was the settled policy of the state at that time to afford no favors to either class of companies at the expense of the other in the matter of charter powers pertaining to the kind of risks that might be insured.

In 1914 the general assembly passed an act which repealed a number of the sections previously mentioned and enacted in lieu thereof what might be termed a new code relating to the organization of mutual insurance companies other than life. The

section numbers of this act in the original were consecutive beginning with "1" (See 104 Ohio Laws, 202). The Attorney-General gave to the act the supplemental code numbers 9607-1 to 9607-29, inclusive. Originally this act dealt only with the manner of organization and the special regulations pertaining to mutual companies, including the reorganization of a mutual protective association into a mutual company, specifically preserving the distinction between a mutual protective association and a mutual company. (See section 9607-27 G. C.).

The passage of this act of 1914 did not in anywise disturb the settled policy of the state which has just been described, for the second section of that act, designated as section 9607-2, originally provided that:

> "A domestic mutual company may be organized with such powers to transact the business of insurance as are, or may be, granted by law to stock fire insurance companies organized under the laws of this state."

In other words, after the passage of the law which took the section numbers 9607-1 et seq. in the year 1914, we still went to sections 9510, 9511 and 9556 and like sections to find possible charter powers of a mutual company.

Now in 1917 section 9607-2 was amended so as to take on its present form. It is to be admitted that the draftsman of this amendment did an inappropriate thing: instead of amending the section which dealt with possible charter powers he amended the section which had formerly declared the policy of the state that there should be no distinction between the possible powers of a stock company and those of a mutual company. It may be argued that in so doing he manifested an intention, which must have been shared by the members who voted for the measure, to overturn the policy of the state and to deal separately with the charter powers of mutual companies. If this was the original intention it was certainly changed in the processes of legislation by the sentence already considered, which in effect provides, *as formerly*, that the charter powers of a mutual company shall be the same as those of a stock company.

In other words, this legislative history discloses the following situation: Formerly we had a section that prescribed the charter powers of insurance companies and primarily applied to stock insurance companies; we also had another section stating that the powers of stock and mutual companies should be the same; then there was enacted a section prescribing primarily (no doubt) the powers of mutual companies, but also providing, as had been the previous rule, that the powers of stock companies should be the same. In other words, broadly though somewhat inaccurately speaking, we have it that formerly the possible charter powers of mutual companies were to be ascertained by reference to what the powers of stock companies were; while by virtue of the most recent amendment the powers of stock companies are to be ascertained by reference to what the powers of mutual companies are. The process is reversed but the result is the same—the powers of the two companies are the same.

Now as a matter of proper and orderly legislation the purpose of the act of 1917 would have been better subserved by amending sections 9510, 9511 and 9556 G. C. than by amending section 9607-2. Technically, sections 9510, 9511 and 9556 G. C. remain in force; they have not been repealed. But the subsequent amendment of section 9607-2 covers a great part of, if not the entire subject matter of these sections and so long as it remains in force must be given controlling effect to the extent that it does overlap the other sections. It is impossible to regard the new section as a cumulative measure for this is clearly inconsistent with the use of the word "only" therein. This word clearly implies a negative to the effect that things not included within the enumeration which it makes shall not be done. Therefore, if there is anything which a stock or a mutual insurance company could be authorized to do under sections 9510, 9511 and 9556 G. C., but which is not authorized under section 9607-2 G. C., it is not now permissible because the latter section specifically provides that *only* the "first

kind of insurance" therein mentioned may be transacted by a company engaged in that kind of business generally.

In the same connection another consideration presents itself. Section 9607-2 either does or does not apply to existing stock companies to the extent that they may avail themselves of it by amendment to their articles of incorporation. If it does not apply, then existing stock companies, and for that matter new stock companies, are limited to the powers mentioned in sections 9510, 9511 and 9556 G. C. if they engage in the first kind of insurance mentioned in section 9510. But if the effect of section 9607-2 is to enlarge in any respect the powers of such companies, either existing or new, then it must also be given such restricted effect as it has. It would not be open to companies of that class to accept its benefits without also being subject to its burdens. The section operates as a whole and not in parts.

It has been suggested to me that the phrase "the first kind of insurance" as used in section 9607-2 denotes the kind of insurance mentioned in section 9593 G. C., dealing with mutual protective associations, that being the first section in the chapter in which section 9607-2 is found. This is a very forced interpretation of the section which is scarcely permissible in view of the use of the word "following" in the same context. But if it were permissible at all it would be entirely negatived by the above outlined history of the section under consideration, and particularly that part of it which shows how the section happened to get into the chapter in which it is found, and further that part of it which shows how carefully the distinction between a mutual protective association and a mutual insurance company has always been preserved.

It is not meant in this opinion to hold that sections 9510, 9511 and 9556 G. C. are repealed by implication in their entirety. That question is left undetermined. For example, it is not at all clear that section 9607-2 deals with anything else than the organization of domestic companies. This appears to be its intended effect because section 9607-19, as amended by the same act, deals with the admission of one kind of foreign companies, viz.: "a foreign mutual company." Therefore it would seem that foreign stock companies are still governed by section 9510 G. C. However, as stated, no opinion is expressed on this point nor on the point as to whether the state of the law thus resulting would be violative of any federal or state constitutional limitation.

For the foregoing reasons it is the opinion of this department that, except in the particulars previously noted, in which respect the amended articles of incorporation should be corrected, the said amended articles of The National Fire Insurance Company, which is assumed to be a domestic company, may be received and filed by the secretary of state, the charter powers assumed therein being authorized by section 9607-2 of the General Code, which with respect to the business of fire insurance as defined in paragraph 1 thereof has the effect of enlarging in some respects such charter powers as compared with those formerly authorized for the transaction of this class of insurance business by section 9510 G. C.

It is only necessary to add that in the opinion of this department the amendment by implication resulting from the amendment of section 9607-2 and its effect upon the pre-existing law, as laid down in the other sections under consideration may be appropriated to the use of a corporation originally organized under section 9510 G. C. In other words, section 9607-2 is not limited in its application to companies organized after its enactment.

Respectfully,
JOHN G. PRICE,
Attorney-General.

540.

BOARD OF DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS—ALPHABETICAL SETS OF REGISTRATION BOOKS LOST—NEW LIST CAN BE MADE FROM ORIGINAL REGISTRATION—WHEN BOTH ALPHABETICAL LISTS AND ORIGINAL REGISTRATION BOOKS ARE LOST—HOW NEW ALPHABETICAL LISTS CAN BE PREPARED.

1. *When the alphabetical sets of registration books are lost or destroyed, and not in the possession of the board of deputy state supervisors and inspectors of elections, and the original registration book is in the possession of the board, new alphabetical lists can be made up from the original registration book for the use of the registrars, clerks, and judges of election.*

2. *When the alphabetical lists and original registration books are lost or destroyed, new alphabetical lists can be prepared from the bound volumes of registered voters required to be made under the provisions of section 4917 G. C. and from such other papers or information as are in the possession of the board of deputy state supervisors and inspectors of elections.*

COLUMBUS, OHIO, August 4, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts submitted to you by the board of deputy state supervisors and inspectors of elections for Franklin county:

> "In a recent election contest case, held in this county, the entire set of registration books in precinct 'E' of the 14th ward and both alphabetical sets of registration books of precinct 'C' of the 12th ward for the year 1918 were used in evidence before the Hon. E. B. Kinkead, judge of the court of common pleas of Franklin county, Ohio. The court and officials are unable to locate the above registration books
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> At a meeting of the board of deputy state supervisors and inspectors of elections for Franklin county, Ohio, held on Saturday, July 19, 1919, all members concurring, we were authorized to request you to furnish this board with an official opinion as to what course this board is to pursue at our special registration on August 9 and the August 12, 1919, primary election in the above precincts."

From the above statement of facts it is apparent that in precinct "E" of the 14th ward of the city of Columbus, the entire set of registration books will be lacking for use in the primary on Tuesday, August 12, 1919, and that the same condition will obtain in precinct "C" of the 12th ward of the same city, as far as the alphabetical lists prepared for such precincts are concerned. The question at issue involves only the primary election of August 12th, because new registration lists must be prepared in the city of Columbus in the month of October prior to the November election of 1919, because such city is an annual registration city as described by the statutes.

Section 4975 of the General Code bears upon the registration of electors prior to any primary election and reads as follows:

> "The board of deputy state supervisors in municipalities where registration of electors is required by law, shall, prior to any primary election, make such provision as shall be necessary and reasonable for the transfer upon the registration books and the registration of all persons, not previously registered, who may qualify themselves to vote at the ensuing November

election. No person shall be admitted to vote at any primary election, in such municipalites, unless he shall have caused himself to be registered as an elector therein, in the manner provided by law for the registration of electors.'

It is noted from the above section that no person shall be permitted to vote in the primary election of August 12th unless such person shall be properly registered as an elector in the precinct where he resides and in the manner provided by law for the registration of electors, that is, the names to appear in the various books and forms as provided in the statutes describing the forms for registration of electors.

It might be said that the electors in the precinct or precincts in question had registered, and were registered, in the manner provided by law, at some previous date and that the fact that such records are lost, as indicated in your statement of facts, is no fault of the electors residing in such precincts This is true in the fullest degree that it is no fault of the electors that the registration books, which are the evidence of proper registration under the law, are missing and the board of deputy state supervisors and inspectors of elections is, therefore, confronted with the question of providing on August 12, 1919, a proper registration list in the precinct where such lists are missing, in order that every elector in such precincts may be registered and have an opportunity to vote, for the law plainly provides that no person shall vote at any primary election in a municipality unless he shall be properly registered as an elector therin; and the statutes mean that upon the date of the primary election there should be in each precinct the registration books provided for by the statutes.

Under section 4975 G. C., supra, the board of deputy state supervisors and inspectors of elections, in municipalities where registration of electors is required by law, has broad powers, for it may make such provisions as shall be necessary and reasonable for the registration of all persons not previously registered.

In addition to such section 4975, attention is invited to the following quotation from the election laws of Ohio:

"Sec. 4887. While exercising office under this or any other law regulating elections, all registrars of electors * * * at all hazards * * * shall preserve and secure the registers, poll books, * * * at every election from violence, fraud, or tampering

Sec. 4874. The board of deputy state supervisors * * * shall provide for the * * * preservation * * * of books, blanks and forms necessary for the registrations and elections herein designated. * * *"

Sec. 4918. After making and returning such lists to the board of deputy state supervisors, the registrars shall make in books, to be prepared and furnished them by the board, duplicate lists of all registered electors in their precinct, arranged alphabetically in the order of their surnames, followed by their full Christian names, ages and residences, as registered, and the registry number of each prefixed. * * * These lists shall be carefully compared by the registrars of each precinct with the registers thereof and with each other, and then certified by them in the form prescribed for the lists *returned to the board of deputy state supervisors, and at the openings of the polls at the next succeeding election shall be there produced by them for the use of the judges,* as herein provided.

Sec. 4891. * * * in annual general registration cities, on or before the first day of September of each year, the board shall procure and have at its office duplicate books for each election precinct in such city for the registration of electors therein, which shall be styled and known as 'registers of electors'.

Section 4893. On Wednesday in the fifth week before the November election, each year, the registrars of each precinct in such city shall apply for such lists and such registers and the map of their precinct and such printed instructions for the discharge of their duties as the board of deputy state supervisors may lawfully prescribe."

Section 4893 G. C., last quoted, provides that the registration lists covering the old registration shall be called for in the fifth week before the November election in order that such registration lists can be used for comparison purposes on the days of the new registration, which takes place each year in every annual registration city in the month of October, as provided by section 4894 G. C., which reads in part as follows:

"Section 4894. The days for the general registration of electors in cities wherein annual general registration is required * * * shall be Thursday in the fifth week and Friday and Saturday in the third week next before the day of the general election in November in each year.

Section 4901. Within a sufficient time previous to such state or other public election, the registrars of each precinct in such city *shall obtain the preceding register* made by them *from the board of deputy state supervisors* * * *. Such registrars shall take *all such preceding registers* of their respective precincts, so required to be furnished them, as hereinbefore provided * * * and make a report of their proceedings carefully noting any and all changes found, together with such additional names of the electors registered by them to the board of deputy state supervisors.

Section 4911. * * * No person shall be entitled to vote *at any election in such city* unless he shall establish his residence by causing himself to be registered in the precinct where he shall claim to reside, in the manner and at the time required herein, nor shall *a ballot be received* by the judges at any election under any pretense whatever, unless the name of the person offering it shall have been entered on both of the registers of the precinct in which he claims to vote, as herein provided. *It shall be the duty of each elector resident in any such city to see that his name has been so registered.*"

Appearing under the chapter headed primary elections, attention is invited to the following language of section 4967 G. C.:

"The county boards of deputy state supervisors of elections shall have all the powers granted and perform all the duties imposed by the laws governing general elections. * * * All statutory provisions relating to general elections * * * shall, as far as applicable, apply to and govern primary elections."

Section 4980 provides:

"At such election only legally qualified electors, or such as will be legally qualified electors at the next ensuing general election, may vote, and all such electors may vote only in the election precinct where they reside * * *. Affiliation shall be determined by the vote of the elector making application to vote, at the last general election held in even numbered years."

From all of the above quoted sections of the statutes, it would seem that no person can vote in any precinct on August 12th, such being the primary election, unless there

is present in such election booth the evidence that such person is properly registered in that precinct, and it is therefore necessary that the board of deputy state supervisors of elections in Franklin county shall take steps under section 4975 G. C. to see that such registration lists for such precincts shall be present and in possesison of the judges of election in such precincts on the day of the primary, August 12, 1919.

It is presumed that the election board in question has carried out the clear mandate of the law provided for in section 4917 G. C., which reads as follows:

> "* * * A copy of the complete registration prior to a November election from each precinct shall be retained by the board of deputy state supervisors, and each year, after the close of the annual registration, bound together in a volume and preserved in its office. They shall cause *at least fifty additional copies* of such list respectively to be printed in pamphlet form for immediate distribution."

It would seem, therefore, that even if the original registration books and alphabetical lists were taken into court and from some cause or other were lost, the bound volume provided for in section 4917, to be preserved in the office of the board of deputy state supervisors of elections, would be available. In precinct "E" of the 14th ward the board of deputy state supervisors and inspectors of election have the original registration list, which contains a correct list of all the voters of that precinct. Only the alphabetical set required to be made by the registrars is lost. Therefore, since the original list is in their possession, it will only be necessary for them to make the new alphabetical list from this record as is required in the first instance. However, in precinct "C" of the 12th ward a more serious question arises because both the original registration books and the alphabetical lists are missing. I am informed, however, that the bound copy required by the above mentioned section is in the office of the board.

Section 4917 does not say that the election board may make this copy, but says that they *shall* do it, and the seeming intent of the law in question is to take care of just such a situation as is now confronting us; that if the original copy is lost the other official copy could be available and from these official copies the form books could be made up in an official manner. This bound copy contains the exact list of voters in the various precincts on the last registration day. I am informed, however, after communicating with the board of deputy state supervisors and inspectors of election of Franklin county, that this list does not show who was transferred from this precinct on the evening prior to the last general election as provided by law, nor does it show the names of those who were transferred into this precinct at said time. They have, however, the transfer slips, so that they can make a correct list of all the voters eligible to vote at the last general election, with the exception of those who were transferred to another precinct. The only objection to this list, then, would be that it might show that there were persons eligible to vote in this precinct who had been transferred prior to the last general election, but I do not think that this would be a serious discrepancy, and if a voter would attempt to vote in any precinct except the one in which he was entitled to cast his ballot he would be subject to prosecution.

I am also informed that this list was not verified and there was a possibility that this printed list did not contain the names of all of the voters who had registered at the time the list was printed. However, this is a record which is required by law to be made by the board of deputy state supervisors and inspectors of elections and therefore it must be presumed to be correct; but if said board is satisfied that there are any mistakes or errors in this bound volume, they have the authority to correct this record and supply any omissions therein.

> "A recording officer while in office may amend his record by correcting mistakes or supplying omissions so as to make it conform to the facts."
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> 34 Cyc., p. 591.

It is the clear duty of the board of deputy state supervisors and inspectors of elections to have registration books, in proper form, in every precinct in the city on the day of the primary election, Tuesday, August 12th, for if there are no such books in the precinct on that day it must follow that the persons who attempt to vote at such primary could not do so because there would be no evidence at hand that they lived in the precinct and were qualified to vote therein.

Clearly, every citizen who is qualified by residence and age, who resides in the precinct in question, is entitled to vote at the primary election on Tuesday, August 12th, if he cares to do so, and he should not be prohibited from doing so because the registration books have disappeared. Since the voters have registered as required by law, it is incumbent upon the board of deputy state supervisors and inspectors of election to exhaust all means within their power to see that such registration books are on hand so that no citizen will be deprived of his ballot.

Inasmuch as your inquiry refers to the specific date of August 12, 1919, it is important to notice that such date is also the time mentioned in senate bill 187 for the calling of a special school election for the purpose of voting on increased levies for school purposes. It is entirely possible that such election will be held in the Coulmbus city school district, which includes the precincts in question. I am also informed that special elections on other questions will also be held in this precinct on that day. This makes it doubly important that there should be in each and every precinct in the city in question a valid and complete registration list on the morning of Tuesday, August 12, 1919.

Bearing on the question of special elections and the registration therefor, section 4941 G. C. reads as follows:

> "The provisions of the preceding sections of this chapter shall extend to any special election authorized by law to be held in a registration city * * *;
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> 1. * * * on Friday and Saturday in the second week before any such special election, the registrars of each precinct shall obtain the *last registers* made by them from the board of deputy state supervisors, and attend at the place in such precinct appointed for the registration of electors * * * and receive application for registration by such qualified electors residing therein as are not already registered. * * *
>
> 9. If the board of deputy state supervisors is of the opinion that it is unnecessary to require the registrars of each precinct to attend in each precinct for the registration of voters for a special election, such board may make such other reasonable provisions for transfers and the registration of voters at such election as it deems proper.
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> 10. When a new ward has been created, or the boundaries of any ward or the precincts thereof have been changed after the general registration and before any such special election following, the board of deputy state supervisors shall appoint election officers, rearrange the voting precincts, provide for registration of electors not already registered, make new registers, certify the registration of registered electors whose voting precinct has been changed, and make all necessary arrangements and regulations for holding elections in such new or altered wards and precincts. *The right of any registered elector to vote shall not be prejudiced by any error in making out the certified list of registered voters.*"

The fact that the legislature made specific provision that electors should not be prejudiced in the case of rearranging the boundary lines, in my opinion, only emphasizes the fact that if they are registered they should not be prejudiced by any error, and the fact that such a provision is not made in any other case would not change the electors' rights in any manner. I believe the same principle would apply

in all cases and that any error made by the board of deputy state supervisors would not bar the elector's right to vote if he could establish the fact that he had properly registered as required bylaw.

I am therefore of the opinion that in precinct "E" of the 14th ward a new alphabetical list can be prepared from the bound copy of the list of voters in said precinct, together with the certificates of transfers into this precinct which the board has in its possession. If any elector contends that he has registered and his name is not found on this list or transfer certificate, and can satisfy the board that this is correct, the board has authority to correct the list so as to conform to the facts.

It is my opinion therefore that

(1) When the alphabetical sets of registration books are lost or destroyed, and the original registration book is in the possession of the board of deputy state supervisors and inspectors of elections, new alphabetical lists can be made up from the original registration book for the use of the registrars, clarks and judges of election.

(2) When the alphabetical lists and original registration books are lost or destroyed, new alphabetical lists can be prepared from the bound volumes of registered voters required to be made under the provisions of section 4917 G. C. and from such other papers or information as are in the possession of the board of deputy state supervisors and inspectors of election.

Respectfully,
JOHN G. PRICE,
Attorney-General.

541.

INHERITANCE TAX—WHERE NO LEGAL ADMINISTRATION IS BEING HAD FOR SETTLEMENT OF ESTATES WHICH MAY OR MAY NOT BE LIABLE FOR PAYMENT OF TAX.

There is no necessity to consider whether or not the tax commission of Ohio can apply for the appointment of an administrator in the case of an estate in which it appears probable that some inheritance tax is due, and the other parties in interest refuse or neglect to ask for administration.

An application for determination as to the inheritance taxes due on account of the estate of a deceased person may be made to the probate court which would have jurisdiction to grant letters testamentary or of administration on such estate, by the heirs or next of kind of the decedent or by the tax commission, though no administration is being had.

COLUMBUS, OHIO, August 5, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge the receipt of your letter of recent date requesting the opinion of this department, as follows:

> "In connection with the administration of the inheritance tax law this commission is encountering many cases in which no legal administration is being had for the settlement of estates which may or may not be liable for the payment of the tax. The commission is uncertain as to the proper procedure to adopt under such circumstances and desire to have your advice.
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> We ask therefore:
>
> 1. In cases where it appears probable that some tax is due and the

heirs refuse or neglect to ask for administration, ought the commission to do so?

2. Can an application be made by the heirs of a decedent in the probate court of the proper county solely for a determination as to inheritance tax without having full administration?

3. If such an application can be made, can the tax commission on its part similarly invoke the jurisdiction of the probate court in connection with estates where no administration is being had, for the sole purpose of determining if any inheritance tax is due and the amount, if any?"

The first question which you ask will not be considered as a question of law in view of the answer to be given to the other two questions which you submit. That is to say, it will not be necessary in the view taken of the general purport of the inheritance tax law to consider the question as to whether or not the tax commission of Ohio, sustaining such relation as it does to the new inheritance tax, can qualify as a "creditor" under the general administration sections of our statutes; though it is intimated that if it were necessary to express an opinion upon this point the ruling would be in the negative.

The following provisions of the new inheritance tax law may be quoted in connection with the remaining questions in your letter:.

"Section 5340. The probate court of any county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent, on the succession to whose property a tax is levied by this subdivision of this chapter, or to appoint a trustee of such estate, or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine the questions arising under the provisions of this subdivision of this chapter, and to do any act in relation thereto authorized by law to be done by a probate court in other mettars or proceedings coming within its jurisdiction; and if two or more probate courts shall be entitled to exercise such jurisdiction, the court first acquiring jurisdiction, hereunder, shall retain the same to the exclusion of every other probate court .Such jurisdiction shall exist not only with respect to successions in which the jurisdiction of such court would otherwise be invoked, but shall extend to all cases covered by this act, to the end that succession inter vivos, taxable under the provisions of this subdivision of this chapter, may be reached thereby.

Section 5341. The county auditor shall be the inheritance tax appraiser for his county. The probate court, upon its own motion may, or upon the application of any interested person, including the tax commission of Ohio, shall by order direct the county auditor to fix the actual market value of any property the succession to which is subject to the tax levied by this subdivision of this chapter. Such auditor shall forthwith give notice by mail to all persons known to him to have a claim or interest in the property to be appraised, including the tax commission of Ohio, and to such persons as the probate court may by order direct, of the time and place when he will appraise such property. * * *"

Section 5345. From the report of appraisal and other evidence relating to any such estate before the probate court, such court shall forthwith upon the filing of such report, by order entered upon the journal thereof, find and determine, as of course, the actual market value of all estates, the amount of taxes to which the succession or successions thereto are liable, the successors and legal representatives liable therefor; and the townships or municipal corporations in which the same originated. Provided, however, that in case no application for appraisement is made the probate court may make and enter such findings and determinations without such appraisement. * * *"

By the first of the above quoted provisions jurisdiction is conferred upon the probate court in inheritance tax cases. Though this jurisdiction depends upon the jurisdiction to grant letters testamentary or of administration, it is not conditioned upon the actual granting of such letters testamentary or of administration.

The second of the sections from which quotation has been made provides for the initiation of the proceeding to determine the tax. This proceeding is not conditioned in any way upon the granting of letters testamentary or of administration. The proceeding may be initiated by the tax commission of Ohio.

These considerations lead me to return to your second and third questions unequivocal answers in the affirmative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

542.

SCHOOLS—DISTRICT SUPERINTENDENT—SALARY OF SAID OFFICER HOW PROVIDED—WHEN SALARY GREATER THAN $1,500.00 HOW APPORTIONED—SECTIONS OF STATUTE GOVERNING WEAK SCHOOL DISTRICTS HAVE NO CONNECTION WITH ASSISTANCE RENDERED BY STATE IN PAYMENT OF SALARIES OF DISTRICT SUPERINTENDENTS—ONE YEAR TERM FOR FIRST CONTRACT AND NOT TO EXCEED THREE YEARS FOR SUBSEQUENT CONTRACTS OF DISTRICT SUPERINTENDENTS.

1. *There is nothing in section 4743 G. C., which prohibits the fixing of the salary of a district superintendent by the electing body at any amount in excess of* $1,000.00 *per year which it may deem proper.*

2. *When the salary of the district superintendent is fixed in an amount greater than* $1,500.00, *the supervision district is to pay the balance remaining after deducting the portion paid by the state and such balance is to be apportioned and certified as provided in sections* 4744-1, 4744-2 *and* 4744-3 *of the General Code.*

3. *The financial assistance rendered by the state in the payment of salaries of district superintendents, under section* 4743 *G. C. is of uniform operation in all supervision districts of the state and has no connection with state aid that may be given to weak school districts under section* 7595 *G. C.*

4. *District superintendents can be nominated by the county superintendent, but the electing body in such supervision district shall fix the compensation of the district superintendent as well as his term, which may be for a period not to exceed three years following his first contract for one year.*

COLUMBUS, OHIO, August 5, 1919.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for the opinion of this department upon the following questions:

> "Is there any statutory limitation to the powers of the presidents of the boards of education of the districts constituting a supervision district which contains one or more weak districts receiving state aid under the provisions of sections 7595 and 7595-1 of the General Code of Ohio as to the maximum amount of salary that may be paid a district superintendent?

For what length of time may a district superintendent be employed the first time after a supervision district has been formed? For what length of time may he be employed thereafter? "

Section 4739 G. C. provides that each supervision district shall be under the direction of a district superintendent, who shall be elected by the presidents of the village and rural boards of education within such district, unless where such supervision district contains three or less rural or village school districts such district superintendent shall then be chosen by the members of the boards of education of such school districts in joint session. District superintendents shall be employed upon the nomination of the county superintendent, but the board may elect a district superintendent who has not been nominated by the county superintendent, by a majority vote of the rural and village presidents composing such district. The section means that the district superintendent, being an administrative officer, can suggest a name to the board, but the authority goes no further, as far as the law is concerned, in recommending either the salary or the time of the contract, the latter two matters being entirely within the purview and jurisdiction of the electing body.

Section 4743 of the General Code reads as follows:

"The compensation of the district superintendent shall be fixed at the same time that the appointment is made and by the same authority, which appoints him; such compensation shall be paid out of the county board of education fund on vouchers signed by the president of the county board. The salary of any district superintendent shall in no case be less than one thousand dollars per annum, half of which salary not to exceed seven hundred and fifty dollars shall be paid by the state and half by the supervision district, except where the number of teachers in any supervision district is less than forty in which case the amounts paid by the state shall be such proportion of half the salary as the ratio of the number of teachers employed is to forty. The half paid by the supervision district shall be pro-rated among the village and rural school districts in such district in proportion to the number of teachers employed in each district."

The above section provides that the district superintendent shall have his compensation fixed at the same time that he is appointed and by the same authority which appoints him, that is, the electing body. Growing out of said section, your question now arises as to whether the figures mentioned in section 4743 place a mandatory limit upon the amount of salary that may be paid a district superintendent by the various boards of education composing a supervision district, such salary being paid out of the county board of education fund upon the order of the presidents of the county board, but a portion of which is afterwards prorated among the village and rural school districts in such district in proportion to the number of teachers employed in each district.

Attention is invited to the fact that section 4744-1 G. C., which provides for the salary of the county superintendent and the portions that shall be paid by the state and by the school districts composing the county districts, reads practically the same as section 4743 G. C., which latter section treats of the salary of the district superintendent. While section 4743 G. C. has never been construed on the particular point in question, yet the same principle has been covered in an opinion of the Attorney-General, rendered upon section 4744-1, bearing upon the salary of the county superintendent, which section also carries the language that "half of such salary shall be paid by the state * * * and in no case may the amount paid by the state be more than one thousand dollars." The opinion referred to, bearing upon the question as to whether a county board of education could pay more than $2,000.00 salary to a

county superintendent, inasmuch as the state, under the law at that time, was permitted to furnish but one thousand dollars of the whole, was rendered on September 21, 1914, to the prosecuting attorney of Cuyahoga county, and appears at page 1265, Vol. 2, 1914 Annual Report of the Attorney-General. The syllabus of such opinion reads:

> "There is nothing in section 4744-1 G. C. which prohibits a county board of education from fixing the salary of the county superintendent at any amount in excess of twelve hundred dollars per year as it may deem proper.
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> When the board of education fixes the salary of the county superintendent in an amount greater than two thousand dollars, the county district is to pay the balance remaining after deducting the one thousand dollars to be paid by the state and such balance is to be apportioned and certified as provided by sections 4744-1, 4744-2 and 4744-3 G. C."

In a very exhaustive opinion upon this section, which is largely analogous to section 4743, which governs the pay of district superintendents, the Attorney General said:

> "If it were the intent of the legislature that the salary should in no event exceed two thousand dollars, why was this not said? A minimum is provided definitely, 'the salary shall be fixed * * * to be not less than $1,200.00 per year.' No maximum is named. It is provided that half the salary is to be paid by the state, the balance by the county school district. It is then provided that the amount to be paid by the state in no case shall be more than $1,000.00 This is in a separate sentence. * * * If the maximum salary is to be $2,000.00, then, as the legislature has not so said, after limiting the amount to be paid by the state to $1,000.00 it should also limit, in the same way, the amount to be paid by the county school district. This is not done. Can it be inferred that because the provision is for the state to pay one-half of such salary, and in no case to pay more than $1,000.00, the salary is limited by law to $2,000.00. I do not think so; for the following reasons:
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> First. A definite minimum of $1,200.00 is provided.
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> Second. No maximum is provided.
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> Third. Limitation s expressly placed on the amount the state may pay.
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> Fourth. No limitation is placed on the amount to be paid by the county school district."

After discussing the matter further very exhaustively, the Attorney-General concludes with this statement:

> "In any event I cannot see that this alters the main question; that is, that the salary is not limited by the act, to $2,000.00. Even if it were true that not to exceed half of the salary is to be paid by the county district, the fact still remains that nowhere in this statute does it say that the half to be paid by the county school district is not to exceed $1,000.00.
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> * * * upon first reading it, one at once gains the impression that a limitation of $2,000.00 is placed upon the salary, but upon carefully considering it, from every angle, it is perfectly plain that this is not the case, and whether it be by design or not, the statute carefully refrains not only from placing any maximum limit upon the amount of the salary of the county superintendent, but also from placing any maximum limit upon the portion of the salary which the county district is to pay."

The above opinion is quoted for the reason that the same language which gives the salary of the county superintendent also appears to be the governing language in section 4743, supra, which governs the compensation of the district superintendent, and it seems to have been the policy throughout the state to have accepted such opinion of the Attorney-General as bearing upon both the maximum salary of the county superintendent and the maximum salary of the district superintendent.

An examination of the files in the office of the superintendent of public instruction shows that while section 4743 G. C. might indicate that the salary of any district superintendent could not be more than $1,500.00, for the reason that the portion paid by the state is $750.00 as the state's maximum, the majority of district superintendents in Ohio, from the records in the office of the superintendent of public instruction, have been receiving more than $1,500.00, the state paying $750.00, the maximum of the state's portion under section 4743 G. C., and the remainder being paid by the village and rural school district in such district in proportion to the number of teachers employed in such district. However, where the number of teachers is less than forty in such supervision district, the portion paid by the state is that fractional amount of $750.00 which the number of teachers bears to forty teachers; that is, a supervision district with thirty-four teachers would receive 34–40 of the $750.00 allowed by the state and the remainder of such salary would be made up by the districts themselves, who are the employing body.

It is entirely clear that the construction put upon section 4744-1 G. C., by the former Attorney-General, in 1914, would apply with equal force in construing section 4743 G. C., that is, that there is nothing in the law which prevents a supervision district from paying more than the $1,000.00 minimum mentioned in such section, or the $1,500.00 that might be in force from such section on the basis that the state was to always pay one-half of the total salary.

You indicate that such supervision district might contain one or more weak school districts receiving state aid under section 7595 and 7595-1 of the General Code, and desire to know if the fact that there is one or more weak schools in such supervision district would obviate against the general provisions which apply in other supervision districts regarding the district superintendent's salary.

It is clear there is no connection between the two for the reason that the aid which is given by the state to *all supervision districts*, in order to enable them to more easily comply with the requirements of the law that they have a superintendent, applies uniformly over the entire state and has nothing to do with the "state aid to weak school districts," and such aid granted under section 4743 G. C., and also under section 4740 G. C., is allowed whether such districts are weak or not. The Attorney-General has previously ruled upon this point and attention is invited to opinion 1179, Vol. 2, 1916, Opinions of the Attorney-General.

In answer to your question as to what length of time the district superintendent may be employed for the first time if a supervision district has been formed, attention is invited to section 4741 G. C., which reads in part as follows:

> "The first election of any district superintendent shall be for a term not longer than one year, thereafter he may be re-elected in the same district for a period not to exceed three years.'

Bearing upon the above section it may be said that the electing body which has the sole power to fix the compensation, as well as the term, has no authority to elect for a longer period than one year where such election is the first election of any district superintendent in a certain district. However, after such first employment has taken place for the one year term, and has been satisfactory, the law contemplates under section 4741 G. C. that the school system should be disturbed as little as possible by making new contracts for short periods, and where a district superintendent has been

satisfactory, the policy of employment for more than one year should be encouraged for the reason that such employes would seemingly be able to give better service in that district by knowing that his tenure extended beyond the present school term. Not only is the teacher entitled to this consideration—and the law had it in mind when they set the maximum at three years—but the people of the district are also entitled to know whether continuous changes are liable to occur in the superintendency of the schools in which they are interested. If the law did not contemplate that elections of district superintendents, after the first election, should be for a longer period than one year, but not exceeding three years, then there would not have occurred in the law the maximum limitation of three years.

It is, therefore, the opinion of the Attorney-General:

1. There is nothing in section 4743 G. C. which prohibits the fixing of the salary of a district superintendent by the electing body at any amount in excess of $1,000.00 per year which it may deem proper.

2. When the salary of the district superintendent is fixed in an amount greater than $1,500.00, the supervision district is to pay the balance remaining after deducting the portion paid by the state and such balance is to be apportioned and certified as provided in sections 4744-1, 4744-2 and 4744-3 of the General Code.

3. The financial assistance rendered by the state in the payment of salaries of district superintendents, under section 4743 G. C. is of uniform operation in all supervision districts of the state and has no connection with state aid that may be given to weak school districts under section 7595 G. C.

4 District superintendents can be nominated by the county superintendent, but the electing body in such supervision district shall fix the compensation of the district superintendent as well as his term, which may be for a period not to exceed three years following his first contract for one year.

Respectfully,
JOHN G. PRICE,
Attorney-General.

543.

MUNICIPAL CORPORATION—COPY OF ORDINANCE SHALL BE FILED WITH CITY AUDITOR OR VILLAGE CLERK BEFORE CIRCULATING REFERENDUM PETITION—SAID PROVISION OF SECTION 4227-6 G. C. IS MANDATORY.

The provision of section 4227-6 G. C. that a duly verified copy of an ordinance shall be filed with the city auditor or village clerk before circulating a referendum petition, is mandatory and jurisdictional.

COLUMBUS, OHIO, August 5, 1919.

HON. WILLIAM T. DIXON, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—Your letter of recent date requesting my opinion relative to section 4227-6 G. C. was duly received, and reads as follows:

"Under date of May 6, 1919, the city council of the city of Bellaire, Ohio, passed an ordinance relative to permits to use public streets for public meetings, etc. This ordinance was approved by the mayor and is now law.

A referendum petition has been filed, with the required number of names, as provided by law.

No attempt was made to comply with section 4227-6 of the General Code. See volume 104 at the top of page 240, and no copy of the ordinance was filed with the city auditor.

Will the omission to comply with this section of the General Code invalidate the referendum?"

The statute referred to in your letter provides as follows:

"Whoever seeks to propose an ordinance or measure in a municipality by initiative petition or file a referendum petition against any ordinance or measure shall before circulating such petition file a duly certified copy of the proposed ordinance or measure with the city auditor, if it be a city, or with the village clerk, if it be a village."

It is my opinion that the filing of a duly verified copy of the proposed ordinance with the city auditor or village clerk, as the case may be, before circulating a referendum petition against it, as provided in that section, is mandatory and jurisdictional, and that failure so to do invalidates the referendum. This conclusion is justified under the doctrine of Wright vs. City of McMinnville, 59 Ore., 397; and State vs. Fulton, decided by the supreme court of Ohio on Janauary 28, 1919.

In Wright vs. City of McMinnville, supra, an initiative petition for an amendment to the city charter was filed with the proper officer, but the provision of the law requiring that notice of the election be posted in three public places in the city was not complied with. Notices of the election were issued, but only one copy posted, and in lieu of the other two postings the notice was printed in two consecutive issues of newspapers printed in the city, and also printed in a pamphlet and mailed to each voter, etc. The failure to post the notices as required by law was held fatal.

In the opinion of the court, speaking with respect to the particular statute involved, said:

"The command in this respect was imperative, and necessitated the posting of notices in three public places in the city, in the failing to comply with which the election was void."

In State vs. Fulton, supra, it was held that the provisions of the state constitution for the filing of petitions of proposed amendments to the constitutions, and for copies, arguments and explanations thereof, etc., are mandatory and jurisdictional.

Respectfully,

JOHN G. PRICE,

Attorney-General.

544.

SCHOOLS—COUNTY OR CITY BOARD OF SCHOOL EXAMINERS—CANNOT LEGALLY ISSUE CERTIFICATES FOR BRANCH OF STUDY NOT ENUMERATED IN STATUTE—CANNOT LEGALLY PAY TEACHER FOR INSTRUCTING IN SAID BRANCH—WHEN TEACHER HOLDS NO CERTIFICATE OF DISTRICT OVER WHICH BOARD HAS JURISDICTION CANNOT BE LEGALLY PAID.

1. *A county or city board of school examiners may not legally issue certificates for a particular branch of study not enumerated in the sections of law respectively relating to such boards.*

2. *A county or city board of school examiners may not legally issue certificates for a particular branch of study not enumerated in the law but which is considered by the examining and issuing board to logically be an extension of or logically related to, a branch or branches of study already enumerated in the law.*

3. *A board of education cannot legally pay a teacher for instructing in a branch of study not enumerated in the law.*

4. *A person who holds no certificate cannot be legally paid by a board of education for teaching in schools of the district over which the board has jurisdiction.*

COLUMBUS, OHIO, August 5, 1919.

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

GENTLEMEN:—Acknowledgment is made of your request for an opinion on the following questions:

> "1. May a county or city board of school examiners legally issue certificates for a particular branch of study not enumerated in the sections of law respectively relating to such boards?
>
> 2. May a county or city board of school examiners legally issue certificates for a particular branch of study not enumerated in the law, yet which is considered by the examining and issuing board to logically be an extension of, or logically be related to, a branch or branches of study already enumerated in the law?
>
> 3. If such boards may legally issue certificates for a particular branch of study not enumerated in the law is the inclusion of that branch, in a certificate, to be made only upon the initiative of the examining and issuing board, or primarily and necessarily upon the suggestion or the desire of a board of education?
>
> 4. May a board of education legally pay a legally certificated teacher for instructing in a branch of study not enumerated in the law? May such board pay such teacher for instructing in a branch of study that is considered by that board to logically be an extension of, or logically be related to, a branch or branches of study already enumerated in the law and specifically covered by the certificate held?
>
> 5. May a person who holds no certificate whatever, unless it be for a non-enumerated branch, be legally paid by a board of education for instructing throughout the school year in a branch of study that is a part of the curriculum, yet is not enumerated in the law? May such board legally pay such person for instructing throughout the school year in a branch of study that is in both the curriculum and the law?"

Careful examination has been made of the enclosures and exhibits from the city of Cleveland, where this question arose, including the correspondence in 1917 between the state superintendent of instruction and the Cleveland school officials. It would seem that the condition has been corrected in that city, from the following statement by the secretary to the superintendent of schools of Cleveland, but for your future guidance an opinion is herein given.

In reply to the request of this department for further information that would be more recent than the file submitted, the secretary to the superintendent of schools of Cleveland says:

> "In 1917, the mayor's advisory war board established classes for the instruction of aliens who had applied for their second papers. These classes were established under an arrangement which provided that the board of education should appoint the teachers and supervise their work. The teach-

ers were appointed and duly certificated. The payrolls covering their services were made up in the division of educational extension and sent to the mayor's board, out of whose funds they were paid.

During this school year these classes have been conducted on another plan. The teachers have been selected by the mayor's board and paid out of the board's funds. They have not been appointed by the board of education nor have they been certificated, except in cases where regular teachers holding certificates to teach in the public schools have been selected by the mayor's board for citizenship class work."

In order to determine what certificates may be issued by a board of examiners and to whom the same may be issued, it is first necessary to determine the exact powers of the various boards of school examiners mentioned in your inquiry, and to aid in such determination it will be necessary to note the several sections of the General Code which make reference thereto and the classes of certificates which each board is authorized to issue.

Section 7811 G. C. provides that there shall be a county board of school examiners for each county which shall consist of the county superintendent, one district superintendent and one other competent teacher, and section 7816 provides:

"The board shall make all needful rules and regulations for the proper discharge of its duties, and the conduct of its work, *subject to statutory provisions* and the approval of the superintendent of public instruction."

Section 7821 provides that county boards of school examiners may grant teachers' certificates for *one year* and *three years* which shall be valid in all villages and rural school districts of the county wherein they are issued. Section 7821-1 provides that all five year and eight year certificates now granted (that is, which were granted prior to the enactment of said section) shall continue in force until the end of their terms and shall be renewed by the superintendent of public instruction upon proof that the holders thereof have taught successfully until the time of each renewal.

Section 7821-2 G C. provides:

"All two-year and three-year primary, elementary and h gh school certificates now granted shall continue in force until the end of their terms and may be renewed by the county boards of examiners on proof of five years' successful teaching experience.'

Special certificates are provided for in section 7852 G. C., which reads as follows:

"No person shall be employed and enter upon the performance of his duties as a special teacher of music, drawing, painting, penmanship, gymnastics, German, French, Spanish, the commercial and industrial branches, or any one of them, in any elementary or high school supported wholly or in part by the state in any city, village, or rural school district, who has not obtained from a board of examiners having legal jurisdiction a certificate of good moral character that he or she is qualified to teach the special branch or branches of study, and, in addition thereto, possesses an adequate knowledge of the theory and practice of teaching."

Emergency certificates are provided for by section 7832-1 G. C. as follows:

"A 'teacher's emergency certificate' which shall be valid for one year in any village or rural school district in the county may be granted by the county

board of school examiners with the approval of the superintendent of public instruction to applicants who have had one year's experience teaching in the public schools whenever for any reason there is a shortage of teachers in such district."

The various certificates, whether issued for one or three years, or renewedfor two, three, five or eight years, are divided into three classes or kinds by the provisions of section 7829 G. C., which reads as follows:

"Three kinds of teachers' certificates only shall be issued by county boards of school examiners, which shall be styled respectively 'teacher's elementary school certificate,' valid for all branches of study in schools below high school rank, 'teacher's high school certificate,' valid for all branches of study in recognized high schools and for superintendents and 'teacher's special certificate,' valid in schools of all grades, but only for the branch or branches of study named therein."

An elementary school is defined as:

"Section 7648. An elementary school is one in which instruction and training are given in spelling, reading, writing, arithmetic, English language, English grammar, composition, geography, history of the United States, including civil goverment, physiology and hygiene. Nothing herein shall abridge the power of boards of education to cause instruction and training to be given in vocal music, drawing, elementary, algebra, the elements of agriculture and other branches which they deem advisable for the best interests of the schools under their charge."

A high school is defined as:

"Section 7649. A high school is one of higher grade than an elementary school, in which instruction and training are given in approved courses in the history of the United States and other countries; composition, rhetoric, English and American literature; algebra and geometry; natural science, political or mental science, ancient or modern foreign languages, or both, commercial and industrial branches, or such of the branches named as the length of its curriculum makes possible. Also such other branches of higher grade than those to be taught in the elementary schools, with such advanced studies and advanced reviews of the common branches as the board of education directs."

It is most worthy of being noted here that while an elementary certificate is valid for all branches of study in schools below high school rank and the high school certificate is valid for all branches of study in recognized high schools and for superintendents, yet that teachers' special certificates *are valid in schools of all grades but only for the branch or branches of studies mentioned therein.* This is an indication of legislative intent which must not be overlooked.

Section 7830 G. C. provides:

"No person shall be employed or enter upon the performance of his duties as a teacher in any elementary school supported wholly or in part by the state in any village, or rural board district who has not obtained from a board of school examiners having legal jurisdiction a certificate of good moral char-

acter; that he or she is qualified to teach orthography, reading, writing, arithmetic, English grammar and composition, geography, history of the United States, physiology, including narcotics, literature and elementary agriculture, and that he or she possess an adequate knowledge of the theory and practice of teaching."

Section 7831 G. C. provides:

"No person shall be employed or enter upon the performance of his duties as a teacher in any recognized high school supported wholly, or in part, by the state in any village, or rural school district, or act as a superintendent of schools in such district, who has not obtained from a board of examiners having legal jurisdiction a certificate of good moral character; that he or she is qualified to teach six branches or more selected from the following course of study (three of which branches shall be algebra, rhetoric and physics); literature, general history, algebra, physics, physiology, including narcotics, Latin, German, rhetoric, civil government, geometry, physical geography, botany and chemistry, and high school agriculture; and that he or she possesses an adequate knowledge of the theory and practice of teaching."

So that, as noted by the above quoted sections, before a teacher can teach the elementary branches he must secure an elementary certificate and before he can teach the high school branches he must secure a high school certificate, and before he can teach the special branches he must secure a special certificate.

To recapitulate, then, with reference to county certificates, the board is permitted to grant the three classes, elementary, high and special, and outside of the emergency certificate which is granted by the board, with the approval of the superintendent of public instruction, no other kinds or class of county school certificates are provided for by our laws.

Coming now to the certificates which may be issued by the city board of school examiners, section 7838 G. C. provides that there shall be a city board of school examiners for each city school district. Such board shall consist of the city superintendent of schools and two other competent teachers serving full time in the dayschools of such city, and section 7841 G. C. provides that to secure a thorough examination of applicants in difficult branches, or special studies, the board may secure the temporary assistance of persons of sufficient knowledge in such branches or studies, who must promise on oath or affirmation to perform the duties of examiner faithfully and impartially.

Section 7844 G. C. provides for the issuing of one year and three year certificates; section 7845 G. C. provides for the renewal of all five and eight year certificates; Section 7846 G. C. provides for renewal of all two and three year certificates and section 7852 G. C. provides:

"The provisions of this chapter relating to the kinds of certificates authorized to be issued by the county boards of school examiners for teachers in elementary schools, high schools and for superintendents shall apply to city boards of school examiners; except that city boards, in their discretion, may require teachers in elementary schools to be examined in drawing, music, or German, if such subjects are a part of the regular work of such teachers."

That is, the provisions of section 7829, supra, which provides that there shall be three classes of certificates, viz., elementary, high and special, are made by the provisions of section 7852 G. C. to apply to city boards of school examiners and therefore if it was the intention of the legislature, as I think it was, that no one but the possessor of an elementary or a high school certificate, or one who would be permitted to teach

in all grades, could secure a special certificate, then the city board of school examiners would have no right to issue special certificates to any person outside of those who are entitled to elementary or high school certificates.

Teachers are not permitted to teach in Ohio without a certificate. In School District No. 2, etc., vs. Dillman, 22 O. S., 194, it was held:

> "The law forbids the employment of a teacher who has not secured a certificate. * * * The mischief intended to be guarded against was the teaching of a school by an incompetent person * * *."

Section 7786 G. C., which is general in its nature, that is, applies to all boards of education, provides that:

> "No clerk of a board shall draw an order on the treasurer for the payment of a teacher for services until the teacher files with him such reports as are required by the superintendent of public instruction and the board of education, *a legal certificate of qualification*, or a true copy therof, covering the entire time of the service, and a statement of the branches taught. *But orders may be drawn for the payment of special teachers of drawing, painting, penmanship, music, gymnastics, or a foreign language, on presentation of a certificate to the clerk, signed by a majority of the examiners, and the filing with him of a true copy thereof, covering the time for which the special teacher has been employed, and the specialty taught.*"

This opinion is based on existing law in force at this time and there should be read in conjunction herewith the provisions of new legislation on certificates which, however, is not effective until in September, 1919. After that time the provisions of senate bill 44, senate bill 134 and house bill 317, all bearing on certificates, will apply. These new laws in nowise militate against the holding herein, but rather strengthen it, for section 7831 G. C. has been amended to read:

> "* * * and no such certificate shall be issued by such authority except on the *specific conditions provided by the statute.*"

These new laws, effective in September, 1919, provide for the certification of teachers to teach vocational subjects under the supervision of the state board of education; elimination of German from teachers' examinations with an oath of allegiance by teachers; the issuing of elementary and high school life certificates, including kindergarten, primary certificates by the superintendent of public instruction; in fact the legislature has seemed to make more clear the provisions that certificates cannot be granted except upon subjects specifically provided by law.

A further discussion of the payment of instructors in branches not provided by existing law, is found in opinion No. 396, under date of June, 1919, to the superintendent of public instruction. holding that a board of education could not say that military training was an extension of "physical training" and that it could not be placed in the curriculum under section 7721 G. C., which provides for physical training.

It is therefore the opinion of the Attorney-General that:

> "1. A county or city board of school examiners may not legally issue certificates for a particular branch of study not enumerated in the sections of law respectively relating to such boards.
>
> 2. A county or city board of school examiners may not legally issue certificates for a particular branch of study not enumerated in the law, but

which is considered by the examining and issuing board to logically be an extension of or logically related to, a branch or branches of study already enumerated in the law.

3. The answers to your first and second questions answer your third.

4. A board of education cannot legally pay a teacher for instructing in a branch of study not enumerated in the law.

5. A person who holds no certificate cannot be legally paid by a board of education for teaching in schools of the district over which the board has jurisdiction.

Respectfully,
JOHN G. PRICE,
Attorney-General.

545.

SCHOOLS—CENTRALIZATION AND BOND ISSUE FOR SAID CENTRALIZATION CANNOT BE SUBMITTED TO ELECTORS AT SAME TIME—SEE SECTION 4726-1 G. C.—CENTRALIZATION UNDER SECTION 4726-1 G. C. CAN BE SUBMITTED AT EITHER A GENERAL OR SPECIAL ELECTION.

1. *The question of centralization of schools and the issuance of bonds necessary to the furtherance of the scheme of centralization, can not be submitted at the same time to the qualified electors of the school district under section* 4726-1 *G. C.*

2. *Where the qualified electors in the township proceed to the centralization of schools under section* 4726-1, *such question can be submitted at either a general election or special election called for that purpose by the respective boards of education concerned, or upon the order of the county board of education, or upon petition of not less than one-fourth of the qualified male electors in such township.*

COLUMBUS, OHIO, August 5, 1919.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio:*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following two questions:

"1. Can the question of centralization and issuing of bonds be submitted at the same time to the qualified electors of school districts under section 4726-1 of the General Code to be voted upon at the same time, or will it be necessary for them to be voted upon at separate elections?

2. Can centralization be voted upon at a special election in accordance with the provisions of section 4726-1 of the General Code?"

In reply to your first question your attention is invited to opinion No. 41, dated January 30, 1915, and appearing at page 67, Vol. 1, Opinions of the Attorney-General for 1915, wherein the syllabus reads:

"A proposition for the centralization of schools under the provisions of section 4726, General Code, and a proposition to issue bonds authorized by section 7625 G. C. may both be submitted to the electors of the rural school district at one election."

In arriving at such conclusion the Attorney-General said:

"I assume that the bonds referred to are deemed necessary to the furtherance of the scheme of centralization, and I shall confine my answer to such state of facts.

I am of the opinion that the question of centralization of schools as provided in section 4726 G. C., as amended in 104 O. L. 139, and the question of the issuance of bonds as authorized by section 7625 G. C., may both be submitted to the electors of a rural school district at one election. It might be suggested, however, that before the issue of such bonds would thereby be authorized, there must be a concurrence of a majority of the votes cast at such election in favor of both centralization and the issuing of bonds, and the answer implies that the election shall be in all further respects in compliance with the statutes relative thereto."

It is noted that the above opinion is upon section 4726 G. C., while you make your inquiry relative to the same question as regards section 4726-1 G. C., which latter section takes care of the question of centralization in a township in which there is more than one rural or special district.

It may be said in a general way that unless section 4726-1 G. C. be read in conjunction with section 4726 G. C., the supplemental section would not be put into force for the reason, among others, that section 4726-1, taken alone, does not provide for the manner of calling an election for the centralization of the districts in question in the township and therefore it is necessary that this special section, speaking of centralization, must be read in the light of section 4726 G. C., which section, preceding the supplemental section, provides for the calling of elections on school centralization.

But while a school district operating under section 4726 G. C., in order to bring about centralization can hold the election on centralization and vote on the question of a bond issue on one and the same day, a close analysis of section 4726-1 G. C. (which governs where more than one district is concerned) shows that under such section the questions must be submitted separately and at different times.

Section 4726-1 G. C. reads as follows:

"In townships in which there are one or more school districts, the qualified electors of such school districts may vote on the question of centralizing the schools of said township districts, or of special school districts therein, without interfering with the existing school district organization until the result of the election shall have been determined. If at such election in any township a majority of all the votes cast shall be in favor of centralizing the schools in said township, the probate judge of the county shall create a new board of education for the said township, without delay, by selecting from the several boards of education thus consolidated, five suitable persons, giving each former district its fair representation in such selection, which such five persons so selected shall constitute the board of education for said township until the first township election thereafter; at such first township election thereafter the electors of such township shall elect two members of the board of education for two years, and three members to serve for three years, and at the proper elections thereafter their successors shall be elected for four years. If a majority of the electors in said township vote against said centralization at the time above designated, then the several school districts in said township shall proceed as though no election had been held."

Section 7625 G. C. reads as follows:

"When the board of education of any school district determines that

for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a schoolhouse or houses, to complete a partially built schoolhouse, to enlarge, repair or furnish a schoolhouse, or to purchase real estate for playground for children, or to do any or all of such things, that the funds at its disposal or that can be raised under the provisions of sections seventy-six hundred and twenty-nine and seventy-six hundred and thirty, are not sufficient to accomplish the purpose and that a bond issue is necessary, the board shall make an estimate of the probable amount of money required for such purpose or purposes and at a general election or special election called for that purpose, submit to the electors of the district the question of the issuing of bonds for the amount so estimated. Notices of the election required herein shall be given in the manner provided by law for school elections."

It will be noted that to call an election to issue bonds for a new school building the election must be called by "the board of education" of any school district. In the case at hand, under section 4726-1 G. C., there is more than one board of education prior to centralization being passed, and until centralization is passed by a majority vote, "then the districts shall proceed as though no election were held" (section 4726-1 G. C.). The section on bonds (section 7625 G. C.) further provides that "*the* board shall make an estimate" and the question shall be submitted to "the electors of *the district.*" Here "the district" in question is not created until after centralization carries by a majority of all votes cast, and there follows a new school board appointed by the probate judge of the county, and it is for this new board of education to call the election on the bond issue in the new centralized district. The old boards involved pass out with centralization, while this is not true under section 4726 G. C., under which one district centralizes and no new board is created. Where centralization is had in one district under section 4726 G. C., the same board would make the estimate and call the election, and there is no objection to such board submitting both the centralization and bond issue questions on the same day, but this condition does not obtain where two or more districts operate under section 4726-1 G. C., for the reason that "the district" to vote on the bonds under section 7625 G. C. secures *a new school boacd* which is to "make the estimate" and call the bond election. Taxes to take care of the bond issue must be laid uniformly over the whcle of the new district and the bonds to be issued must be the bonds of the new district and retiring boards of education would have no legal authority to call a bond election in a newly created district that was to have a new board of education appointed by the probate judge.

Section 7626 G. C. reads in part:

"If a majority of the electors voting on the proposition to issue bonds, vote in favor thereof, *the board* thereby shall be authorized to issue bonds for the amount indicated by the vote. The issue and sale thereof shall be provided for by *a resolution* * * *."

Bonds issued for centralization purposes must come under the provisions of sections 7625 and 7626 G. C. and such sections contemplate that but *one board of education* shall issue such bonds, and in the case indicated by you it would be the new board created by the probate judge in the new district, and it would follow that a second election is necessary for the bond issue, as the first election was upon centralization only, for under section 7625 G. C. more than one district can not vote upon *the same bond issue,* the section saying that the question shall be submitted to "the electors of the district" and not more than one district.

Referring to your second question, as to whether centralization can be voted upon at a special election in accordance with the provisions of section 4726-1 G. C., it is

advised that such supplemental section must be read in connection with section 4726 which it supplements, on the subject of centralization of schools, for, as pointed out before, section 4726-1 G. C., taken alone, does not provide clearly as to the manner of calling an election for centralization of two or more districts in a township, and it is necessary to refer to the language of section 4726 G. C., which says that the question of centralization can be submitted "to the vote of the qualified electors * * * at a general election *or a special election* called for that purpose." It must have been the clear intent of the general assembly that section 4726-1 should be an effective law and not a nullity and it is therefore necessary that the main section, which section 4726-1 G. C. supplements, must be read in conjunction with the latter section.

It is therefore the opinion of the Attorney-General that:

1. The question of centralization of schools and the issuance of bonds necessary to the furtherance of the scheme of centralization, can not be submitted at the same time to the qualified electors of the school districts, under section 4726-1 G. C.

2. Where the qualified electors in the township proceed to the centralization of schools under section 4726-1, such question can be submitted at either a general election or special election called for that purpose by the respective boards of aducation concerned, or upon the order of the county board of education, or upon petition of not less than one-fourth of the qualified male electors in such township.

Respectfully,
JOHN G. PRICE,
Attorney-General.

546.

ROADS AND HIGHWAYS—ASSISTANTS TO COUNTY SURVEYOR—PAID FROM ALLOWANCE MADE UNDER SECTIONS 2787 AND 2788 G. C—NOT FROM SPECIFIC ROAD IMPROVEMENT ALLOWANCE.

The services of assistants to the county surveyor rendered in connection with the construction of roads under the county road improvement statutes as amended 107 *Ohio Laws, are to be paid from the allowance made in accordance with sections* 2787 *and* 2788, *General Code, and are not to be charged to a specific road improvement.*

COLUMBUS, OHIO, August 5, 1919.

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

GENTLEMEN:—You have recently submitted for opinion the following:

> "We desire to call your attention to an opinion of the Attorney-General to be found in the Opinions for 1917, Volume 1, page 721, and would ask for your opinion as to whether assistants of the county surveyor while performing services on roads built under section 6919 G. C., as amended 107 O. L. 98, are to be paid from the appropriation set aside by the county commissioners under the provisions of sections 2787 and 2788 G. C., or whether the cost of their services becomes a part of the cost of the improvement which would permit such assistants to be paid from other funds than that provided in sections 2787 and 2788 G. C."

Said sections 2787 and 2788, G. C., as amended 107 Ohio Laws, p. 70, read as follows:

"Sec. 2787. On or before the first Monday of June of each year, the county surveyor shall file with the commissioners of such county a statement of the number of all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office for the year beginning on the first Monday of September next succeeding and their aggregate compensation. The county commissioners shall examine such statement and, after making alterations therein, as are just and reasonable, fix an aggregate compensation to be expended therefor for such year. Provided, however, that if at any time any county surveyor requires an additional allowance in order to carry on the business of his office, such county surveyor may make application to a judge of the court of common pleas of the county wherein such county surveyor was elected; and thereupon such judge shall hear said application, and if upon hearing the same said judge shall find that such necessity exists he may allow such a sum of money as he deems necessary to pay the salaries of such assistants, deputies, draughtsmen, inspectors, clerks or other employes as may be required. Notice in writing of such application and the time fixed by such judge for the hearing thereof shall be served by the county surveyor five days before said hearing upon the board of county commissioners of such county; and said board shall have the right to appear at such hearing and be heard upon said application and evidence may be offered both by the county surveyor and the county commissioners.

Sec. 2788. The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office, and fix their compensation, but compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners or allowed by a judge of the court of common pleas of the county. After being so fixed such compensation shall be paid to such persons in monthly installments from the general fund of the county upon the warrant of the county auditor. The county surveyor may require such of his assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems proper to give bond to the state in an amount to be fixed by the county surveyor with sureties approved by him, conditioned for the faithful performance of their official duties. Such bond with the approval of the county surveyor, indorsed thereon, shall be deposited with the county treasurer and kept in his office."

The headnote accompanying the opinion of this department to which you refer (Opinions 1917, volume 1, p. 721) reads as follows:

"The report made by the county surveyor to the county commissioners, under the provisions of section 2787 G. C. should not include those deputies and assistants who do not receive their pay from the general county fund. Neither should the total compensation reported to the county commissioners include compensation not drawn from the general county fund.'

An examination of the opinion shows that the reason underlying it was, to quote the words of the officer who submitted the question:

"* * * but that the above salary estimate is not to include the compensation of employes when engaged on either state aid road work or on ditch work; because the engineering expense on these two kinds of work becomes a part of the cost of the work, to be paid from special funds created for these purposes and not out of the general county fund."

While the opinion in question does not designate the statute which was assumed

to provide that the engineering expense on state aid improvements should be treated as part of the cost of the work, doubtless section 1219 as it appeared in the Cass act (106 Ohio Laws, 639) was the statute had in mind. That statute was amended 107 Ohio Laws, 131; and its effect as amended and when taken in connection with other pertinent statutes was passed upon by this department in an opinion of date April 20, 1918, appearing in Opinions of the Attorney-General 1918, Volume I, p. 584. The first three paragraphs of the headnote accompanying that opinion are as follows:

> "1. The cost and expense of engineering work done preliminary to the construction, improvement, maintenance or repair of highways by the state highway commissioner are paid half by the county or township making application for state aid and half by the state. If the improvement is made under the preliminary plans, the expenses of the same may be added to the total cost and expense of the improvement.
>
> 2. The cost and expense of supervision and inspection done during the progress of the construction, improvement, maintenance or repair of said highways, form a part of the total cost and expense of the improvement and are to be apportioned and paid as are other costs incident to the improvement.
>
> 3. The work performed by the county surveyor in the matter of preparing preliminary plans is covered by his regular salary under the provision of section 7181 G. C. If any engineering work is required during the course of the improvement, the county surveyor would perform the same under section 7192 G. C. However, the state highway commissioner employs all superintendents and inspectors for the improvement and they are paid as set out in syllabus No. 2."

In contrast to these express provisions of section 1219 to the effect that certain engineering, supervision and inspection expenses may be treated as a part of the cost of a state aid road improvement, we find no similar provision as to expenses of this character in the series of statutes relating to road improvements made under the supervision of county commissioners, section 6919, to which you refer, being a part of said series. This contrast becomes the more marked when we note that there are in the county road improvement statutes provisions that certain items shall be treated as part of the cost of the improvement, as, for instance, "extra work," as defined in section 6948, General Code, the cost of which, according to said section, "shall be paid by the county commissioners * * * and the amount shall be charged to the construction of said improvement and apportioned as the original contract price for said improvement," and likewise approaches to abutting lands, the cost of which under certain conditions as stated in section 7212, General Code, "may be assessed against the lands along which they are constructed."

In considering the question whether in view of the omission from the county road improvement statutes of special provisions on the subject, there is yet room to conclude from the statutes that the engineering expense is to be treated as part of the cost of a given improvement or that such expense may through affirmative action of the commissioners be so treated, our principal inquiry is, naturally, into the duties imposed upon the county surveyor. Those duties are provided for by sections 2792 and 7184, General Code (the latter as amended 107 Ohio laws, 111), which read respectively as follows:

> "Section 2792. The county surveyor shall perform all duties for the county now or hereafter authorized or declared by law to be done by a 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, constructed under the authority of any board within and for the county. When required by the county commissioners, he shall inspect all bridges and culverts, and on or before the first day of June of each year report their condition to the commissioners. Such report shall be made oftener if the commissioners so require.

Section 7184. The county surveyor shall have general charge of the construction, reconstruction, improvement, maintenance and repair of all bridges and highways within his county under the jurisdiction of the county commissioners. The county surveyor shall also have general charge of the construction, reconstruction, resurfacing or improvement of roads by township trustees under the provisions of sections 3298-1 to 3298-15n, inclusive, of the General Code. The county surveyor shall have general charge of the construction; reconstruction, resurfacing or improvement of the roads of a road district under the provisions of sections 3298-25 to 3298-53, inclusive, of the General Code. The county surveyor shall not be authorized, however, to perform any duties in connection with the repair, maintenance or dragging of roads by township trustees, except that upon the request of any board of township trustees he shall be required to inspect any road or roads designated by them and advise them as to the best methods of repairing, maintaining or dragging the same."

Thus it is seen that very broad powers and duties are cast upon the county surveyor as to county highway improvements; and as has already been noted from a reading of above quoted sections 2787 and 2788, ample provision is made for the procuring of such assistants, etc., as may be required by the surveyor in the performance of those duties. It is to be noted also that there is a mandatory provision in section 2788 that the compensation of assistants, etc., shall be paid from the county fund. Furthermore, section 7181 provides that the surveyor shall receive an annual salary, computed on a certain basis, and that "such salary shall be paid monthly out of the general county fund."

These specific provisions to the effect that the surveyor shall prepare all plans, details, forms of contract, etc. for the construction or repair of roads constructed under authority of any board within and for the county, and shall have general charge of the construction of highways within his county under the jurisdiction of the county commissioners, and that his services and those of his assistants shall be paid for out of a certain designated county fund, would seem of themselves to negative any theory that the expense of such services might ultimately be charged to a specific road improvement. It is true that section 6919 provides that "the compensation, damages, costs and expenses of the improvement shall be apportioned and paid" according to certain percentages; but while these terms are quite broad in describing the total cost of the work, the same expression and its equivalent so far as our present discussion is concerned, "cost and expense thereof," are used repeatedly in statutes relating to state aid improvements, notwithstanding which the legislature found it proper to make special provision in the latter series of statutes that certain engineering expense should be counted in calculating the cost of the improvement. But an additional and very strong reason for concluding that the words "compensation, damages, costs and expenses of the improvement," as used in section 6919 and elsewhere in the county road improvement statutes are not to be taken of themselves as authority or as giving the county commissioners authority for including in the cost of an improvement the engineering expense thereof, is found in section 6919 itself. Said section provides four methods of apportioning the "compensation, damages, costs and expenses of the improvement;" and no matter which of the four methods is chosen, a part of the total cost must be assessed against abutting or adjoining lands. Since the legislature has itself made the general rule that salaries and compensation for engineering services shall be paid

from the general county fund, we are not at liberty to assume in the absence of an express legislative enactment making an exception to that rule that the legislature may have intended an exception or may have lodged authority in another body to make an exception; for as stated in Cincinnati vs. Connor, 55 O. S. 82, at page 91 of the opinion:

> "The rule generally prevails that, independent of any legislative requirement on the subject, statutes imposing taxes and public burdens of that nature are to be strictly construed; and where there is ambiguity which raises a doubt as to the legislative intent, that doubt must be resolved in favor of the subject or citizen on whom the burden is sought to be imposed."

In the chapter of the Municipal Code providing for improvements on the assessment plan, it will be seen that the legislature in section 3896, General Code, has made special provision that "the expense of the preliminary and other surveys," shall be included as part of the cost of any improvement contemplated in that chapter; and has further made provision in section 3911 that the improvement proceedings "shall be strictly construed in favor of the owner of the property assessed or injured, as to the limitations on assessment of private property," and these enactments, to some extent at least, indicate the legislative view that engineering expense, when provided to be paid out of the general funds, is not to be taken as an item of cost chargeable to a specific improvement.

Consistent with the foregoing views will be found the opinion of our courts, and previous opinions of this department.

See—

Cincinnati vs. Longworth, 34 O. S. 101;
Spangler vs. Cleveland, 35 O. S. 469;

Also—

Opinions of Attorney-General for 1916, volume I, p. 78, opinion No. 1184;
Same volume, p. 457, opinion No. 1360; and
Opinions of Attorney-General for 1918, volume II, p. 1031,

your particular attention being invited to this last-mentioned opinion.

The answer to your question is, therefore, that the services of assistants to the county surveyor rendered in connection with the construction of roads under the county road improvement statutes as amended 107 Ohio Laws, are to be paid from the allowance made in accordance with sections 2787 and 2788, General Code, and are not to be charged to a specific road improvement.

Respectfully,
JOHN G. PRICE,
Attorney-General.

547.

CENTRALIZATION—ALL RURAL BOARDS OF EDUCATION MUST EACH CALL AN ELECTION FOR SAID PURPOSE UNDER SECTION 4726-1 G. C.—COUNTY BOARD HAS AUTHORITY TO ORDER AN ELECTION FOR CENTRALIZATION—SECTIONS 4726-1 G. C. AND 4726 G. C. MUST BE READ TOGETHER—CENTRALIZATION MUST BE ACTED UPON BY ELECTORS OF TOWNSHIP AND NOT A PART OF IT—COUNTY BOARDS OF EDUCATION HAVE AUTHORITY TO CREATE NEW SCHOOL DISTRICT FROM ONE OR MORE DISTRICTS OR PARTS THEREOF.

1. *Under section* 4726-1 *G. C. all rural boards of education in a township must each call an election in their respective districts for centralization of the schools of such township, in order that such question may be legally voted on in the manner provided in section* 4839 *G. C.*

2. *Section* 4726-1 *G. C. must be read in conjunction with section* 4726 *G. C. and a county board of education has authority to order an election on centralization of schools in a township which has one or more rural school districts as its school territory.*

3. *Centralization of schools must be voted upon by the electors of a township and not a part of it, village and city school districts being excluded.*

4. *County boards of education have full authority to create a new school district from one or more districts or parts thereof.*

COLUMBUS, OHIO, August 5, 1919.

HON. GEORGE F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

"It is proposed by the township rural school districts of one of the townships in our county, to call an election for the purpose of voting on the question of centralizing the schools of the township. In this township there are three special school districts. In one of these special districts there are not sufficient petitioners (25 per cent) to compel the board of education to call an election. The county board of education has not asked nor ordered the board of education in the special district to hold an election and the board of education in said special district has failed to call an election on the question of centralization.

Should the said township rural school district proceed with the election and centralization should carry, and the special district in question should take no part in said election and none of the residents vote on the question of centralization at such election, what effect, if any, would that have on the special school districts stated? In other words, will the special school district in any way be bound by the vote of the balance of the township on the question of centralization, and will they be compelled to come into the centralized district? "

Section 4726-1 G. C. provides:

"In townships in which there are one or more school districts, the qualified electors of such school districts may vote on the question of centralizing the schools of said township districts, or of special school districts therein, without interfering with the existing school district organization until the result of the election shall have been determined. If at such election in any township a majority of all the votes cast shall be in favor of centralizing the

schools in said township, the probate judge of the county shall create a new board of education for the said township, without delay, by selecting from the several boards of education thus consolidated, five suitable persons, giving each former district its fair representation in such selection, which such five persons so selected shall constitute the board of education for said township until the first township election thereafter; at such first township election thereafter the electors of such township shall elect two members of the board of education for two years, and three members to serve for three years, and at the proper elections therafter their successors shall be elected for four years. If a majority of the electors in said township vote against said centralization at the time above designated, then the several school districts in said township shall proceed as though no election had been held."

Attention is invited to opinion No. 1102, issued by the Attorney-General March 25, 1918, found on page 476 of the Opinions of the Attorney-General for that year, bearing upon section 4726-1 G. C., wherein the syllabus reads:

"1. In a township in which there are seven rural school districts the qualified electors of all of such districts may vote on the question of centralizing the schools of such township district.

2. It is not permissible under the provisions of section 4726-1 G. C. for a part of the school districts of a township to vote on the centralizing of the schools of such districts and prevent the electors of other districts, located in whole or in part within the township, from participating in said election.

3. A part of the districts of a township may be united as one district and then provide for centralization under the provisions of section 4726 G. C.

4. The fact that certain territory is located in another civil township, but is attached to the territory of a township where all the districts desire to vote on the question of centralizing the schools of such township, will not prevent the electors residing therein from participating in the election upon the question of centralizing the schools of such township under section 4726-1 G. C."

The question which was answered in this opinion was in the case of where, in a certain township, there were seven special school districts, only four of which were wholly within the township, the rest having adjacent attached territory beyond the township lines, and it was desired to know whether the four districts could centralize their schools without action on the part of the other three special districts or any part of them. Commenting upon such section, in answering the question, which in a very large degree is similar to the one which you have submitted, the Attorney-General said:

"The section is not clear when considered with a view to answering your several questions but I am convinced from a careful consideration of same that all the school districts of a township must participate, where action is desired, under the terms of said section. While it was formerly the policy of the school law of Ohio, and provision was made therefor, that each civil township in itself should consist of a township school district, that provision of law no longer exists and the policy seems now to be that township lines shall not be seriously considered in forming or arranging school districts. In fact, when the new school code was enacted in 1914, section 4736 thereof provided that:

'In changing boundary lines the board may proceed without regard

to township lines, and shall provide that adjoining rural districts are as nearly equal as possible in property valuation.'

This provision no longer remains in said section but the policy thereof seems to be constantly followed in practice. Said section 4726-1 says, 'in townships in which there are one or more school districts.' It does not say where there are one or more entire school districts, but simply that there is more than one school district; that then the qualified electors of such school districts, meaning of course all the school districts of the township, may vote on the question of the centralizing of the schools of said township districts. If the language would say 'may vote upon the question of the centralizing of the school districts lying only within the township lines of the civil township,' or would specifically provide that all territory outside of such township lines should be excluded and residents thereof not permitted to participate in such election, a different conclusion might be reached, but, as noted above, considering the language in its present form, I can come to but one conclusion and that is that all school districts with territory within the township must unite when the provisions of section 4726-1 are followed. You will understand, however, that each school district may centralize its schools separately, as is provided by section 4726 G. C., and in case such proceeding is impracticable, districts may be combined into one district and then centralize their schools."

In the case which you submit you indicate that practically the entire township rural population is favorable to the proposition of holding an election for the purpose of voting on the question of centralizing the schools of the township and that in such township there are three special school districts, in one of which there is not sufficient petitioners to call an election in that particular district, under the provisions of section 4726-1, and it is entirely possible that in such special district the question of centralization may not be voted upon.

Attention is invited to the fact that under the existing Ohio law and since the adoption of the new school code in 1914, there are no longer any special districts, but such former special districts are now rural school districts and the tendency has been toward centralization of the schools of a township and the elimination of many of these small former special districts, in order that the township, as a whole, by uniting its efforts along educational lines, may be in a position to bring to all its pupils the best possible educational advantages which grow out of unity of purpose and a common endeavor. It would hardly seem reasonable or good school administration, that a small rural school district, formerly a special school district, could hold out and nullify the desires of the other district or districts, in the township and thus prevent a majority of the electors of such township from securing the centralization of schools which a majority of such township might desire.

A careful analysis of the language of section 4726-1 G. C. shows the intent of the legislature to be that centralization of schools should take place in a township for the reason that the section speaks of "such election in any township," the "schools in said township," and that after an election in such township there shall be created "the board of education for said township" by the probate judge in his selection from the several boards of education thus consolidated five suitable persons; further, this section speaks of the "electors of the township," in that they shall elect in the following years the members of the board of education. The section further says:

"If a majority of the electors in said township vote against said centralization * * * then the several school districts in said township shall proceed as though no election had been held."

Nowhere in the above section is there any provision that any lesser section of

territory than a township shall vote upon the question of centralization of schools, and it is section 4726-1 which provides for the centralization of schools in townships in which there are one or more school districts.

But section 4726-1 G. C., taken alone is not effective, for the reason that it does not provide for calling an election, but merely says,

> "the qualified electors of such school districts may vote on the question of centralizing the schools of said township districts, or special districts therein."

Supplemental section 4726-1 G. C. must be read in the light of, and in connection with, section 4726 G. C., which it supplements in order to care for a township in which there is more than one district. Section 4726 G. C. reads in part:

> "* * * upon the order of the county board of education, must submit such question to the vote of the qualified electors * * * at a general or special election * * *."

It would follow that if a county board has authority to order an election in a township to centralize its schools, where such township is one district, then an election could also be ordered by that authority in a township which happened to have more than one district, for in centralization proceedings the township is the unit, and the purpose in both section 4726 G. C. and supplemental section 4726-1 G. C. is to get the view of a majority of the electors *in a township.*

So unless section 4726-1 G. C. is read with main section 4726 G. C. there is no provision for calling an election unless every one of the school boards in the township join in the action and call the election under section 4839 G. C., which reads:

> "The clerk of each board of education shall publish a notice of all school elections in a newspaper of general circulation in the district or post written or printed notices thereof in five public places in the district at least ten days before the holding of such election. Such notices shall specify the time and place of the election, the number of members of the board of education to be elected, and the term for which they are to be elected, or *the nature of the question to be voted upon..*"

The county board of education has full authority to arrange districts as it sees fit; it can combine two or more districts into a new district, in which an election on centralization could be had under section 4726 G. C. if such territory was a township; or it can combine any districts into a lesser number of districts, but regard must always be had to the remonstrance provided for in section 4736 G. C. and in section 4692 G. C. where transfers of territory only are made and no new district is created. If the county board creates a new district or districts, it must also appoint a new board of education for such new district or districts, and such new district could be composed of one or more existing school districts or parts thereof under section 4736 G. C. and a remonstrance against such new district to nullify the action of the county board must be signed by a majority of the male electors in the whole of such new district, that is the territory affected, and such remonstrance must be filed within thirty days after the filing of the notice of change of territory sent by the county board to each local board affected by such new district. If, after a county board of education has created new districts in a township, there still remains more than one school district in such township, then section 4726-1 G. C. applies for centralization purposes, but it must be read with the main section 4726 G. C. in order to be effectively administered in the matter of bringing the issue to a vote in the township concerned

and where several districts in the township are involved. But if one of the "special districts" you indicate, had later become a village district and not a rural district, such village district cannot be concerned in a centralization election under either section 4726 G. C. or 4726-1 G. C., for the sections cover rural districts only.

It is therefore the opinion of the Attorney-General that:

(1) Under section 4726-1 G. C. all rural boards of education in a township must each call an election in their respective districts for centralization of the schools of such township, in order that such question may be legally voted on in the manner provided in section 4839 G. C.

(2) Section 4726-1 G. C. must be read in conjunction with section 4726 G. C. and a county board of education has authority to order an election on centralization of schools in a township which has one or more rural school districts as its school territory.

(3) Centralization of schools must be voted upon by the electors of a township and not a part of it, village and city school districts being excluded.

(4) County boards of education have full authority to create a new school district from one or more districts or parts thereof.

Respectfully,
JOHN G. PRICE,
Attorney-General.

548.

INTERPRETATION OF STATUTES RELATIVE TO DISPOSITION, CARE AND TREATMENT OF AN INDIGENT PERSON WHO HAS PASSED THE INCIPIENT STAGE OF TUBERCULOSIS—ELIGIBLE TO ADMISSION IN DISTRICT TUBERCULOSIS HOSPITAL—WHEN IT IS DUTY OF TOWNSHIP TRUSTEES AND SUPERINTENDENT OF COUNTY INFIRMARY TO CARE FOR SUCH A PERSON.

1. *A person who is otherwise eligible to admission to a district tuberculosis hospital cannot be denied admission thereto on the sole ground that he has passed the incipient state of the disease.*

2. *It is the duty of the township trustees under sections* 3476 *and* 3480 *G. C. to afford public support and relief, including medical attention, to an indigent person suffering with tuberculosis, until he becomes a county charge as provided for by section* 2544 *G. C. unless in the meantime he is received into the district tuberculosis hospital, whereupon the expense of his care and treatment therein should be met by the county commissioners under section* 3152 *and* 3152-1 *G. C.*

3. *A person suffering with tuberculosis who has become a county charge under section 2544 G. C., may be cared for by the superintendent of the county infirmary outside of the infirmary such time as he shall be admitted into the district tuberculosis hospital.*

COLUMBUS, OHIO, August 5, 1919.

HON. CHARLES M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Your letter of July 21, 1919, requesting the advice of the Attorney-General concerning the disposition, care and treatment of William Wright, an indigent person, resident of Seal township in your county, who is in an advanced stage of tuberculosis, was duly received.

In your letter you suggest for consideration the applicability of section 2544 G. C., and inquire whether the superintendent of the county infirmary can receive the person referred to and provide for his care and treatment outside of the infirmary at the expense of the county, and, if not, whether there is any other place or institution where he can be received and cared for at public expense.

In your subsequent letter of July 24th you advise that Pike county has joined in the establishment of a district tuberculosis hospital under authority of section 3148 et seq. G. C. You further state that when this case was brought to your attention you advised the township trustees to make application for Mr. Wright's admission to the district hospital, and was subsequently informed by the township trustees and superintendent of your county infirmary that admission to the district hospital had been refused on account of the advanced stage of the disease.

(1) District hospitals for tuberculosis are established and maintained under favor and authority of section 3148 et seq. G. C. for the express purpose of caring for and treating persons afflicted with and suffering from tuberculosis, who are in need of proper care and treatment (see sections 3146 and 3148 G. C.). "This law," to use the language of Judge Johnson in Brissel vs. State, 87 O. S., 154, 162, "was passed in response to an intelligent public sentiment which was formed in the light of the gratifying advances in medical science, in recent years. * * * It was an effort on the part of the legislature, to provide a plan for arresting the advance, and if possible, for the extermination of a dreadful disease." And it may also be pertinent to state in this connection that the constitutionality of this law was sustained by the supreme court because it was enacted by the legislature in the exercise of the police power, and in the performance of its duty to provide for the health, safety and best interest of the people. (Brissel vs. State, supra.) Such being the origin and purpose of the law, those who are charged with its administration should at all times earnestly and diligently seek to bring about the beneficent and humane results intended to be accomplished by its enactment.

Persons who are suffering with tuberculosis and in need of proper care and treatment are entitled to admission to such hospital, and cannot be excluded therefrom on the ground that they are in an advanced stage of tuberculosis. No such policy of exclusion is hinted at in the law, but on the contrary the policy of the statutes governing these hospitals is clearly that of admission. Had the legislature intended to limit admission to persons in an early stage of tuberculosis, it would have used apt words to that effect, as was done in sections 2054 et seq. G. C. relative to the Ohio state sanatorium. To refuse admission to the district hospitals on the ground that the applicant is in an advanced stage of the disease, would place it within the power of the medical superintendent and trustees to thwart the very purpose of the law. Statutes such as sections 3145, 3147 and 3153 G. C., requiring the medical superintendent to investigate applicants for admission, and empowering the state board and trustees to prescribe and enforce rules and regulations for the government of district hospitals, etc., have not been overlooked in the consideration of this case, but such statutes, in

my opinion, were never intended to authorize the exclusion of a person from the hospital on the ground referred to. On the contrary, the exercise of the authority to investigate and to prescribe and enforce rules and regulations for the government of these hospitals, must be consistent and in harmony with the beneficent intent and purpose of the law to arrest, as Judge Johnson has well said, the advance, and if possible, exterminate the disease. The authority cannot be exercised in such manner as will arrest or exterminate the law.

However, if the medical superintendent or trustees of a district hospital should refuse to admit a resident of the district suffering from tuberculosis and in need of proper care and treatment, the case can be called to the attention of the state board of health, which board, under section 3147 G. C., has general supervision of the hospital. Such board is also clothed by section 3144 G. C. with the authority upon a proper presentation of facts, to order removed to the district hospital any person suffering from tuberculosis, when in its opinion such person is a menace to the public and cannot receive suitable care and attention at home, and surely an indigent person in an advanced stage of tuberculosis comes within that description.

With regard to the expense of caring for and treating indigent persons admitted to the district hospital who are unable to pay therefor as provided in section 3145 G. C., such expense should be charged against the county of the patient's residence and raised by taxation and paid over to the hospital trustees as authorized and provided in sections 3152 and 3152-1 G. C., and the obligation imposed upon county officers by these two later statutes cannot, under the doctrine of Brissel vs. State, supra, be disregarded.

(2) With regard to the care and treatment of Mr. Wright, other than at the district hospital, I beg to advise as follows:

By section 3476 G. C. it is provided that the township trustees shall afford at the expense of the township public support or relief to all persons therein who are in condition requiring it. The support and relief referred to by that section is of a general character, the subject of medical services and attention being specifically provided for and authorized by section 3480 G. C.

The latter statute clearly authorizes the township trustees on their own initiative to furnish medical services to any persons in the township who are in a position requiring public relief, and such trustees are not required to stand back and wait until a formal complaint has been made or given by some person having knowledge of the situation. This has been the uncontradicted and settled law in this state for years. See Trustees vs. Way, I. C. C. 249, wherein the court had occasion to construe the poor relief laws of this state. In that case the court, speaking with particular reference to sections 3476 and 3480 G. C. (then known and designated as sections 1491 and 1494 R. S.) said:

> "The general liability of the township is fixed, not by section 1494 (now 3480) but by section 1491 (now 3476) * * *. The provision of section 1494 is not exclusive. The trustees in a proper case, under section 1491 may furnish the relief, and if the trustees take the initiative and solicit a person to furnish the relief in a proper case, the township becomes liable for its reasonable value. The township is liable generally for relief under the first section."

The primary duty or responsibility of affording public support or relief, including medical services to the indigent poor of a township, is imposed upon the township trustees. See 1918 Opinions of Attorney-General, Vol. 1, p. 54, holding that:

> "Primarily the duty to provide for the indigent poor rests with the trustees of each township * * * and this condition continues until the

indigent poor becomes a county charge under the provisions of section 2544 G. C."

In an opinion by a former attorney general (1918 Opinions, Vol. 1, p. 649), it was also said:

> "As a fundamental principle it can be stated that the furnishing of support or relief to the needy poor rests upon the townships and municipal corporations of which the needy poor are residents. Section 3476 makes such provision * * *.
>
> When we note section 3480 G. C. we find that this principle applies not only to the needy poor in general, but to those who are in need of the services of a physician or a surgeon."

In other words, until such time as Mr. Wright can be admitted to the district hospital, it is the duty of the trustees of Seal township to provide for his support, including necessary medical services, until he becomes a county charge as hereinafter referred to.

(3) In the event the township trustees are of the opinion that Mr. Wright should become a county charge and the township relieved of his care, they should bring the matter to the attention of the superintendent of the county infirmary as provided in section 2544 G. C., and if the superintendent, after receiving a statement of the facts transmitted to him by the trustees under that statute, is satisfied that he should become a county charge, provision should be made for his support and care outside of the infirmary. Mr. Wright could not be kept at the infirmary, because of section 3139 G. C. which provides that persons suffering from tuberculosis shall not be kept there.

While as pointed out in division 2 of this opinion, the duty of furnishing support and relief to the needy poor of a township rests primarily upon the township, yet, as was said in 1918 Opinions of Attorney-General, Vol. I, p. 650-651,

> "It is to be further noted that the township * * * may be relieved of the duty of furnishing relief to the needy poor, under section 2544 G. C., when something more than temporary relief is required.'

The present law of the state on this subject was considered in 1915 Opinions of Attorney-General, Vol. I, p. 358, and with reference to section 2544 G. C. it was said:

> "From the provisions of this section it is manifestly the policy of the law that in case of all those persons who are entitled to admission to the county infirmary, and whose circumstances and conditions are such as to reasonably indicate the necessity of public relief for an indefinite or any considerable period of time, the matter of providing relief should in as expeditious a manner as is practicable and in conformity to law, be turned over to the superintendent of the infirmary and that in those cases the trustees should provide only such relief as is necessary for such person during the time required to transmit it to the superintendent of the infirmary the statement of facts prescribed and for such person in due course of business to be received by the superintendent. * * *
>
> From an examination of the statutes above referred to, it will seem clear that there is no authority for trustees providing other than temporary relief in counties having infirmaries except in those cases, if such there be, where persons who for any reason are not entitled to be admitted to any infirmary require public relief. * * *

Attention is called to section 2544, wherein, after it is determined that a person should become a county charge by the superintendent of the infirmary, it is made the duty of the superintendent to 'forthwith receive and provide for him in such institution or otherwise.' Again in section 2545 G. C., the superintendent is required to report the names of all persons to whom relief has been given outside of the infirmary. From this it will hardly be doubted that it was the legislative purpose to vest in the superintendent authority to provide relief for persons other than those actually confined in the infirmary under certain contingencies. * * *

Cases suggest themselves which by reason of their peculiar circumstances render it impracticable that the necessary relief of proper county charges be afforded at the infirmary. A county charge may be in such physical condition as to render his removal extremely hazardous or be affected with a contagious or infectious disease of such character as to render it dangerous to the safety and health of other inmates that he be admitted to the infirmary or by reason of epidemic or other such exigency it may become temporarily impracticable to furnish proper accommodations for all those persons who are properly subject of county charge in the infirmary, hence the necessity for some provision and authority for relief outside of the infirmary. It is my opinion, however, that outside relief by the superintendent should be carefully restricted to cases of a character similar to those above indicated," etc.

While, as was held in 1918 Opinions of Attorney-General, Vol. I, p. 54, the duty of determining whether a person is qualified to become a county charge rests with the superintendent of the county infirmary under the provisions of section 2544, and that the course pointed out in that section is the only one by virtue of which a person may be found qualified to become a county charge, it cannot be too strongly stated that the authority vested in the superintendent must not be exercised arbitrarily. If the facts transmitted to him by the trustees disclose that Mr. Wright is in a condition requiring public support and relief, and the truth of these facts cannot be successfully disproved, it becomes the imperative duty of the superintendent to provide for his relief outside of the infirmary at county expense. It is not absolutely necessary, as was said in the opinion last referred to, that a person must be admitted to the infirmary to become a county charge, but as was also said in 1915 Opinions of the Attorney-General, Vol. I, p. 358, in cases where the applicant is suffering from a disease of such character as to endanger the inmates of the infirmary, etc., relief outside of the infirmary at county expense is justified.

It may be suggested or contended that section 2544 G. C. cannot be applied to persons having tuberculosis, on the theory that such outside relief is only authorized to be given to persons "entitled to admission" to the infirmary, and that since under section 3139 G. C. a person suffering from tuberculosis cannot be kept at the infirmary, it must follow that the superintendent cannot provide for his support and relief outside. Such contention, in my opinion, is unsound. On the contrary, as has already been stated above, it has been held that section 2544 G. C. authorizes outside relief for persons who on account of the peculiar conditions or circumstances of their cases should not be received into the infirmary, and it is my opinion that the purpose of 3139 G. C. is to specifically point out one of the cases that should not be taken into the hospital, but on the contrary, should be provided for outside of the infirmary. Such construction is in harmony with the previous ruling of this department above referred to, and when it is kept in mind that the poor laws of the state should be liberally construed so as to accomplish the object and purpose of their enactment, and should not, excepting only when clearly and imperatively so required by their own language, be so construed as to exclude from their protection an indigent poor person

who is in condition requiring public support and relief, the reasonableness and fairness of my conclusion becomes apparent. To hold in the present case that Mr. Wright is not entitled to relief outside the infirmary at county expense, after facts have been presented by the township trustees to the superintendent of the infirmary clearly showing that he is in a condition requiring permanent public support and relief, would violate both the letter and spirit of the law.

Based upon the information furnished in your letter, and the present law of this state, it is my duty to advise you:

(1) That Mr. Wright is eligible to admission to your district tuberculosis hospital, and that he cannot be excluded therefrom on the sole ground that he has passed the incipient or early stage of tuberculosis, and that the expense of his care and treatment at such hospital is provided for in sections 3152 and 3152-1 G. C.

(2) That it is the duty of the trustees of Seal township to provide for his support and relief, including medical services, until he becomes a county charge as provided for by section 2544 G. C.

(3) That after the township trustees have brought the case to the attention of the superintendent of the county infirmary in the manner pointed out by section 2544 G. C., it is the duty of the superintendent to provide for him at county expense outside of the infirmary until he is admitted to the district tuberculosis hospital.

Respectfully,
JOHN G. PRICE,
Attorney-General.

549.

COUNTY OFFICERS—COMPENSATION OF DEPUTIES, CLERKS AND OTHER EMPLOYES OF SAID OFFICERS HOW FIXED—COMPENSATION FOR EXTRA HOURS UNAUTHORIZED—SEE SECTION 2981 G. C.—FINDINGS LEFT TO DISCRETION OF BUREAU PURSUANT TO SECTION 286 G. C. ET SEQ.

The compensation of deputies, clerks and other employes of the several county officers is to be fixed by the said officers respectively and a certificate thereof filed with the county auditor as provided in section 2981 G. C., and allowances to such employes in excess of the amount so fixed and certified, purporting to be made in consideration of extra work or for extra hours are unauthorized.

The matter of return of findings as involved in the inquiry is one addressed to the discretion of the bureau in pursuance of sections 286 G. C. et seq.

COLUMBUS, OHIO, August 5, 1919.

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

GENTLEMEN:—You recently requested my opinion upon the following questions:

"1. May a person who has been appointed as a deputy or clerk in any

county office, whose certificate of appointment fixes a monthly salary legally receive from the county additional compensation for working overtime or for extra hours?

2. May a deputy, inspector, clerk or laborer appointed by the surveyor whose compensation is fixed at a certain rate per day legally draw compensation for a number of days in any one month in excess of the actual number of days contained in that particular month by reason of the fact that he worked extra hours each day during the month?

3. If these questions be answered in the negative should a finding for recovery be made for the excess compensation drawn?"

The section of the statute providing for the employment of deputies, clerks, assistants, etc., in the various county offices is as follows:

"Section 2981. Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, bookkeeper, clerk and other employe shall be paid monthly from the county treasury, upon the warrant of the county auditor."

Both your first and second questions require consideration of the practice of allowing compensation to deputies, assistants and employes of the several county offices in addition to their regular compensation as fixed and made a matter of record in pursuance of the provisions of section 2981 supra, the same purporting to be in consideration of the performance of extra services or for extra hours of service.

The statutes nowhere have assumed to prescribe the hours of service for such deputies and employes of the various county offices, but the employment itself presumably contemplates such reasonable hours of service as the necessities of the offices may require, and conversely, consistency suggests that the service rendered by such employes is referable to their employment and compensated by the emolument attached thereto.

Thus, the scope and extent of service contemplated by the regular employment is such, when fully executed, as to suggest a probable disqualification for engaging in so-called extra services.

While instances may readily be conceived wherein it would appear to the public advantage to avail of the services of regular employes in a public office for the discharge of a temporary accumulation of work of the office or other exigency, by the devotion of additional time outside of the usual hours of the office, yet in its operation such a practice would be fraught with much of opportunity and tendency to open the way for abuse and fraud against the public treasury, which, in practice, would be found difficult of ascertainment and restraint.

Public policy usually has been held to demand the rejection of practices which, though free from objection in particular cases, yet in their general adoption and operation tend to facilitate the accomplishment of fraud and circumvention. The suggested practice of payment of extra compensation to regular employes is not a faithful compliance with the letter and the spirit of the statute above noted, providing the conditions of creation of valid obligations against the public treasury on account of services required in the various offices of the county.

The statute contemplates a definite action on the part of the several county officers by way of employment and fixing of compensation of necessary deputies, assistants,

etc., and the filing by such officers respectively with the county auditor of certificates of such action. While the county officers are invested, no doubt, with a continuing discretion in the matter of fixing the amount of compensation of the several deputies and employes of their respective offices, within the aggregate allowance for the purpose subject to their disposal, yet the action so taken in pursuance of the statute and appearing as a matter of record must determine the extent and manner of exercising the authority for charging the public funds on account of deputy and clerk hire.

I do not find that the exact question under consideration has been before the courts of the state in any reported decision, nor considered in previous opinions of this department, although some questions bearing analogy to that under consideration have been the subject of previous ruling by this office.

In opinion No. 199 of the Opinions of the Attorney-General for 1917, page 511, the question of authority of the senate to allow additional compensation to its employes, in excess of that previously fixed, was considered and the following is quoted from the opinion:

> "In my opinion the senate is without power to allow pay for extra services to its officers and employes. The compensation fixed by statute or by the initial resolution is deemed to be in full of all services which the senate may exact of them within the scope of their respective employments. * * *
> My opinion is, therefore, that senate resolution No. 56 is a nullity."

Again in opinion No. 2064, found in the Opinions of the Attorney-General for the year 1916, page 1841, the syllabus is as follows:

> "A state officer or an employe of a state department or institution who is receiving the full regular salary out of the state treasury, as fixed by the appropriation of the legislature, is not entitled to receive additional compensation for overtime or night work."

In the opinion it is said:

> "The legislature in fixing the annual salary undoubtedly contemplated that each officer or employe should put in so much time daily as the necessities of the office should require."

While the questions involved in the opinions cited might have been determined entirely or in large measure by considerations not affecting the general question you submit, yet the principles of public policy which are here recognized were manifestly given recognition in connection with other considerations in the opinions referred to.

Thus, from the considerations that have been pointed out I hold that the manifest purpose and policy of the statute governing the employment of deputies, clerks, assistants, etc., in the various county offices, would be circumvented and the way opened for the practice of fraud and imposition by the recognition of a liability against the public treasury on account of services of the character under consideration incurred otherwise than in faithful compliance with the provisions of the statute.

It therefore follows that payments made to such employes in excess of that stipulated in the certificate of employment were without authority of law.

The conclusions which have been reached in reference to your first and second

inquiries will be found sufficient as a guide in determining your course with relation to findings, in connection with the provisions of section 286 G. C. et seq.

Respectfully,
JOHN G. PRICE,
Attorney-General.

550.

WHEN CORONERS AND ACTING CORONERS ARE AUTHORIZED TO HOLD INQUESTS—WITNESS FEES HOW DETERMINED AS TO LIABILITY FOR UNAUTHORIZED INQUESTS.

Coroners and acting coroners are only authorized to hold inquests in case of a dead body found within the county, and where there is reason to suspect the death caused by unlawful agency

However, when witnesses have been subpoenaed and have attended in case of an unauthorized inquest, such as a mere accidental death, free from all suspicion of violence, the liability for fees of such witnesses should be determined from the fact of their attendance in obedience to lawful authority, rather than by consideration of the abuse of process by the coroner.

COLUMBUS, OHIO, August 6, 1919.

HON. CHESTER A. MECK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication requesting my opinion as follows:

> "I have been having a great deal of annoyance in regard to acting coroners' bills. These have been coming through my office for O. K. before going to the commissioners for payment, and it has seemed that these acting coroners were holding inquests without the knowledge of the coroner, in cases where no inquest should be held, and I have been rejecting them.
>
> I have cited section 2856 of the General Code to these acting coroners on this proposition, that an inquest should only be held over a body of a person, 'whose death is supposed to have been caused by violence,' and not over persons killed in shops and on the railroad, where no suspicious circumstances existed.
>
> I would like to know from you whether I am right or wrong in this contention, and if I am right as to the rejection of the claim of the acting coroner, whether I should allow the fees to witnesses called at such inquests."

The section of the statute relating to the general duties of coroners is section 2856 G. C. and reads as follows:

> "When informed that the body of a person whose death is supposed to have been caused by violence has been found within the county, the coroner shall appear forthwith at the place where the body is, issue subpoenas for such witnesses as he deems necessary, administer to them the usual oath, and proceed to inquire how the deceased came to his death, whether by violence from any other person or persons, by whom, whether as principals or

accessories before or after the fact, and all circumstances relating thereto. The testimony of such witnesses shall be reduced to writing, by them respectively subscribed, except when stenographically reported by the official stenographer of the coroner, and, with the finding and recognizances hereinafter mentioned, if any, returned by the coroner to the clerk of the court of common pleas of the county. If it deems it necessary, he shall cause such witnesses to enter into recognizance, in such sum as may be proper, for their appearance at the succeeding term of the court of common pleas of the county to give testimony concerning the matter. The coroner may require any and all such witnesses to give security for their attendance, and if they or any of them neglect to comply with his requirements, he shall commit such person to the prison of the county, until discharged by due course of law.'

Section 1745 provides for justices of the peace acting as coroner in case of vacancy in that office, and is as follows:

"When the office of coroner becomes vacant by death, resignation expiration of the term of office, or otherwise, or when the coroner is absent from the county, or unable from sickness or other cause to discharge the duties of his office, a justice of the peace of the county shall have the powers and duties of the coroner to hold inquests. When acting in the capacity of coroner, a justice may receive the fees allowed by law to coroners in such cases."

It is to be noted that the acting coroner has the same powers and duties as the coroner in relation to holding inquests, and shall be allowed the same fees.

Section 2856 G. C. which was formerly section 1221 of the revised statutes has been construed by the supreme court in the case of State ex rel. Bellows, 62 O.S. 307. The question before the court involved a determination of the scope of the statute. It is pointed out, after consideration of the provisions of the section that "it is thus indicated that the inquest is intended to aid in the detection of crimes and in the punishment of those perpetrating them."

A death "caused by violence" is held to be "a death caused by unlawful means such as usually calls for the punishment of those who employ them," and it is said in the syllabus:

"Death is supposed to have been caused by violence whenever the coroner from observation or information has substantial reason for believing or surmising that death was caused by unlawful means."

The supreme court approved the opinion of Shearer, C. J.,disposing of the same case in the circuit court, and reported in 15 C. C. 504, and there the question is dealt with somewhat more specifically; this opinion may be invoked as an authoritative pronouncement of a proper construction of the statute on the following propositions:

" 'Violence' means the unlawful use of physical force or other agency to cause death. It does not include mere accident or casualty. * * *

The coronial office is of ancient origin, and its duties, while they have undergone some changes, are substantially the same as they were under the English common law. These duties are in many respects judicial, and their exercise, except in case of gross abuse, should not be interfered with. * * *

Violence, in the sense used in the statute, means force unlawfully exercised, as distinguished from mere accident or casualty. See Anderson's

Law Dic. 1091. Also Lancaster Co. vs. Holyoke, 21 L. R. A., 394 and notes.

If there be reasonable ground to suspect that the death was a natural one, it is a perversion of the whole spirit of the law to compel the county to pay him for such services (inquest).

The coroner must act in good faith—not capriciously or arbitrarily. He may not act where there is no ground to suspect violence was the cause of the death."

The determination by the courts, as above quoted, is authoritative, and you are therefore advised that the law does not contemplate the holding of inquests in cases of natural or mere accidental death but only where there is reason to suspect an unlawful agency where the inquest may serve as an aid in the detection of crime and the ascertainment of those perpetrating it, which, in the last analysis, is the purpose and intent of the law.

Similar holdings have been made by this department in the following opinions:

Opinion No. 1291, A. G. R. 1914, p. 1529;
Opinion No. 189, A. G. R. 1913, p. 1196;
Opinion No. 336, A. G. R. 1913, p. 1281;
Opinion A. G. R. for 1909-10, p. 493.

Of course, the rule announced would apply equally to a justice of the peace acting as coroner in case of the absence of the coroner from the county or his inability from sickness or other causes to discharge his duties.

This will furnish the rule governing your first inquiry, and your second inquiry relates to the allowance of witness fees to witnesses called at inquests of the character referred to in your inquiry, to-wit: cases of "mere accidental death at shops or on the railroad where no suspicious circumstances existed."

The provisions governing the payment of witness fees in case of coroner's inquest, are as follows:

"Section 3012. Each witness in civil causes shall receive the following fees: * * * for attending a coroner's inquest, one dollar for each day and the same mileage allowed a witness in the taking of depositions, to be paid from the county treasury.

Section 2460. No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal allowing the claim."

Substantially the same provision is made for fees of constable or other persons serving process at the direction of the coroner as governs the matter of witness fees to persons subpoenaed before the coroner.

In State ex rel. vs. Hagerty, 11 O. C. C. 226, the court in considering whether constable fees must be allowed by the commissioners, said:

"It is entirely clear, we think, that the amount due the relator is not 'fixed by law.' "

The court points out that while it is true that the statute attaches certain fees to the performance of certain duties, yet the amount allowable ultimately depends upon the fact of the service being rendered, which latter fact, of course, is not fixed by law, and it is said:

"Unless a bill of this kind is allowed by some other officer or tribunal authorized by law to allow the same, it is eminently proper that before the issue of the warrant by the auditor, for its payment, it should, as is expressly required by the statute, be scrutinized, and if correct be allowed by the county commissioners upon whom the law imposes the duty in cases of this kind, of guarding and protecting the interests of the county. * * *

There is no claim that any statute authorizes the coroner to make such a certificate to the auditor and that on receipt of the same he is to issue his warrant."

The court's conclusion is:

"All such and like bills must be presented to the county commissioners for examination and allowance, and if not allowed by them, or by some other tribunal on appeal from such decision, can not be paid by the auditor."

While the bill for witness fees is not a charge fixed by law within the meaning of the statute, nor the coroner an officer or tribunal authorized to fix the fees, yet inasmuch as the coroner has legal authority to subpoena witnesses and compel their attendance, where witnesses have attended in pursuance of such process, I am of the opinion that such witnesses should be paid from the county treasury their legal fees and mileage, and while the same must be allowed by the county commissioners, and as pointed out in your letter, are submitted to the prosecuting attorney for his approval before allowance, I am of the opinion that the exercise of the authority to subpoena by the acting coroner and the obedience of the witnesses thereto, in pursuance of the statute, should entitle the witnesses to their compensation.

Other adequate means will be found to protect the public treasury against abuses in this regard, and it will rarely be found necessary to make that an element of determination of the allowance of witness fees, which rather should rest on the fact of attendance in pursuance of lawful subpoena.

It will be observed in your statement that "acting coroners are holding inquests without the knowledge of the coroner," and it is considered probable that in addition to the questions which have been considered above, you desire the further consideration of this department with reference to the authority of justices of the peace to exercise the functions of the coroner, and I may say without entering broadly upon a discussion of this phase of your inquiry, that the authority of justices of the peace in this regard must be found in the provisions of section 1745 G. C., and is not broader than the express provisions of the section. Thus, justices of the peace may only assume to act as coroner:

(1) When that office becomes vacant by death, resignation, expiration of the term of office or otherwise; or (2) when the coroner is absent from the county; or (3) when the coroner is unable from sickness or other cause to discharge the duties of his office.

In event of an inquest assumed to be held by a justice of the peace when the coroner is within the county and able to perform the duties of his office, you are advised that a justice of the peace so assuming to act is an intruder, and should be dealt with as such.

However, my conclusion as above expressed relative to witness fees will not be modified even in relation to such an unauthorized proceeding as last considered, for the reason that even in that case the justice of the peace may be regarded as acting under apparent color of office, and it is not considered that the burden of ascertaining the jurisdictional facts in every case of acting coroner's subpoenas be imposed upon the citizens at large who may be recipient of the process of such officer.

Respectfully,

JOHN G. PRICE,

Attorney-General.

551.

TAXES AND TAXATION—FISCAL YEAR FOR TOWNSHIP—CALENDAR YEAR.

The fiscal year for townships is not prescribed by specific statutory provision, and ever since the enactment of the Smith law its ascertainment has been treated as addressed to the administrative department of government, and under provisions of the law authorizing the tax commission to prescribe uniform rules and methods to be followed in procedure relating to taxation, the fiscal year has been determined to be the calendar year. This determination having been generally adopted in practice, it is held to be the fiscal year for the purpose of house bill No. 567 relating to taxation.

COLUMBUS, OHIO, August 6, 1919.

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

GENTLEMEN:—Acknowledgment is made of your communication of July 17, 1919, requesting my written opinion as to "what is the fiscal year of a township," and in which you say that your question arises in connection with the provisions of house bill No. 567, enacted by the present legislature.

The act to which you refer is entitled "An act to authorize taxing authorities of counties, municipal corporations, townships and school districts to fund deficiencies in operating revenues of the year 1919, issue bonds and to levy taxes for such purposes," and is popularly known as the relief measure.

Without undertaking any extended review of the provisions of the act, it is sufficient here to say in a general way that it provides for the ascertainment of deficiencies in revenues of counties, townships, municipalities and school districts appearing during the fiscal year, 1919, and authorizes the issuance of bonds for the funding of such deficiencies, and provides a levy for the interest on said bonds and their retirement.

The references in said act to the fiscal year have occasioned your inquiry as to "what is the fiscal year" and likewise certain provisions of the so-called Smith one per cent law have given rise to the necessity for consideration of the same question heretofore.

While specific provision is made in the law for the fiscal year of the state, municipalities, and in reference to certain offices in various sub-divisions, yet difficulty has arisen in reference to certain other taxing sub-divisions, for which specific provision in this regard has not been made in the law, which fact has required the supplying of the ommission in legislation by necessary implication.

For example, the Smith law which deals, broadly speaking, with the production of public revenue by taxation and the expenditure thereof, provides in section 5649-3a for the submission of an annual budget by each of the taxing sub-divisions, which shall set forth in itemized form an estimate of the amount of money needed for their wants for the incoming year: while section 5629-3d provides in substance that at the beginning of each fiscal half year the proper authorities of the various taxing subdivisions of the state shall make appropriation for each of the several objects for which moneys have been provided, etc., and all expenditures within the following six months shall be made from such appropriations, etc.

Thus, while there is found no express statutory provision fixing the fiscal year of some of the taxing subdivisions, neither in the Smith law, nor in other statutes previously enacted, yet it is manifestly the intent and policy of the Smith law that the authorities of the several taxing subdivisions in preparing the budget shall have in mind the financial needs of the subdivision for a definite year, that is designated as the "incoming year," which obviously refers to the same period of time as that denoted in section 5644-3d as the "fiscal year."

In the main, therefore, it may be said that the occasion for considering the question of the "fiscal year" for a particular subdivision of the government, arises largely, if not entirely, in connection with the subjects of taxation and the appropriation of revenues derived from taxation, and the question as it arises in your present inquiry under the legislative relief measure, supra, involves the same consideration as has arisen relative to the fiscal year under the provisions of the Smith law as noted.

There having been no specific provision fixing the fiscal year with reference to townships, and the provisions of certain sections of the Smith law (5649-3a and 5649-3d) having required the ascertainment of a fiscal year with reference to the levy of taxes and appropriations thereof, the determination of such "fiscal year" became an administrative function.

Provision has been made for uniformity of administration of the taxing machinery, as found in section 5624 et seq. G. C.

Section 5624 provides that the tax commission of Ohio shall from time to time prescribe general and uniform rules and regulations and issue orders and instructions respecting the manner of the exercise of powers and duties of any and all officers relating to the assessment of property and the levy and collection of taxes. It shall cause the rules and regulations prescribed by it to be observed, the orders and instructions issued by it to be obeyed and the forms prescribed by it to be observed and used.

Section 5624-1 provides that the tax commission of Ohio shall prescribe and furnish to all county boards of revision, county auditors and county treasurers blank forms for all statements, returns, reports, tax lists and duplicates and all other documents, files and records authorized or required by any provision of law relating to the assessment, levy or collection of taxes; and the county auditors and county treasurers and all other officers having functions in regard to listing property shall use true copies of such blank form.

Acting in pursuance of this statute and previous statutes of similar import, the tax commission of Ohio has prescribed uniform methods to be pursued in the making up of the tax duplicates and forms for budgets and for all of the various activities involved in the levy and collection of taxes, and in so doing, as I am advised at the office of the tax commission, and from their records, have determined and prescribed the fiscal year for townships as the calendar year, to-wit, January 1 to January 1.

There appears no reason from an examination of the statutes for any alteration of date determined by the tax commission, and you are advised that in pursuance of such determination, and the established practice in that regard, the fiscal year for townships is the calendar year.

Respectfully,
JOHN G. PRICE,
Attorney-General.

552.

JUSTICE OF THE PEACE—WHERE PART OF TERRITORY OF CIVIL TOWNSHIP ANNEXED TO MUNICIPAL CORPORATION—RIGHT OF SAID JUSTICE FOR RE-ELECTION AND RIGHT OF RESIDENTS TO VOTE AT TOWNSHIP ELECTIONS.

Where a part of the territory of a civil township is annexed to a municipal corporation the status of a justice of the peace in the annexed territory is not altered by reason of the annexation; and the right of the incumbent to be a candidate for re-election as well as the

right of the residents of the annexed territory to vote at township elections is likewise unaffected, in the absence of specific statutory provisions to that effect.

COLUMBUS, OHIO, August 6, 1919.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication requesting an opinion from this department. Your statement of facts involved in the inquiry being somewhat lengthy, may be summarized as follows:

> During the fall of 1917 the city of Youngstown, with the concurrence of the county commissioners, annexed a portion of Boardman township known as Pleasant Grove. In this annexed portion there resided and still resides a justice of the peace for Boardman township and whose term of office expires this year. From the time of such annexation this justice of the peace has continued to exercise his office while a resident of the city of Youngstown, having become such by living in the annexed portion of the township. This justice of the peace now desires to be a candidate for re-election while still residing in Pleasant Grove in the city of Youngstown, and as stated above, this is the annexed portion taken from Boardman township.
>
> The question now is, can he be a candidate, and if elected, hold his commission while a resident of said annexed portion, and can the voters of such annexed portion vote for township officers while residents of the city of Youngstown.

You further add that the township still exists as before annexing a part of it by the city.

You express it as your opinion that the justice of the peace in question may be a candidate for re-election in the township and is qualified to hold the office if successful at the polls, and also that the residents of the annexed portion of Boardman township are entitled to vote at the township election.

I concur in the views you have thus expressed, and call attention to considerations which lead me to that conclusion.

The matter of annexation of territory to municipal corporations is covered by sections 3547 G. C. et seq. which sections are presumed to have been complied with in annexation of territory to the city of Youngstown in the instance in question.

Section 3512 G. C. provides:

> "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, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation."

While specific provision has thus been made relative to the merger of the civil township into the municipal corporate entity in case the boundaries of the township and the municipal corporation become identical, yet no provision is found affecting the continued existence of the township entity or its boundaries in any other case of annexation of territory to a municipal corporation than that above provided.

The civil township having been established by previous action and authority of law, obviously will remain in existence and intact until specific action to the contrary has been taken in pursuance of legislative authority, which is not affected by the mere annexation of a portion of its territory to the municipal corporation, and it therefore follows that the township entity remains intact and the political status of its residents in relation to township matters unaffected by the annexation in question, unless the status be found to have been changed by the provisions of the municipal court law of Youngstown, which must be consulted in connection with ascertaining the law affecting the general powers and jurisdiction of courts in that territory.

On examination, however, I find that no provision of the act would affect the question before us.

Section 51 of the act (1579-177 G. C.) provides, as far as pertinent:

> "The said municipal court shall supersede all the powers, duties and rights, as, now, or may hereafter be, provided by law as successors of the criminal or police court in and for the city of Youngstown and of justices of the peace in and for Youngstown township."

While the form of expression employed in the statute might have been improved upon, its effect and intent obviously does not extend beyond the implication that the municipal court should take the place of the criminal and police court of the city of Youngstown and of justices of the peace of Youngstown township theretofore existing, and does not purport to extend to justices of the peace of Boardman township, nor is there anything in the language that requires the conclusion that no justice of the peace may reside or exercise jurisdiction within the limits of the city of Youngstown, if the same be authorized by other provisions of the law as seems manifestly to result from the annexation of a part of Boardman township to the city of Youngstown.

Section 56 of the act (1579-182), so far as pertinent, provides:

> "The office of justice and justices of the peace in and for Youngstown township, Mahoning county, Ohio, and of clerk and clerks and of constable and constables thereof; and the criminal court and police court and mayor's court and of clerk and clerks thereof of the city of Youngstown, Ohio, are hereby abolished."

Here again it is apparent that the force of the statute to abolish the office of justice of the peace is confined to the office in Youngstown township, and does not purport to extend to the office as existing in Boardman township, and cannot be so extended by implication.

Likewise the provisions of the repealing clause at the end of the section in reference to justices of the peace are confined to matters relating to Youngstown township.

It is concluded, therefore, that the municipal court act for the city of Youngstown and Youngstown township does not have the effect of curtailing the general provisions under authority of which the office of justice of the peace in Boardman township exists.

The case of State ex rel. vs. Truman Ward, 17 O. S., 544, to which you call attention, is in point, and pertinent observations thereof are as follows:

> "On the organization of a city of the second class divided into wards, the boundaries of which city are not coterminous with those of any township,

the territory within such city does not cease to be a part of the township or townships within the limits of which it is situate.

* * * * * * * * *

In the offices of township trustees, clerk, treasurer, justices of the peace and constables, electors and tax payers of the city have in some or in all respects a like interest with electors of the townships outside the city limits, and are entitled to a vote in the choice of them."

In the course of the opinion the court said:

"Neither as a matter of theory or practice, is there any necessary difficulty in the existence and harmonious working of a civil township organization and at the same time of a city organization within the limits of such township, or within the limits of more than one township; and the statutes nowhere provide, either expressly or by just implication, that, on the organization of a city within the limits of a township or townships, the territory within the city limits shall cease to be a part of the township or townships from which the same was taken. But there are clear indications of a contrary legislative intent."

I have examined the case of State ex rel.vs. Morse, 94 O. S., 435, to which you also call attention, but am of the opinion that the conclusion there reached as well as the reasoning of the court are not applicable to the case in question, for the reason that the annexation of territory there involved was an annexation "to the city of Toledo and Port Lawrence township," and the conclusion of the court that the justice of the peace residing in the territory annexed was authorized to continue in the exercise of his office, was based upon the provisions of section 1716 G. C. which provides:

"If a part of a township is attached to another township, justices of the peace residing within the limits of that part so attached shall execute the duties of their office in the township to which such part is attached," etc.

Thus the question there treated as an annexation of a portion of a township to another township, while in the case under consideration, as specifically stated, Boardman township still exists as before the annexation of a part of its territory to the city.

My conclusion is that the status of the office of justice of the peace in question and the right of the present incumbent to become a candidate for re-election to such office has not been affected by the annexation of part of the territory of the township to the city of Youngstown, and further that the right of the residents within the boundaries of the township to vote at township elections has not been affected by the annexation in question.

Respectfully,
JOHN G. PRICE,
Attorney-General.

553.

TAX COMMISSION—CONSTRUCTION OF AMENDED SENATE BILL No. 72 (108 O. L. 138) REQUIRING SAID COMMISSION TO FIX COMPENSATION TO CLERKS IN COUNTY AUDITOR'S OFFICE—NOT APPLICABLE TO REGULAR EMPLOYES—WHEN APPROVAL OF TAX COMMISSION IS NECESSARY DISCUSSED AND SECTIONS OF SENATE BILL No. 72 INTERPRETED.

1. *Amended senate bill No. 72 requires the tax commission to fix the number and approve the compensation of such clerks only as may be required from time to time in addition to the regular employes of the county auditor's office; it does not require the commission to fix the number and approve the compensation of all clerks in the auditor's office performing services required by sections* 2583, 5366 *and 5612 G. C., unless the allowance made to the auditor under section* 2980-1 *G. C. by the county commissioners is insufficient, having regard to the extent of other work in the auditor's office, to enable him to employ any clerks and other assistants for such service within the limits of such allowance and at the same time adequately to man his department for the performance of other services.*

2. *The commission is not required to fix the number and approve the compensation of the clerks performing duties under sections* 2583, 5366 *and* 5612 *G. C. for the last half of July and the remainder of the calendar year* 1919, *and in the absence of any action under section* 5366 *by the tax commission clerks employed under section* 2981 *G. C., and actually performing such services, will continue to receive their compensation out of the allowance fixed by the county commissioners or the common pleas court under the provisions of sections* 2980 *and* 2980-1 *G. C.*

3. *It will be necessary for a county auditor to secure the approval of the tax commission under senate bill No. 72 before issuing a warrant on the county fund for the remainder of the month of July in compensating any deputy or clerk performing services under sections* 2583, 5366 *and* 5612 *G. C., but it will not be necessary to secure such approval as a condition of retaining regular deputies and employes in service in the performance of such work, the compensation to be payable out of the fee fund, as formerly.*

4. *It follows that without action by the tax commission the deputies and clerks of the county auditor, whether performing the service indicated or not, will continue to be paid from the county auditor's fee fund.*

5. *Amended senate bill No. 72 in practice may become operative at any time, the commission being authorized to act in the premises whenever it sees fit. It is, therefore, not true that the act itself will not in practice become operative until January* 1, 1920. *It is probably true that after new allowances are made in the fall of the year* 1919, *operative on and after January* 1, 1920, *from which regular employes of the county auditor are to be employed, new conditions may arise which will probably require further action on the part of the tax commission. The jurisdiction of the commission under section* 5366 *is continuing and may be exercised at any time.*

COLUMBUS, OHIO, August 6, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This department is in receipt of your letter requesting an opinion upon the following questions involving the construction of amended senate bill No. 72 (108 O. L. 138) which became effective July 16, 1919:

> "1. Does this act require the commission to fix the number and approve the compensation of all clerks in the county auditor's office performing the services required by sections 2583, 5366 and 5612 of the General Code or only such clerks as may be required from time to time in addition to the regular employes of the office?
>
> 2. Will the tax commission be required to fix the number and approve

the compensation of the clerks performing duties under sections 2583, 5366 and 5612 G. C. for the last half of July and the remainder of the calendar year 1919 or will such clerks continue to receive their compensation out of the allowance fixed by the county commissioners and the common pleas court under the provisions of sections 2980 and 2980-1 G. C.?

3. If it is held that the commission is to fix the number and approve the compensation of such clerks for the balance of the calendar year and authorizes their payment out of the general county fund, would the county auditor be permitted to use the surplus thus created in the allowance made under sections 2980 and 2980-1 to increase the salaries of his other clerks or to employ additional clerks for work other than that required by sections 2583, 5366 and 5612 of the General Code?"

About the same time Hon. Thomas F. Hudson, prosecuting attorney of Clark county, requested the opinion of this department upon similar questions relative to the same measure. His questions were submitted to him by Hon. R. W. McKinney, auditor of Clark county, in the following form:

"In accordance with sections 2980 and 2980-1 of the General Code, the county auditors of Ohio secured their clerk hire allowance for the calendar year 1919 some time previous to January 1, 1919. Amended senate bill No. 72, passed by the present legislature becomes operative on July 16, 1919. In the second paragraph on page 2 of this bill, provision is made whereby the number of employes of the county auditor doing work under the provisions of sections 2583, 5366 and 5612 of the General Code (in other words, the employes of the county auditor having to do with duplicate or tax matters) are to be prescribed by the tax commission of Ohio, their time of employment to be determined by that commission and their compensation to be fixed by the county auditor, subject to the approval of the tax commission, said compensation to be paid out of the general county fund.

1. Under the provisions of amended senate bill No. 72, will it not be necessary for the auditors of Ohio to secure the approval of the tax commission and carry out the provisions of this law before issuing warrants on the county fund for the remainder of the month of July, viz: the 16th to the 31st inclusive, in compensating their deputies and clerks who come under the provisions of said act?

2. Will not these said deputies and clerks be paid from the county auditor's fee fund for the first fifteen days of July and from the county fund for the last sixteen days of that month?

3. Will it be lawful to pay the deputies coming under the provisions of amended senate bill No. 72 for the last 16 days of July and the months of August, September, October, November and December from the county auditor's fee fund, provision having been made under sections 2980 and 2980-1, when amended senate bill No. 72 becomes effective on the 16th of July?

4. Inasmuch as provision for the auditor's clerk hire has been made for the current year under sections 2980 and 2980-1, is it true that amended senate bill No. 72, in practice, would not become operative until January 1, 1920?"

So much of amended senate bill No. 72 as gives rise to the questions thus submitted, embraced within section 5366 of the General Code as therein amended, is as follows:

"For the purpose of carrying out the provisions of this act and the pro-

visions of sections 2583, 5366 and 5612 of the General Code, each county auditor shall appoint such number of experts, deputies, clerks and employes as may from time to time be prescribed for him by the tax commission of Ohio. Such experts, deputies, clerks and employes shall hold their employment for such time as may be prescribed by the tax commission of Ohio. The compensation of such experts, deputies, clerks and employes shall be fixed by the county auditor subject to the approval of the tax commission of Ohio, and shall be paid monthly out of the general county fund upon warrant of the county auditor. Such compensation shall constitute a charge against the county, regardless of the amount of money in the county treasury appropriated for such purposes and notwithstanding any failure of the county commissioners to levy or appropriate funds therefor. On the first day of January, annually, any amount in the fee fund of the county auditor in excess of that necessary to pay the one-sixth of the aggregate compensation of the deputies, assistants, clerks and other employes of such auditor as fixed under section 2980-1 of the General Code, but not in excess of the amount paid out of the general county fund under the provisions of this section, shall be transferred to the general county fund without action by the county."

This section refers to duties performed under certain sections of the General Code including the section itself. Said section 5366, in addition to containing the provision quoted, relates to the duties of the county auditor in procuring the voluntary listing of personal property, moneys, credits, investments, etc. He is to

"have supplied at his office for the use of persons required to list such property of any character" the necessary blanks, and he is "to mail or distribute such blanks * * * to the persons required to list such property, or he may place listing blanks at convenient places in each taxing subdivision, and give notice thereof in (a) newspaper * * *."

By himself or by his deputy he may administer oaths to persons required to list such property.

After the lists are made up and filed it is the duty of the county auditor to "make corrections thereof," and he has the power to "go over the same together with the assessor of the same taxing subdivision, and if they believe any property is omitted from any returns, or that the value is incorrect, the assessor shall call upon the person listing such property and upon actual view list and assess such property at its true value in money."

The county auditor is also required to "deliver to the assessors of the respective subdivisions at the time of their meeting for instructions, a list of all persons and property so returned for taxation, and may deliver the original returns to such assessor for his use"; whereupon it becomes the duty of the assessor to inspect the returns and list all property not at that time listed and returned.

Without considering these provisions in detail, it is sufficient to observe of them that they relate to the securing of returns of personal property, the correction thereof, and the listing of omitted property, which latter is to be done by the assessor under the direction of the auditor. Considerable clerical work is involved in this process, as well as some work of an expert character.

Section 2583, referred to in that portion of section 5366 which gives rise to the inquiry, relates to making up the tax list and duplicate of real and personal property and its correction in accordance with the additions and deductions ordered by the tax commission of Ohio and the county board of revision. This work is entirely clerical.

Section 5612 requires the county auditor to make out and transmit to the tax

commission of Ohio an abstract of the real and personal property of each taxing district in his county. This work is entirely clerical.

The work to be done under section 5366 of the General Code would in the ordinary course of events be largely, if not entirely, completed by the middle of July of a given year. The work to be done under the other two sections the provisions of which have been abstracted above would, however, fall within the latter part of the year and would be completed about the first of October, in the ordinary course of events.

It is therefore apparent that a part at least of the duties devolving upon a county auditor, for the purpose of aiding in the performance of which the above quoted paragraph of section 5366 was enacted, are as yet unperformed for the year 1919.

In the letter of the commission and that of Mr. McKinney two extreme views of the operation of section 5366 in this particular are, among others, suggested. These may be described as follows:

> (1) That the paragraph does not go into practical effect at all until January 1, 1920, when, so to speak, the effect of the prior action of the county commissioners in making an allowance for deputy hire for the calendar year 1919 under section 2980-1 of the General Code will have expended its force.
>
> (2) That the section not only goes into immediate effect, but also operates so as to require the tax commission immediately to prescribe the number, tenure of employment and compensation of such members of the office force of each county auditor as may be engaged in the performance of services of the character above referred to. That is to say, in this view of the section, it would require all deputies, assistants, etc. of the county auditor engaged on the date when the law went into effect in the performance of such services to be transferred, so to speak, from the regular corps of assistants, etc., for which allowance had been made by the county commissioners, and placed in a special class with compensation payable from the general county fund instead of from the auditor's fee fund, as formerly, subject, however, to the action of the tax commission, which would be required in each case.

Before leaving this last alternative, it may be pointed out that it follows as a necessary corollary of such a view of the section that until the tax commission had acted in a given county by prescribing the number of such clerks, etc., their tenure of employment and their compensation, it would not be lawful to employ or pay any person whatsoever in such capacity; for such persons could not be employed and paid out of the auditor's fee fund, the effect of the act having been to re-classify the positions formerly occupied by them and to take them out of the class of deputies, assistants, etc., employed by virtue of the allowance of the county commissioners; nor could they be paid out of the general county fund, for only such compensation as has been allowed by the tax commission can be paid out of that fund.

Returning to the first of tht two alternatives which have been thus far suggested, it is apparent that such a view of the practical going into effect of the above quoted paragraph of section 5366 as amended would be predicated upon the supposition that the action of the tax commission thereunder could only be taken at the time when the allowance for general clerk hire of the county auditor was made. Such a supposition, however, finds no warrant in the language used in the section. In fact, the commission's action is not in the nature of an allowance for clerk hire at all; the commission is to prescribe the number of experts, deputies, clerks and employes to be appointed by the county auditor for the purpose specified, the time they shall serve and is to approve their compensation as fixed by the county auditor. In other words, the action of the commission is more closely analogous to the action of the county auditor himself under the county auditors' salary law. The function of the commissioners under that law would be to fix an aggregate allowance. It is for the au-

ditor to determine the number of persons whom he will employ within the limits of such allowance, and the compensation of each of them, as well as the period of their employment.

Without discussing this question further it is believed that the first of the two views above suggested must be rejected, and that it cannot be said that the tax commission has no authority or duty to act under section 5366 as amended until the expiration of the present calendar year; but that on the contrary whatever may be the authority or duty of the tax commission, such authority or duty existed on and after the date when section 5366 as amended went into effect as a law.

But does it follow that on the date when section 5366 as amended went into effect it immediately produced the result described in the second alternative above suggested? The answer to this question depends upon the interpretation of the first sentence of the paragraph which is under consideration. The language of that sentence may be repeated here for convenience as follows:

> "For the purpose of carrying out the provisions of this act, etc. * * * each county auditor shall appoint such number of experts, deputies, clerks and employes as may from time to t me be prescribed for him by the tax commission of Ohio."

This sentence prescribes a duty on the part of the county auditor arising when action on the part of the tax commission is taken. It is not an appropriate expression to designate mere power or authority; it enacts that the auditor *shall* appoint such number of experts, etc., as may from time to time be prescribed for him by the tax commission. Such an expression does not necessarily negative any power which he may have from any other source to appoint deputies, experts, etc., for the purpose designated in the section.

Section 2980 of the General Code provides, in effect, that the county auditor, among other officers of the county, must on the twentieth of each November file with the county commissioners "a detailed statement of the probable amount necessary to be expended for deputies, assistants, bookkeepers, clerks and other employes, * * * for the year beginning January 1st next thereafter." It is then made the duty of the county commissioners within a short time after the filing of such statement to "fix an aggregate sum to be expended for such period for the compensation of such deputies, etc."

Section 2980-1 places limitations on the amount of the allowance and affords relief against the operation of such limitations by application to the common pleas court.

Then follows section 2981 of the General Code, which provides that—

> "Such officers may appoint and employ necessary deputies, assistants, clerks, bookkeepers or other employes for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action. Such compensation * * * shall be paid monthly from the county treasury, upon the warrant of the county auditor."

Section 2987 may be mentioned in this connection. It provides in effect that the compensation of deputies, etc., shall be paid from the fee fund.

A comparison is suggested between section 5366, previously considered, and section 2981, which relates to the appointment and employment of persons in the office of the county auditor, among other county officers. As previously observed, the former makes it the mandatory duty of the auditor to appoint the prescribed number of deputies, etc.; section 2981, however, confers a power rather than imposes a duty.

This comparison is made for the purpose of determining whether or not section 5366 has the effect previously imputed to it, namely, of withdrawing clerks, etc. who are performing the services designated therein from the class of employes and appointees employed and compensated under section 2981 of the General Code. In order to arrive at this result it is necessary to regard section 5366 as having the effect of making it *illegal* for a county auditor to employ what might be termed personal tax deputies and clerks under section 2981, regardless of the action of the tax commission. That is to say, whether the tax commission prescribes any employes for him or not under section 5366, the auditor is wholly without authority to employ persons for the performance of the services referred to in that section in the exercise of such authority as he may have under section 2981.

Further illustrating the necessary implications of such a construction, let it be observed that it will require us to paraphrase section 5366 substantially as follows:

> The necessary experts, deputies, clerks and employes for the purpose of carrying out the provisions of this act, etc., shall be appointed by the county auditor in such number as the tax commission may prescribe, for such time as that commission may prescribe, and at such compensation as shall be fixed by the auditor, subject to the approval of the tax commission, and shall be paid out of the general county fund; and such deputies, etc., shall not be employed or paid in any other manner.

It is true that a negative implication may often be drawn from an affirmative statute where it is clearly the intention of the legislature that the affirmative statute is to govern the subject matter exclusively. The maxim which is applied in such a case is that expressed by the Latin phrase: *Expressio unius est exclusio alterius.* It has apt and almost necessary application to every grant of power; it does not, however, have such clear application to the imposition of a duty; that is to say, it is perfectly conceivable that the legislature may empower a public officer to act in a given manner but make it his duty to act in a different manner when certain conditions exist.

It is thus seen that the maxim under discussion does not have perfect application to section 5366 unless that section be regarded as a grant of power, which, to be sure, it is in the sense that every positive duty of a public officer also embraces the power to discharge that duty.

Unless we can interpret section 5366 as providing the exclusive method for the employment of the clerks, etc., who are to do the work referred to therein, we cannot say that the subsequent adoption of that section had the effect upon section 2981 which is described as implied amendment, at least to the extent of holding that the subsequent section, 5366, of ts own force and without any action thereunder by the tax commission has this effect.

But it is believed that the question as to whether or not the two sections may stand side by side under any circumstances is perhaps best tested by consideration of whether or not it is the duty of the tax commission to take any action under section 5366—in other words, whether or not mandamus will lie to compel the tax commission to prescribe any clerks. experts, etc., for a county auditor thereunder.

There is no mandatory language in the section in so far as it refers to the tax commission. The phraseology is "as may from time to time be prescribed for him by the tax commission of Ohio." The tax commission may prescribe; it *may* do this "from time to time." It is very difficult at least to get out of this language any inference that action under it by the tax commission is mandatory.

If we say that the section is directory and reposes discretion in the tax commission whethe to act or not in a given case, then we face the question as to whether we will impute to the legislature the intention of denying to a county auditor the right to

employ anybody to do the work provided for in sections 2583, 5366 and 5612 of the General Code, unless the tax commission happens to so "prescribe."

It is believed that this was not the intention of the legislature. Conceivably there must be many of the smaller counties in the state in which what has come to be known in the larger counties as a "taxing department" in the auditor's office, in the sense of a corps or body of clerks distinct from the others who are employed in that office, is not required. That is to say, while the work has to be done, it may very well be done by persons who not only need not devote their entire time during the whole year to the performance of such services, but whose entire time even at the periods of stress is hardly consumed by the necessities of the taxation work. Section 5366 seems to take account of this in providing that the tax commission may prescribe the number, and do it from time to time.

It is true that the word "additional" is not in the first sentence of that paragraph of section 5366 which is under consideration. That is to say, it is not therein provided that the county auditor shall appoint "such additional number of experts, etc., as may be prescribed." Nevertheless, the failure of the section to provide that the commission shall prescribe the number at all, as hereinbefore pointed out, makes it clear that unless the commission has acted the employment of deputies, etc., on such work as is indicated in the section but made under section 2981 G. C. is authorized and lawful. Inasmuch, therefore, as the section under consideration imposes a duty on the auditor without expressly limiting his powers under other sections, and further, because the tax commission would, in the nature of things, act in the light of circumstances as they exist, it must follow that though the word "additional" is not used in the first sentence of the paragraph, that sentence is to be interpreted as if the word were actually there. Putting it in another way: the auditor *may* under section 2981 lawfully appoint deputies for this service; he *must* under section 5366 appoint such number as the tax commission prescribed; those whom he must appoint would necessarily be in addition to those whom he is authorized to appoint, if he has exercised the authority.

It follows from this that the paragraph of section 5366 as amended now under consideration expends its force with respect to providing for the payment of deputies, assistants, etc., engaged in the work therein mentioned and their employment upon the appointment of such number of deputies, assistants, etc.,as the commission has prescribed; so that if the commission should prescribe, for example, that one expert should be employed by a given county auditor to perform designated service of this character, his compensation would have to be fixed subject to the approval of the commission and paid out of the general county fund; but this would not preclude the auditor from retaining in his employment what might be termed a "regular" deputy or clerk employed by him under section 2981 G. C. To reach any other conclusion would necessitate such an interpretation of section 5366 as to make it, either in the first instance or when action thereunder is taken by the tax commission, a limitation upon section 2981. Both sections are affirmative in form and presumably are intended to be cumulative. Therefore, the suggested interpretation would be false. Moreover, section 5366 recognizes the necessary relation of the clerks, experts and other employes prescribed by the tax commission to the total number employed by the auditor by the provision therein made for a reimbursement of the general county fund out of the surplus, if any, remaining at a given time in the fee fund of the auditor.

From the reasons thus far adduced, it is the opinion of this department that section 5366 in and of itself does not so operate, so to speak, as to discharge the employes already at work by virtue of appointment or employment under section 2981 G. C. and engaged in assisting the auditor in the performance of his duties under sections 2583, 5366 and 5612 of the General Code; that that result is not reached under section 5366 even when the tax commission of Ohio takes action thereunder; and that the

tax commission of Ohio is not required to take such action if in its judgment the number of deputies, etc., now at work in a given county is sufficient.

It is further the opinion of this department that the tax commission's action under section 5366 is to be predicated upon conditions as it finds them in the office of a given county auditor; so that if the auditor's force is sufficient in number and quality of personnel to perform the services referred to in the section the commission need not act at all; but if at the present time or at any time hereafter, by reason of the expansion of other work in the auditor's office and the consequent inability of the auditor to procure a sufficient number of employes of the kind desired for the performance of the work mentioned in section 5366, within the limits of his allowance as fixed by the county commissioners for any year, the commission is of the opinion that action under section 5366 should be taken, it may and should prescribe for such county auditor such number and character of employes, in addition to those capable of performing this work and otherwise provided for, if any, as it may see fit to prescribe without in anywise necessarily affecting thereby the status of persons employed under section 2981 G. C.

These considerations lead to the following answers to the specific questions submitted to this department:

(1) Amended senate bill No. 72 requires the tax commission to fix the number and approve the compensation of such clerks only as may be required from time to time in addition to the regular employes of the office; it does not require the commission to fix the number and approve the compensation of all clerks in the county auditor's office performing service required by sections 2583, 5366 and 5612 G. C., unless the allowance made to the auditor under section 2980-1 G. C. by the county commissioners is insufficient, having regard to the extent of other work in the auditor's office, to enable him to employ any clerks and other assistants for such service within the limits of such allowance and at the same time adequately to man his department for the performance of other services.

(2) The commission is not required to fix the number and approve the compensation of the clerks performing duties under sections 2583, 5366 and 5612 G. C. for the last half of July and the remainder of the calendar year 1919; and in the absence of any action under section 5366 by the tax commission clerks employed under section 2981 G. C., and actually performing such services, will continue to receive their compensation out of the allowance fixed by the county commissioners or the common pleas court under the provisions of sections 2980 and 2980-1 G. C.

(3) The answers given to the first two questions submitted by the tax commission make unnecessary an answer to the third question submitted by the commission.

(4) It will be necessary for a county auditor to secure the approval of the tax commission under senate bill No. 72 before issuing a warrant on the county fund for the remainder of the month of July in compensating any deputy or clerk performing services under sections 2583, 5366 and 5612 G. C., but it will not be necessary to secure such approval as a condition of retaining regular deputies and employes in service in the performance of such work, the compensation to be payable out of the fee fund, as formerly.

(5) It follows that without action by the tax commission the deputies and clerks of the county auditor, whether performing the service indicated or not, will continue to be paid from the county auditor's fee fund.

This statement answers the second and third questions submitted by the prosecuting attorney of Clark county.

(6) Amended senate bill No. 72 in practice may become operative at any time, the commission being authorized to act in the premises whenever it sees fit. It is therefore not true that the act itself will not in practice become operative until January 1, 1920. It is probably true that after new allowances are made in the fall of

the year 1919, operative on and after January 1, 1920, from which regular employes of the county auditor are to be employed, new conditions may arise which will probably require further action on the part of the tax commission. The jurisdiction of the commission under section 5366 is continuing and may be exercised at any time.

Respectfully,
JOHN G. PRICE,
Attorney-General.

554.

COLD STORAGE ACT—BOTH OWNER OF UNWHOLESOME FOOD OR SLAUGHTERED ANIMALS AND LICENSED OPERATOR OF WARE HOUSE MAY BE GUILTY OF DOING UNLAWFUL ACTS UNDER SECTIONS 1155-10 AND 1155-13 G. C.—STAMPING OF DATE FOOD DEPOSITED IN WAREHOUSE IS IMPOSED UPON OWNER OF FOOD AND LICENSED WAREHOUSEMAN—SEE SECTION 1155-11 G. C. —KNOWLEDGE THAT FOOD IS UNWHOLESOME BY OWNER OR LICENSED OPERATOR NOT NECESSARY TO CONSTITUTE VIOLATION OF LAW.

1. *The owner of unwholesome food, or of slaughtered animals, as the case may be, and also the licensed operator of a cold storage warehouse, may be guilty of doing the several acts made unlawful by sections* 10 *and* 13 *of the act providing for the inspection and regulation of cold storage goods and warehouses* (107 *O. L.*, 594).

2. *The duty of stamping the date on food deposited in and removed from cold storage warehouses, is imposed upon both the owner of the food and the licensed warehouseman by section* 11 *of said act.*

3. *Knowledge on the part of the owner of food or of the licensed operator of a cold storage warehouse, that such food is unwholesome, is not necessary to constitute a violation of said law.*

COLUMBUS, OHIO, August 6, 1919.

HON. THOMAS C. GAULT, *Chief of Bureau of Dairy and Foods, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date relative to the interpretation of certain sections of the act providing for the inspection of cold storage goods, and the regulation and supervision of cold storage warehouses (107 O. L. 594), was duly received, and reads as follows:

> "Please advise who shall be held responsible for a violation of section 13 of the cold storage act where an individual rents storage from a licensed cold storage operator.
>
> Also violation of sections 10 and 11, regarding the keeping in storage of unwholesome food and the marking of the same. Shall the responsibility for such violation be charged wholly against the licensee or against the owner of such food commodities, should he be other than the licensed operator of cold storage plant?"

In the consideration of your questions, the provisions of section 12380 G. C., commonly referred to as the aider and abettor statute, are also applicable.

(1) Section 10 of the act, now designated as section 1155-10 G. C., provides:

> "It shall be unlawful for any person, firm or corporation to place in any

cold storage warehouse, to keep therein, or to sell, offer or expose for sale, any diseased, tainted, or otherwise unwholesome food, or to place in cold storage any slaughtered animals or parts thereof unless the entrails and other offensive parts have first been properly removed."

It will be observed that the foregoing section is directed at the following acts:

(a) To place in any cold storage warehouse:

(b) To keep in any cold storage warehouse; or

(c) To sell, offer or expose for sale any diseased, tainted, or otherwise unwholesome food; and

(d) To place in cold storage

any slaughtered animals or parts thereof unless the entrails and other offensive parts have first been properly removed.

It is made unlawful by the section referred to for any person, firm or corporation to do any of the forbidden acts above enumerated, and both the owner of the food, or slaughtered animals, as the case may be, and the licensed operator of the warehouse, may be guilty of doing any of the enumerated unlawful acts. For example:

The owner of unwholesome food, or of prohibited slaughtered animals, would violate the section as principal by placing the same in the warehouse; and if the licensee should allow the owner to place such food and animals therein, he would be liable as an aider.

A licensed operator of a warehouse who keeps therein unwholesome food or prohibited slaughtered animals would violate the section as principal; and the owner who placed such food in the warehouse would be liable.

The owner of unwholesome food who sells, offers or exposes for sale such food would be liable as principal; and any person, including the licensed operator of the warehouse, acting for the owner in selling, offering or exposing for sale such food or animals, would also be an offender; and

The owner of prohibited slaughtered animals who places such products in cold storage would violate the section, and a licensee who permits him to do so would also be liable.

(2) Section 2 of the act provides:

"All food shall at the time it is deposited in any cold storage warehouse bear the date of such deposit plainly stamped thereon. Such food shall also bear a stamp indicating the date of removal. The marking of food as provided in this section shall be under such further regulations as may be prescribed by the secretary of agriculture."

This section is directed against the deposit and removal of food unless the date of deposit and removal is stamped thereon as therein provided, and it is my opinion that the section imposes the duty of stamping upon both the owner of the goods and the licensed operator of the warehouse.

(3) Section 13 of the act provides:

"No person, firm or corporation shall sell, or offer, or expose for sale, any of the following foods which have been held for a longer period of time than herein specified in a cold storage warehouse: Whole carcasses of beef, or any parts thereof, six months; whole carcasses of pork, or any parts thereof, six months; whole carcasses of sheep, or any parts thereof, six months; whole carcasses of lamb, or any parts thereof, six months; whole carcasses of veal, or any parts thereof, four months; dressed fowl, ten months; butter, nine months, and fresh fish, nine months."

The prohibition in the foregoing section is against the sale, offering for sale or exposing for sale, the foods therein mentioned, which have been in storage beyond a certain specified time. The statute is broad enough to include not only the owner of the food who sells, offers for sale or exposes for sale the foods mentioned, but also the licensee in event he undertakes to act for the owner in selling, offering for sale, or exposing for sale such foods.

In conclusion I desire to call attention to the fact that while the act in question does not, in express terms, require that the owner of the food or the licensed operator of the warehouse shall have knowledge that the food placed or kept in cold storage warehouses, or sold, offered or exposed for sale, is unwholesome, it is my opinion however, that knowledge is not an essential element of any such offense under the act, and that both the owner of the food and the licensed operator of the warehouse act at their peril in committing or permitting any of the prohibited acts, or in omitting to discharge any duty imposed upon them by the act.

The evident purpose of the act was to protect the public against the harmful consequences of unwholesome food, and to prevent the hoarding of food supplies, and if the burden of proving knowledge on the part of the owner or licensed operator is placed upon the state, the very purpose of the act might, in may cases, be defeated. The act, in my opinion, falls clearly within the doctrine of State vs. Kelly, 54. O. S., 166, and kindred cases, holding that in prosecutions under food acts, ignorance of adulteration or condition is no defense. The law in question being enacted, as already stated, in the interests of and to protect the public against the harmful consequences of unwholesome food, and also to prevent the hoarding of food supplies, the licensed operator of the warehouse cannot sit supinely by and close his eyes to what use is being made of his warehouse, but is required by the provisions of this act to be on guard at all times and to be diligent, to the end that the acts prohibited by the act shall not under any circumstances be committed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

555.

ELECTIONS—PARTY AFFILIATION FOR VOTING PARTY TICKET AT PRIMARY—HOW DETERMINED.

Party affiliation as a requisite qualification for voting a party ticket at a primary is to be determined upon challenge, by requiring the affidavit of the proposed voter upon facts touching his qualification, and by his examination under oath, and any further investigation which may be determined upon by the judges or either of them, and the judges of the party to which the person asking the ticket claims affiliation, are the final arbiters of his qualification.

COLUMBUS, OHIO, August 7, 1919.

HON. ROY R. CARPENTER, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—You recently requested my opinion on the following question:

> "At the coming primary election in this city, our board of election and precinct boards will be faced frequently with this question:
> What qualifications are requisite to entitle one to vote a party ticket at a city primary election?"

With your communication you furnish additional information to the effect that

your question relates primarily to the matter of determination of party affiliation as a qualification for voting the party ticket at the primary election.

From among the sections relating to primary elections, I quote provisions reflecting upon your question as follows:

Section 4976 provides in part:

> "Separate tickets shall be provided for each political party entitled to participate in such primary. Such tickets shall contain the names of all persons whose names have been duly presented and not withdrawn."

Section 4980 provides:

> "At such election only legally qualified electors or such as will be legally qualified electors at the next ensuing general election may vote and all such electors may vote only in the election precinct where they reside, and it shall be the duty of the challengers and of the judges, and the right of any elector, whenever there is reason to doubt the legality of any vote that may be offered to interpose a challenge. The cause of a challenge shall be: That the person challenged has received or been promised some valuable reward or consideration for his vote; that he has not previously affiliated with the party whose ticket he now desires to vote. Affiliation shall be determined by the vote of the elector making application to vote, at the last general election held in even numbered years."

Section 4981 provides:

> "Before any challenged person shall be allowed to vote, he shall make and subscribe an affidavit duly sworn to, before one of the judges, who are hereby authorized and empowered to administer such oaths, blanks for which shall be furnished by the board of deputy state supervisors, giving age, residence, nationality, citizenship, party allegiance, length of residence in the voting precinct, county and state, and all other facts necessary to disclose whether he is a legal voter at such election, which affidavit shall be returned to the office of the board with the poll books and tally sheets."

Section 4982 provides:

> "If a person challenged refuses to be sworn, or being sworn, refuses to answer any questions, or if his answers show that he lacks any of the qualifications herein required to make him a legal voter at such primary election, his vote shall be rejected. The judges, or either of them, shall have the power to make further investigation, and he or they may call and examine witnesses as to the qualifications of the person challenged, and, if the judges of the party to which the person asking the ticket claims affiliation are not satisfied that he is a legal voter under this chapter, they shall reject his vote."

It is found from an examination of the statutes that provision is not made for determination of the party affiliation qualifying a person to vote a party ticket at the primaries, strictly as a matter of record, but on the contrary, it is made the duty of challengers and of the judges, and the right of any elector, to interpose a challenge whenever there is reason to doubt the legality of any vote that may be offered. Among the causes for challenge is that the voter has not previously affiliated with the party whose ticket he now desires to vote.

It is further provided that before any challenged person shall be allowed to vote he

shall make and subscribe an affidavit before one of the judges in which he shall state, among other things, his "party allegiance," and "all other facts necessary to disclose whether he is a legal voter at such election." Party affiliation shall be determined "by the vote of the elector making application to vote, at the last general election held in even numbered years."

The making of the affidavit is not conclusive of the applicant's right to vote the particular party ticket, but by the provisions of section 4982 it is provided that the judges or either of them shall have the power to make further investigation, and may call and examine witnesses as to the qualifications of the person challenged; and, finally, if the person challenged refuses to be sworn, or refuses to answer any questions, or his answers show that he lacks any of the qualifications for voting the ticket which he seeks to vote, his vote shall be rejected; and further, if from the entire information at hand, acquired both from the sworn statement of the voter and his answers to questions propounded, and any further investigation which may be made by way of examination of witnesses, or otherwise, if the judges of the party to which the person asking for the ticket claims affiliation, are not satisfied that he is a legal voter, they shall reject his vote.

It seems that the provisions for ascertainment of the qualifications of a voter with respect to his party affiliations and otherwise, authorizes a searching inquiry in case of fraud or attempted abuse in voting, and these provisions will generally be found adequate to afford proper restriction against voting contrary to the spirit and intent of the primary law.

In the case of State ex rel. Murphy vs. Graves, 91 O. S., 36, it was said:

> "Under existing law the primary is necessarily a party primary. Wisely or unwisely, there is no provision made for the independent voter. The members of a party are presumed to act as the members of a lodge, or the members of a church, or of any other voluntary organization, to select representatives of their lodge, church or such association, to fill certain offices and discharge certain trusts. * * *
>
> Sections 4981 and 4982 provide as to how the challenge shall be tried, and that the judges of the party with whom the voter claims affiliation are the judges to finally determine his qualifications as a legal voter."

Here the court was considering the party status of the relator, who had previously been affiliated with another party than that with which he claimed affiliation for the purposes involved in the case before the court, and it was said:

> "Under the statutes he would not be a qualified voter at such Progressive party primary."

You are therefore advised in conformity with the observations of the supreme court in the foregoing case that sections 4981 and 4982 govern the determination of a challenge and the judges of the party with which the voter claims affiliation, are the judges who finally determine his qualification as a legal voter.

Respectfully,

JOHN G. PRICE,

Attorney-General.

556.

DEPUTY SHERIFFS—MAY PERFORM DUTIES UNDER DOG REGISTRATION LAW AND ALSO ACT AS REGULAR DEPUTIES.

Deputy sheriffs whose employment is referable to the increase of duties of the sheriff's office by reason of the provisions of the dog registration law, are not special deputies in the sense of their authority being limited to the performance of functions under said act, but are authorized to act in the full capacity of regular deputies.

COLUMBUS, OHIO, August 7, 1919.

HON. GEO. W. SHEPPARD, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—You recently requested my opinion, as follows:

> "According to a recent ruling of your department the sheriff is to appoint deputy sheriffs necessary to enforce the provision of the act relating to the catching and impounding of dogs and the commissioners are to make the necessary appropriation to pay for said deputy or deputies. Are the duties of such deputies when so appointed restricted to catching and impounding dogs or will such deputies be subject to any duties the sheriff may require of them?"

The ruling to which you refer is no doubt opinion No. 229, addressed to Hon. H. W. Kuntz, prosecuting attorney, Zanesville, Ohio, under date of April 24, 1919. In that opinion I held that the provisions of section 5652-8 G. C. (107 O. L. 535) invested the county commissioners with the authority and the duty to provide sufficient funds for the employment of deputy sheriffs necessary to enforce the provisions of the act which is one relating primarily to the registration and licensing of dogs.

It was pointed out that "section 5652-7 readily discloses that the executive functions under the law are vested in the sheriff, which as readily suggests the probability of the requirement of additional assistants or deputies over that which would be found necessary for the regular duties of the office."

The language "the commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provisions of this act" was construed as a cumulative authorization, supplementing the provisions of section 2980 G. C. et seq. for compensation of deputy sheriffs to the extent that the employment was made necessary by additional duties imposed upon the sheriff's office by the legislation in question. This section was held to authorize proper provision for so much of the work of the sheriff's office as related to the enforcement of the dog registration law, their duty to provide compensation for the deputies so engaged being measured only by the necessity for such service as imposed by this law, rather than that the same should depend upon the condition of the sheriff's fee fund, as in the case of the employment of regular deputies. The section which is involved in your inquiry is section 5652-8, and your question arises out of the provision which was under consideration in the former opinion.

Only the pertinent part of the section will be quoted:

> "Sec. 5662-8. County commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provisions of this act."

From the language of the statute, and the analysis made in the opinion to which you refer, it is apparent that the duties involved in the provision for compensation are duties cast upon the sheriff, while the provision for appropriation of funds is to provide for the employment of deputy sheriffs necessary to enforce the provisions of the act.

It is thus obvious that it was intended that the sheriff in the discharge of the

additional duties imposed upon that office should not be disabled by inability to maintain the proper staff of assistants on account of lack of funds, and therefore the matter of providing the necessary funds for carrying out the purposes of the law was not made to depend upon the general provision for employment of deputies out of percentages of the fee fund, but a special provision was made for the necessary funds, but only such as the additional duties created by the act should require.

It follows then that in practice the sheriff being charged with the administration of the dog registration law, must provide himself not only with such deputies as are required in the administration of the other functions of his office, but also such additional deputy or deputies as may be required in the discharge of the new duties imposed by the dog registration law; and likewise it is made the duty of the county commissioners to co-operate in the matter to the extent of providing the funds for the employment of such additional deputies. Neither the duty nor the authority of the county commissioners in relation to providing this additional fund extends beyond a provision sufficient for the enforcement of the act in question, and likewise the extent of the authority of the sheriff for providing deputies to be compensated under this cumulative provision is measured by the necessities arising under the law.

Therefore, while I think that such deputies as may be appointed by the sheriff are qualified to act for and on behalf of that officer to the full extent of the general authority of deputies, yet presumably there will be no more money provided under the special provision in section 5652-8 than is to be applied to compensation of deputies engaged in the special services marked out in that act, which in fact is the limit of authority in that regard.

The operation of the law I think becomes clear when it is considered that its paramount purpose as involved in your question relates only to providing the sheriff with additional funds for deputy hire to the extent of the additional duties imposed upon his office. It is not apparent from the law that any new department is intended to be created, nor in fact that any special classification of deputies is contemplated, but rather that the regular deputy force of the sheriff's office may be increased commensurate with the additional duties imposed.

The county commissioners are to make the appropriation necessary to provide such additional deputies, and if it be found that the duties would in some instances only require part time of the deputy it is to be presumed that the appropriation will be limited accordingly.

There being a stated volume of this special work to be done, and a corresponding provision for deputy hire to be made, it is not important whether there be a special assignment of deputies for exclusive service in the administration of the dog registration law or not so long as the purpose and spirit of the law is observed to the end that there shall be a due administration of its provisions on the part of the sheriff's office, and the essential appropriation for deputy hire on the part of the county commissioners.

Therefore, answering your question specifically, I advise that deputies in the sheriff's office whose employment is referable to the necessity for additional assistants in the performance of the duties arising under the dog registration law, and whose compensation is provided in pursuance of the law, are not essentially special deputies with restricted authority, but are in fact deputies of the sheriff in the same general sense as what may be termed regular deputies employed in pursuance of other provisions of the law; and while the law only authorizes provision for funds sufficient for compensation of deputies made necessary in the performance of the additional duties stipulated in the dog registration law, and presumably only such amount will be provided, yet there is no legal disqualification against the deputy so employed performing other service in the sheriff's office, if the matter of his compensation therefor is arranged.

Respectfully,

JOHN G. PRICE,
Attorney-General.

557.

BOARD OF EDUCATION—DEPOSITORY HAS DEPOSITED WITH BOARD BONDS AS SECURITY FOR SUCH DEPOSIT—BOARD PLACED BONDS IN SAFE DEPOSIT BOX WHICH WAS BURGLARIZED—LIABILITY OF BOARD.

Where a board of education has received bonds from a bank, which has been made the depository for such board of education, as security for such deposit, and such board has exercised reasonable care in the preservation of such bonds, by placing the same in a safe deposit box of the bank in question, the board of education is not responsible for the loss of such bonds where the bank in question was burglarized and the safe deposit box, bonds and all papers therein, were taken.

COLUMBUS, OHIO, August 7, 1919.

HON. J. H. FULTZ, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

> "The Pleasantville village board of education in Fairfield county had $4,225.42 deposited with the Pleasantville Bank, the legal depository, the law having been complied with in every particular. The bank had deposited with the board of education $5,500.00 of city of Cleveland, Ohio, bonds to secure the deposits. Said bonds were placed in a safety deposit box in the vaults of the bank, the safety deposit box having been rented by the board for the purpose of depositing the valuable papers and securities of the board, and kept in the bank with its consent. The clerk of the board of education could not get the box without the help of the bank clerk, nor could the bank get the securities without the clerk of the board of education. The bank was burglarized February 10, 1919, the box, bonds and all papers were taken.
>
> Is the board of education responsible for the loss of the bonds under the statement of facts?"

Following such request this department asked for further information, viz., a copy of the contract under which such bank became a legal depository of the Pleasantville village board of education and whether there was any stipulation in such agreement as to title in any collateral that may have been given as security in the event of certain contingencies; and an exact copy of the contract rules under which such safe deposit box was rented by the village board of education from the Pleasantville Bank and rules of such bank attendant thereto.

In reply to such request for information as indicated, you made the following statement under date of July 21, 1919.

> "The contract for the deposit of the funds was not in writing, this bank being the only one in the district, and the contract for the safety deposit box in which the bonds were kept was a verbal contract, in which the board paid $1.25 per year for the purpose of filing valuable papers.
>
> The enclosed contract is the entire written evidence, all other arrangements were verbal, just passive acts by both the bank and board."

The copy of the instrument given by the officials of the Pleasantville bank reads as follows:

> "To whom it may concern:
>
> We, the officials of the Pleasantvill e Bank, hereby agree that the bonds

described as follows: being City of Cleveland, Ohio, bonds, numbered 44151, 44152, 44153, 44154 and 44155, each for the sum of one thousand dollars, and all maturing July 1st, 1936, school district of Cincinnati, Ohio, numbered 121 for the sum of five hundred dollars, placed with the board of education of Pleasantville village school district, Fairfield county, Ohio, as collateral security on the part of this bank as depository of said school district, will become at once the property of said board of education, to an amount equal to the sum of such deposit and accrued interest, upon the suspension or default of this bank.

February 1st, 1918.

A. V. Lerch, Vice President.
E. C. Sawyer, Cashier."

An analysis of the above statement of facts shows that the Pleasantville bank became the depository of the village school district of Pleasantville, Ohio, and that on February 10, 1919, the board of education of such village had on deposit in such bank the sum of $4,225.42; that at the time when such bank became the depository of the village board of education the bank offered as collateral security to such board of education the five bonds of the city of Cleveland, Ohio, numbered as indicated in the instrument heretofore quoted; that the board of education, through its clerk, took the collateral security in question and placed it in a safe deposit box in the Pleasantville bank, such bank being the only institution of its kind located in the village school district. On February 10, 1919, the safe deposit box, bonds and all papers were taken by burglars and you now ask the question as to whether the board of education is responsible for the loss of the bonds, under the statement of facts given.

When the board of education of the Pleasantville school district accepted the bonds of the city of Cleveland, offered by the Pleasantville bank as collateral security, required under the statutes where a bank becomes the depository for a school district, it became a bailee in the transaction and was charged with exercising all reasonable care in preserving the bonds in question. The clerk of the board of education thereupon deposited the bonds in a safe deposit box in the bank which was the depository and there can be no question but what this was exercising reasonable care in the preservation of such bonds for the reason that such safe deposit box is presumed to have been the safest and strongest place in the village district for the preservation of papers and valuables.

The law of placement is that where the bailor has deposited with the bailee valuables of any kind and the bailee has exercised all reasonable care as custodian of such bailment, the bailee cannot be charged with the responsibility for a loss of the bailment through an accident or a matter over which the bailee had no control. It is presumed that the board of education, or the Pleasantville bank, has communicated with the authorities of the city of Cleveland, advising that such bonds as numbered above were stolen, hence in the end the loss of the bonds themselves might not be a financial loss, for the reason that when presented for payment or cancellation, the person who had stolen them could not prove ownership to them and would have no title. The title to the bonds would still rest in the bank which had deposited them with the board of education under the instrument above quoted, until there had been a default on the part of the bank in the payment of the deposit in money, made by the board of education in such bank, which default does not appear in your statement of facts and would not be a default until an open demand had been made.

Answering your question specifically, then, it is the opinion of the Attorney-General that where a board of education has received bonds from a bank which has been made the depository for such board of education, as security for such deposit, and such board has exercised reasonable care in the preservation of such bonds, by placing the same in a safe deposit box of the bank in question, the board of education

is not responsible for the loss of such bonds where the bank in question was burglarized and the safe deposit box, bonds and all papers therein were taken.

Respectfully,
JOHN G. PRICE,
Attorney-General.

558.

APPROVAL OF SALE OF CERTAIN SWAMP LANDS IN OTTAWA COUNTY TO THE TOUSSAINT SHOOTING CLUB.

COLUMBUS, OHIO, August 7, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your letter of August 9th, with which you transmit duplicate copies of forms of approval for the Governor and the Attorney-General of the sale of certain swamp lands in Ottawa county to the Toussaint Shooting Club, a corporation duly organized under the laws of the state of Ohio.

The forms have been approved by the undersigned, and are returned herewith in order that they may receive the approval of the Governor.

Respectfully,
JOHN G. PRICE,
Attorney-General.

559.

CIVIL SERVICE—CASHIER IN AUTOMOBILE DEPARTMENT OF SECRETARY OF STATE'S OFFICE NOT IN CLASSIFIED SERVICE.

The position of cashier in the automobile department of the office of secretary of state is not one for which the merit and fitness of applicants is practicable of determination by competitive examination, and said position is therefore outside of the classified service of the state.

COLUMBUS, OHIO, August 8, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication requesting my opinion as follows:

> "I would like an opinion from you relative to my power to appoint a person of my own selection as cashier in the automobile department.
>
> The civil service commission insists that I am compelled to appoint from a certified list which they furnished me. Am I bound to appoint from this list or can I ignore it?
>
> This position is of extreme importance to me as this cashier will handle nearly three millions of dollars within the next twelve months, for all of which I am responsible. I desire to keep in this place a man whom I know to possess the highest standard of qualifications, honesty and integrity, all of which I know from my own personal contact with the man."

The civil service legislation of the state of Ohio consists of a constitutional provision and a legislative measure enacted in pursuance thereof. The constitutional provision is as follows:

> "Section 10, Art. XV. Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

The legislation passed in pursuance of the constitutional provision and now in force is comprised within the act found at page 400 of 105-6 Ohio laws, being sections 486 to 486-31, inclusive, pertinent provisions of which are those relating to the definition of the classified and unclassified civil service of the state, being part of section 486-8, as follows:

> "The civil service of the state of Ohio and the several counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service."

There follows then in subdivision (a) an enumeration of positions comprising the unclassified service; while it is provided in subdivision (b) that classified service shall comprise all persons in the employ of the state, the several counties, cities and city school districts thereof not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class.

> "1. The competitive class shall include all positions and employments now existing or hereafter created in the state, the counties, cities and city school districts thereof, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. * * *
>
> 2. The unskilled labor class shall include ordinary unskilled laborers. * * * "

Other provisions of the act govern appointments, promotions, etc., in the classified service. It is to be noted that there is a recognition both in the provisions of the constitution and the legislative act of the impracticability of ascertaining the merit and fitness of appointees for certain positions by competitive examination, which positions, by the subdivision of the classified service above noted, are expressly excluded from either division thereof, and it follows as a necessary conclusion that in addition to the enumeration of specific positions comprised within the unclassified service, there is the further group of positions the "merit and fitness of which is not practicable of ascertainment, by competitive examination."

While certain of the language of the act is somewhat inaccurate and contradictory, yet the view I have expressed has been universally adopted, and in fact, to hold otherwise would be to construe the law as exceeding the constitutional bounds.

The exact question which you have presented was considered by my predecessor in an opinion addressed to Hon. W. D. Fulton, secretary of state, and reported at page 19 of the Opinions of the Attorney-General for 1917.

In considering the question it was said:

> "This functionary though not called a deputy substantially is one in a particular department of the office of the secretary of state. There is no doubt as to his holding a fiduciary relation, superlatively so, almost exclusively so. There is no doubt of his being authorized to act in the place of his principal."

Among the positions placed in the unclassified service, subsection 9 enumerates the following:

> "The deputies of elective or principal executive officers authorized by law to act for and in the place of their principals and holding a fiduciary relation to such principals."

After noting the character of duties of the cashier in the automobile department of the office of secretary of state, as above quoted, it was further set out in the opinion that while there might arise some doubt as to the cashier being "authorized by law" to act for his principal, within the letter of the provision of section 9 designating positions in the unclassified service, yet it was held this question should be resolved in the affirmative, and it was further observed that in any event,

> "He does, however, come within that designation by the necessary test of the law by its constitutional foundation."

In speaking of the slight discrepancy in the language of the two provisions of the civil service law purporting to be definitive of the classified service, my predecessor observed:

> "Under subdivisions (a) of this section, in subsections numbered from 1 to 12, is what purports to be a complete schedule of all positions in the unclassified service, but which, as shall presently be submitted, has one important limitation—the constitutional one. * * *
>
> The addition to the unclassified service alluded to above consists of all those officials whose merit and fitness it is not practicable to ascertain by competitive examination. This class of officials is recognized in the act itself expressly. * * *
>
> '(1) The competitive class shall include all positions and employments * * * for which it is practicable to determine the merit and fitness of applicants by competitive examinations.'
>
> This is the exact language of the constitutional qualification, except that in one case we have 'for which', and in the other 'as far as', a mere verbal difference. The conclusion is irresistible that this language was employed to effectuate this constitutional qualification. It can do so in no other way than by including as unclassified all those positions for which it is impracticable to determine the merit and fitness of applicants by competitive examinations. To so hold is to hold the statute in accordance with the constitution, a construction which is always adopted where possible, even though it be a forced one."

After pointing out that in cases of any doubt as to the application of the law to a particular position, it has always been the disposition of this department to leave it for determination by the civil service commission, it is said:

> "There are, however, some positions that in the common knowledge of everyone are not practically subject to the test of such examinations, in which case, if there can be no doubt what the commission would find, or what the courts would determine upon the subject, such conclusion may be acted upon as a matter of law, in the first instance, by the appointing authority or its advisers without the unnecessary circumlocution and circumvention of going through the proceedings and records of the commission. This office is such position, and it may safely be said, as a matter of law, that the fitness and merit of a cashier cannot be determined by an examination for the obvious

reason that more than ninety-nine per cent of such fitness is a question of integrity, which is inscrutable, past finding out, by any such test, and which no man can determine except as a result of intimate acquaintance or careful observation thereof on his part, or of someone in whom he confides. What would be said of a board of bank directors who would select a cashier for the bank by a competitive examination? Yet the nature of that duty would render it much more appropriate than this cashier, for that cashier has other very prominent duties and requirements aside from the handling of money.

Suppose a warden of the penitentiary wanted a cashier. He would not have to go outside his own walls to find a goodly number from which to make a selection, most of whom could stand the test of a very severe examination, and yet their very reason for being his involuntary guests is that they are unfit to be cashiers. * * *

It is correct to state, as a matter of law, that it is not practicable to ascertain his merit or fitness by an examination whereby his intellectual acumen or scientific or literary attainments may be compared with those of other persons seeking the same position. He is once for all in the unclassified service. * * * This action is taken with reference to this case alone, because, as shown above, it is so peculiarly and exclusively an unfit case for the test of an examination, that there could be no doubt but what the commission would so hold or that the courts would so hold in the event of its reaching them."

The conclusion thus reached by my predecessor in reference to the same position concerning which you now inquire is so obvious that it is not deemed necessary to engage in an extended discussion of the question.

It is so evidently contemplated by the law that there are positions for which a competitive examination is not practicable that it only remains to ascertain the nature and character of the duties of a given position in the determination of the application of the civil service law thereto. Having ascertained the facts the question of exemption then doubtless becomes one of law, as has been frequently held by the courts

In the case of Chittenden vs. Worster, 152 N. Y., 345, which is in point, the court said:

"We have carefully read the evidence in this case, and not a word have we found tending to show that a competitive examination is practicable for a position where the appointee is to receive, open, read and answer the letters of his chief, where he is to counsel and advise him with reference to the conduct and management of his office, sign his name to checks or warrants, collect and pay out his money, have the combination of his safe and the custody and control of its contents. A candidate may be ever so competent and still lack many of the necessary elements of a trustworthy officer; he may be ever so learned and still lacking in judgment and discretion; he may be discreet and still without character; he may be honest and yet meddlesome and a person in whom you could not confide. To our minds the framers of the constitution or of the statutes never contemplated or intended that a competitive examination was practicable for such a position."

It is sufficient to say that I adhere to the ruling previously announced by this department, as above set out at some length, and therefore advise you that under your statement as to the duties pertinent to the position of cashier in the automobile department of your office, such position is in the unclassified service, appointments to which are not required to be made from a list derived by competitive examination.

Respectfully,

JOHN G. PRICE,

Attorney-General.

560.

ROADS AND HIGHWAYS—DISAPPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN ROSS AND SUMMIT COUNTIES —COMPLIANCE WITH SECTION 5660 G. C. NECESSARY.

COLUMBUS, OHIO, August 9, 1919.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of August 8, 1919, enclosing for my approval, among others, final resolutions on the following improvements:

Dayton-Chillicothe road, I. C. H. No. 29, section A-1, Ross county (township trustees), type A.

Dayton-Chillicothe road, I. C. H. No. 29, section A-1, Ross county, type B (township trustees).

Dayton-Chillicothe road, I. C. H. No. 29, section B-1, Ross county, type A and B (township trustees).

Cleveland-Massillon road, I. C. H. No. 17, section N-1, Summit county.

I note as to the four resolutions mentioned in the first three paragraphs above that the township clerk has stricken from the printed form of certificate of funds on hand the following clause:

"is in the township road fund to the credit of;"

and has also stricken from said printed form the following words:

"and in process of collection."

The certificate in question must be filed in compliance with section 5660 G. C.; and the wording in the printed form,

"is in the township road fund to the credit of, or has been levied, placed on duplicate and in process of collection for the state and township road improvement fund,"

is almost a literal quotation from said section 5660. The printed form of certificate is so drawn as to cover either condition, which would constitute a compliance with section 5660; that is to say, on the one hand, that the money is in the treasury to the credit of the fund from which it is to be drawn; or on the other hand, has been levied and placed on the duplicate *and in* process of collection.

Therefore, unless the improvement proceedings have reached the point where the clerk can make the certificate in the form in which it is printed on the back of the final resolution, and until he does make the certificate in such form, I cannot approve said final resolutions.

The final resolution as to Cleveland-Massillon road, I. C. H. No. 17, section N-1, Summit county, is objectionable in this: That the certificate of the county auditor as to funds on hand is dated July 14, 1919; whereas the action of the county commissioners appears to have been taken on June 28, 1919.

In accordance with the opinion of this department heretofore expressed, the certificate of the county auditor must be made at or before the time at which the commissioners passed their resolution.

I am therefore withholding my approval of said last named resolution.

Respectfully,

JOHN G. PRICE,

Attorney-General.

561.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ASHTABULA, NOBLE, VINTON, WARREN AND WOOD COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, August 9, 1919.

562.

APPROVAL OF BOND ISSUE OF COLUMBIANA COUNTY IN THE SUM OF $97,400.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, August 11, 1919.

563.

APPROVAL OF BOND ISSUE OF SHAWNEE TOWNSHIP RURAL SCHOOL DISTRICT IN THE SUM OF $15,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, August 11, 1919.

564.

APPROVAL OF RESOLUTIONS PROVIDING FOR SALE OF RIGHT OF WAY CROSSING OVER ABANDONED OHIO CANAL IN FRAZEYSBURG TO THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILROAD COMPANY.

COLUMBUS, OHIO, August 14, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of August 12, 1919, transmitting duplicate copies of resolutions providing for the sale of a right of way crossing over the abandoned Ohio canal in the village of Frazeysburg to the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company, for the sum of $500.00.

I have approved said resolutions in their duplicate form as transmitted to me, and return the same herewith.

Respectfully,
JOHN G. PRICE,
Attorney-General.

565.

TAXES AND TAXATION—CONSTRUCTION OF SECTION 3 OF SENATE BILL No. 187, (108 O. L. 924)—SPECIAL TAX FOR SCHOOLS IN YEAR 1919—BUDGET COMMISSION'S AUTHORITY NOT APPLICABLE WHEN LEVY OF SPECIAL TAX APPROVED BY ELECTORS.

Section 3 of senate bill 187 limiting the power of the budget commission with respect to the reduction of school district levies does not apply unless proceedings have been taken under the first and second sections of the act, and the levy of the special tax is approved by a majority of the electors voting thereon at the special election held on August 12, 1919.

COLUMBUS, OHIO, August 14, 1919.

HON. C. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—You request the opinion of this department on the interpretation of section 3 of senate bill 187, (108 O. L. 924), which provides for the levy of a special tax not to exceed a two mill rate by the board of education in the year 1919. The particular question concerning which you desire to be advised is as to whether or not the prohibition in section 3, in the following words,

> "nor shall such budget commission reduce the amount of all other levies made by any board below the amount allowed such board for the preceding year,"

applies to all budget commissions in the adjustment of all school district levies, or rather applies only in the event that action is taken under the bill.

You submit other questions, but the answer to the one stated will suffice for the purposes of your case.

It is the opinion of this department that the provision in question applies only in the event of a favorable vote of the electors upon the submission of the question as provided in the earlier sections of the act. Section 3 in full is as follows:

> "If a majority of the electors voting on the proposition so submitted vote in favor thereof, upon the certification and canvass of such result it shall be lawful for such board of education to levy taxes on the duplicate made up in the year 1919 at the aggregate rate so authorized for such purposes in addition to all other taxes for like purposes. Such levy shall be certified to the county auditor, who shall place it on the tax duplicate; it shall not be subject to any limitation on tax rates now in force, and shall not be subject to the control of the budget commission, nor shall such budget commission reduce the amount of all other levies made by any board below the amount allowed such board for the preceding year."

It will be observed that the whole section is introduced by a condition, namely, the favorable vote of a majority of the electors upon the proposition submitted. All that follows in the section is governed by this condition.

It is therefore apparent that the action of the budget commission with respect to school levies generally is not affected by senate bill 187, but the prohibition contained in section 3 thereof applies only in the event that a majority of the electors voting on the proposition of making a special levy vote in favor thereof.

Respectfully,

JOHN G. PRICE,

Attorney-General.

566.

OFFICES COMPATIBLE—TEACHER WEAK SCHOOL DISTRICT—SCHOOL LIBRARIAN.

A teacher employed at the maximum rate of pay in a weak school district, which receives state aid for teachers, is not prevented from being employed as a school librarian, but such duties must be performed before and after each day's recognized teaching periods and the payment of such librarian by the board of education from its contingent fund will not operate against such district receiving state aid for teachers to which it may be entitled.

COLUMBUS, OHIO, August 16, 1919.

HON. JOHN E. BLAKE, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following statement of facts:

> "The board of education of the Zaleski village schools employed G. S. to teach in their high school at eighty dollars per month for the school term beginning September 1, 1918, this being done in the regular manner according to the school laws of this state. They also employed her as librarian at the same meeting at ten dollars per month. The duties were performed before and after each day's teaching periods. For this extra work she was paid by the board of education out of the contingent funds.
>
> *Question:* Did the payment of the ten dollars per month to G. S. for this extra labor disqualify the Zaleski village schools from receiving state aid?"

The sections bearing upon state aid for weak school districts are as follows (as amended in 107 O. L., p. 623), the same being in effect during the school term beginning September 1, 1918, the period covered by your question:

> "Sec. 7595. No person shall be employed to teach in any public school in Ohio for less than fifty dollars a month. When a school district has not sufficient money to pay its teachers such salaries as are provided in section 7595-1 of the General Code, for eight months of the year, after the board of education of such district has made the maximum legal school levy, at least two-thirds of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficit.
>
> Sec. 7595-1. Only such school districts which pay salaries as follows shall be eligible to receive state aid: Elementary teachers, without previous teaching experience in the state, fifty dollars a month; elementary teachers having at least one year's professional training, fifty-five dollars a month; elementary teachers who have completed the full two years' course in any normal school, teachers' college or university approved by the superintendent of public instruction, sixty dollars per month; high school teachers not to exceed an average of eighty dollars per month in each high school."

Section 7596 G. C. was not amended in 107 O. L., but appears as originally passed in 103 O. L., 267. Section 7596 reads as follows:

> "Section 7596: Whenever any board of education finds that it will have such a deficit for the current school year, such board shall on the first day of October, or any time prior to the first day of January of said year,

make affidavit to the county auditor, who shall send a certified statement of the facts to the state auditor. The state auditor shall issue a voucher on the state treasurer in favor of the treasurer of such school district for the amount of such deficit in the tuition fund."

However, in 107 O. L., p. 621, the above section 7596 G. C., was supplemented by the following section:

"Section 7596-1: Whenever a school district receives state aid, as is provided for in section 7595-1 of the General Code, the board of education of such school district may refund any tuition indebtedness by issuing bonds, as is provided by section 5656 of the General Code. When such bonds are due, the amount and interest of the bonds shall be a part of the deficit for the current year, and shall be paid as state aid by the auditor of state as is provided by section 7596 of the General Code."

Your attention is invited to the fact that section 7595 G. C. says that no person shall be employed to *teach* in any public school in Ohio and does not refer to any other service that may have been performed by a teacher, as a librarian, or otherwise. As an illustration, a weak school district under the schedule given in section 7595-1 G. C. might be paying an elementary teacher the minimum salary of $50.00 per month for *teaching*, and such person might be performing services as school janitor in addition, for possibly an additional $4.00 per month, or whatever figures the board of education and the teacher may have agreed upon. The performance by a teacher of duties outside of teaching for a board of education is not an unusual occurrence; in fact, questions of a teacher performing the duties of teaching and also of a janitor have even been carried into the courts, which have decided that a teacher cannot be compelled to perform janitor services under a contract as a teacher, but there is no objection to such teacher performing such extra service by voluntary arrangement. Such being the case, it would follow that where a teacher had performed duties outside of the teaching for the board of education, such as school librarian, as you indicate, it is eminently proper that such teacher should be paid for such additional service, for it must be performed by some person, and since it is not teaching, as indicated under section 7595 and section 7595-1 G. C., such sections upon state aid to weak school dis tricts would not prevent such employe from performing such extra service outside of school hours and being compensated therefor.

Attention is invited to the new enactment upon state aid for weak school districts, wherein certain of the above sections have been again amended in house bill 406, but such law is not effective until August 18, 1919. You further indicate that the person in question, while paid $80.00 per month, the maximum mentioned in section 7595-1 G. C. for high school teachers, which $80.00 per month was paid out of the tuition fund, was also paid $10.00 per month for performing the duties of librarian, before and after each day's teaching, out of the contingent fund, and hence should not enter into any computation as regards the distribution of state aid. If it is the view of the board of education that the school in question should have a librarian, such board has ample authority to hire such employe, and the mere fact that a teacher is receiving the maximum pay under the statute for teaching, ought not to prevent the board of education from employing such person for other minor work that was not teaching, provided such duties were performed outside of the school periods that are the recognized hours of duty of a teacher.

It is therefore the opinion of the Attorney-General that a teacher employed at the maximum rate of pay in a weak school district, which receives state aid for teachers, is not prevented from being employed as a school librarian, but such duties must be performed before and after each day's recognized teaching periods, and the payment

of such librarian by the board of education from its contingent fund will not operate against such district receiving state aid for teachers to which it may be entitled.

Respectfully,
JOHN G. PRICE,
Attorney-General.

567.

SCHOOLS—TUITION FROM OUTSIDE DISTRICTS PLACED IN CONTINGENT FUND—EXCEPTION IN CASE OF JOINT HIGH SCHOOL—WHEN CONTINGENT FUND MAY BE USED TO PAY SUPERINTENDENT—WHERE BOARD OF EDUCATION PAYS ITS TEACHERS MORE THAN SALARIES PROVIDED IN SECTION 7595-1 G. C., DISTRICTS NOT ELIGIBLE TO STATE AID.

1. *The amount of tuition received by a school district from outside districts shall be placed in the contingent fund of the district receiving such payments, except where two or more school districts have joined to establish a joint high school, in which latter event the provisions of section* 7595-4 *G. C. would apply on and after August* 18, 1919.

2. *Under section* 7690 *G. C. a board of education may use its contingent fund in the payment of a superintendent, after the tuition fund has proved inadequate.*

3. *Where a board of education pays its teachers more than the salaries provided in section* 7595-1 *G. C. for teaching, such district is not eligible to state aid for weak school districts.*

COLUMBUS, OHIO, August 16, 1919.

HON. W. R. WHITE, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion upon the following statement of facts:

> "Two school districts having joined for high school purposes and both districts contributing to the cost of operation of the school—using money for that purpose from the contingent and tuition funds of the respective districts—have received tuition fees from outside school districts under section 7747 of the General Code and placed it in the contingent fund of said high school under authority of section 7603 G. C. The state auditor in the calculation of state aid claims this outside tuition fund should be placed in the tuition fund and not in the contingent fund. The question, therefore, is, should the outside tuition fund or fees be placed in the tuition fund or in the contingent fund?
>
> The second question we desire to know is, 'in calculating state aid, shall we include in the calculation a sum paid a superintendent hired under section 7690 and paid under authority of section 7603 of the General Code from the tuition fund or shall a board pay a superintendent from the contingent fund and if so under what section of the law may it do so?'
>
> "The third question is, 'during the emergency caused by the war, many of the state aid schools were unable to employ teachers for the sums enumerated under section 7695-1 and in order to continue the schools they paid some of the teachers a greater sum than enumerated in the above mentioned section by paying excess salaries from the contingent funds of their respective districts. Would this bar a school district from receiving state aid if it was otherwise entitled to same?"

In your first question you indicate that the state auditor, in his calculation of state aid, claims that the tuition received from outside districts, who send pupils to the high school in question, should be placed in the tuition fund and not in the contingent fund. Under existing law there is no provision in the statutes that this tuition received from foreign pupils shall be placed in any other fund than the contingent fund, for section 7603 G. C. reads in part as follows:

> "* * * Moneys coming from sources not enumerated herein shall be placed in the contingent fund."

In a personal conference with the auditor's department, the Attorney-General is advised that the state auditor does not in his computations add this outside tuition fund to the tuition fund of the district, but has always placed it in the contingent fund, and the answer to your first question is, that under existing law, the tuition received from outside school districts should be placed in the contingent fund.

Bearing upon your second question, section 7690, as amended in 107 O. L., 47, reads in part as follows:

> "Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. It may appoint a superintendent of the public schools, truant officers, and janitors and fix their salaries. * * *"

It is the intent of the law that the salaries of superintendents be paid from the tuition fund, if possible, but where the tuition fund is not adequate in a district to make such payment, the board has authority to use any portion of its contingent fund to make up such salary, such authority appearing in section 7690 G. C., previously quoted.

Attention is invited to the fact that house bill 406, which was filed in the office of the secretary of state May 19, 1919, and is therefore effective on August 18, 1919. clears up a number of these situations and provides in section 7595-1, as newly amended in paragraph (e) of such section, clear authority for the payment of superintendents salaries from the tuition fund.

Bearing upon the question of where two or more school districts have joined to establish a joint high school, the question of state aid for one or more of such districts is covered as follows in section 7595-4:

> "Whenever two or more school districts have joined pursuant to section 7669 to establish a joint high school, and one or more of such school districts makes application for such state aid to cover a probable deficiency in the tuition fund, then a condition precedent to the determination and rendering of such state aid the high school committee shall place in the tuition fund that part of tuition received from other districts which represents the expense for salaries of teachers as computed pursuant to section 7736. And the school district applying for such aid shall, in placing in a separate fund its contribution to the high school committee pursuant to section 7671, pay out of its tuition fund only that part of the total contribution which represents the needs of the high school committee for salaries of the high school teachers. And such high school committee in its disbursements of moneys from the tuition fund shall be governed by the limitations of section 7595-1 of the General Code."

It may be said that until house bill 406 takes effect on August 18, 1919, the matter of payment of a superintendent is nowhere directly touched upon in the statutes

as to what fund he should be paid, except in section 7603 G. C., which you cite and which reads as follows:

> "The certificate of apportionment furnished by the county auditor to the treasurer and clerk of each school district must exhibit the amount of money received by each district from the state, the amount received from any special tax levy made for a particular purpose, and the amount received from local taxation of a general nature. The amount received from the state common school fund and the common school fund shall be designated the 'tuition fund,' and be appropriated only for the payment of superintendents and teachers. Funds received from special levies must be designated in accordance with the purpose for which the special levy was made and be paid out only for such purpose, except that, when a balance remains in such fund after all expenses incident to the purpose for which it was raised have been paid, such balance will become a part of the contingent fund and the board of education shall make such transfer by resolution. Funds received from the local levy for general purposes must be designated so as to correspond to the particular purpose for which the levy was made. Moneys coming from sources not enumerated herein shall be placed in the contingent fund."

In many instances it was felt that after the tuition had been collected from the outside districts and resulted in a largely centralized school, that sooner or later had a superintendent, such tuition payments from foreign pupils placed in the contingent fund under section 7603, should be used in meeting the expenses incurred by having such superintendent. Under existing law, and in the absence of a specific rule, it would seem that the superintendent should be paid from the tuition fund, if such fund will permit it, but there is nothing in the law which prevents the board of education from paying part of a superintendent's salary, if necessary, from the contingent fund, and such authority may be said to exist under section 7690, above quoted.

Coming to your third question, you say that during the emergency caused by the war, many of the state aid schools were unable to employ teachers for the scale mentioned in section 7595-1, and that in order to continue the schools they paid some of the teachers a greater sum than the amounts mentioned in section 7595-1, but such existing salaries were paid from the contingent fund of their respective districts. You now desire to know whether this emergency action taken during the war would prevent such districts from receiving state aid, if they were otherwise entitled to same.

The state aid statute is mandatory as to the salaries to be paid trachers for teaching and in order for a school district to be eligible for state aid, it must comply strictly with the provisions of section 7595-1 G. C., and if a district paid more than the salaries named therein, it could not make a proper certification to the state auditor as required in the application for state aid, and would not be eligible for such aid.

It is therefore the opinion of the Attorney-General that:

1. The amount of tuition received by a school district from outside districts shall be placed in the contingent fund of the district receiving such payments, except where two or more school districts have joined to establish a joint high school, in which latter event the provisions of section 7595-4 G. C. would apply on and after August 18, 1919.

2. Under section 7690 G. C. a board of education may use its contingent fund in the payment of a superintendent, after the tuition fund has proved inadequate.

3. Where a board of education pays its teachers more than the salaries provided in section 7595-1 G. C., for teaching, such district is not eligible to state aid for weak school districts.

Respectfully,
JOHN G. PRICE,
Attorney-General.

568.

SCHOOLS—FUNDS RAISED UNDER SENATE BILL NO. 187, (108 O. L. 924) HOW DISTRIBUTED—TWO-THIRDS FOR TUITION PURPOSES NEED NOT BE OBSERVED.

Funds raised under the provisions of senate bill 187 *need not be divided so that two-thirds of the proceeds of such levy shall be for tuition purposes; the aggregate of such levy can be for any or all school purposes and it is for the board of education to say.*

COLUMBUS, OHIO, August 16, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following question:

> "If a school district desires to come within the class of weak school districts to which aid is rendered pursuant to H. B. No. 406, which goes into effect this month, and such district avails itself of the provisions of senate bill No. 187 (108 O. L. 924) and in doing so raises money by levying for current expense, must two-thirds of the money so raised be placed to the credit of the tuition fund pursuant to the provisions of sections 7594-1 and 7595-1 G. C.?"

Your attention is called to the fact that house bill No. 406 bearing upon state aid to weak school districts goes into effect on August 18, 1919, and not during July, 1919, as you indicate. On the other hand, senate bill No. 187, which permits boards of education to call a special election for August 12, 1919, for the purpose of authorizing the board by vote of the people to levy taxes outside of all limitations for the purpose of meeting deficiencies in current revenues, became effective when filed in the office of the secretary of state on July 7, 1919, as section 4 of said senate bill No. 187 is an emergency clause. From this it will be noted that house bill No. 406 is not effective until after such election of August 12th, as provided in Senate bill No. 187, has been held.

Senate bill No. 187 reads as follows:

"AN ACT

To authorize boards of education to levy taxes outside of all limitations for the purpose of meeting deficiencies in current revenues.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. In lieu of proceeding under an act entitled 'An act to authorize the taxing authorities of counties, municipal corporations, townships and school districts to fund deficiencies in operating revenues for the year 1919, issue bonds and to levy taxes for such purposes but not otherwise,' *the board of education of any school district may levy in the year* 1919 *not to exceed two mills for any and all purposes for which such boards may levy taxes,* upon securing the approval of the electors of such district in the following manner:

By resolution passed by an affirmative vote of a majority of all its members elected or appointed, such board may order that the question of levying such tax, at a rate to be fixed therein, shall be submitted to the electors of the district at a special election to be held therein on Tuesday the twelfth day of August, 1919. A copy of such resolution shall be certified to the deputy state supervisors of elections of the county or counties in which the district is situated. The deputy state supervisors shall prepare the ballots and make the necessary arrangements for the submission of such question.

The result of the election shall be certified and canvassed in like manner as all regular elections for the election of members of boards of education. Notice of such election for not less than ten days shall be given by the deputy state supervisors of elections in one or more newspapers printed in the district, once a week on the same day of the week for two consecutive times prior thereto. If no newspaper is printed therein such notice shall be posted for ten days prior to the election in five conspicuous places in the district, and published as aforesaid in a newspaper of general circulation therein. A notice substantially in the following form shall be sufficient:

NOTICE OF SPECIAL ELECTION.

Notice is hereby given that a special election will be held in the * * * school district, Ohio, on Tuesday the twelfth day of August, 1919, to determine *whether an additional tax levy* of ____ mills, outside of all limitations, for the year 1919, *shall be made for school purposes in such district.*

The expense of giving such notice shall be certified by the deputy state supervisors to the clerk of the board of education and shall be paid as expenses of notices of school elections are paid.

Section 2. The ballots used at such election shall indicate the name of the school district and further shall be in form as follows:

'For additional tax levy of * * * mills for the year 1919, *for school purposes.* Yes.'

'For additional tax levy of * * * mills for the year 1919, *for school purposes.* No.'

Section 3. If a majority of the electors voting on the proposition so submitted vote in favor thereof, upon the certification and canvass of such result it shall be lawful for such board of education to *levy taxes on the duplicate made up in the year* 1919 *at the aggregate rate so authorized for such purposes in addition to all other taxes for like purposes.* Such levy shall be certified to the county auditor, who shall place it on the tax duplicate; it shall not be subject to any limitation on tax rates now in force, and *shall not be subject to the control of the budget commission, nor shall such budget commission reduce the amount of all other levies made by any board below the amount allowed such board for the preceding year.*

Section 4. This act is hereby declared to be an emergency law necessary for the immediate preservation of the public peace and safety. The necessity therefor lies in the fact that in many school districts of the state, under the limitations on tax levies provided by law, deficiencies exist in operating revenues, arising from the abnormal increase of operating expenses and the desirability of increasing the compensation of school teachers; so that unless afforded extraordinary means of raising revenues the boards of education of such district will be unable to carry on the function of public education until permanent revenues can be provided. Therefore this act shall go into immediate effect."

It will be noted that section 1 of senate bill No. 187 provides that such levy not to exceed two mills can be made for "any and all purposes," which means that the board of education could levy the entire two mills (or any portion of such two mills) for tuition purposes or any deficiencies existing in current revenues, for the law says that such levy can be made for any purpose *for which a board may levy taxes.* The law does not specify what the levy shall be for specifically, but says "school purposes," which covers the entire list of school activities by any board and the expense attendant.

thereto. Even the ballot form which shall be used says "school purposes" and that will be the subject the electors will pass upon. The intent of the act seems to have been to provide boards of education with temporary revenues for "operating expenses" and "increasing the compensation of school teachers" (section 4) until permanent revenues can be provided, and from such language it is apparent that the general assembly left to each individual board of education the question of how they should spend the amount arising from the levy that might be voted by the electors on August 12th, for each board in preparing its resolution would set its levy figures (two mills or less) after considering (1) what deficiencies were to be met and (2) the amount that the levy would bring in based on the tax duplicate in that district. No two districts would likely have the same deficiency figures for the same pu poses or the same tax duplicate total to be levied upon.

Section 3 of senate bill No. 187 provides that the levy at the aggregate rate authorized on August 12th "shall be in addition to all other taxes for like purposes," and further that "such levy * * * *shall not be subject to the control of the budget commission,*" which commission is the subject matter of new section 7594-1 G. C., cited by you in house bill No. 406, which is effective on August 18, 1919, and reads as follows:

> "Whenever the board of education of a school district attaches to its budget a certification that it intends to make application for state aid pursuant to sections 7595-1 and 7595-2 of the General Code, and that it is entitled thereto, the budget commission shall proceed to make adjustments in accordance with the provisions of section 5649-3c, but shall lay such adjustment aside and thereupon proceed to make an adjustment which shall allow to such school district a levy of not less than four mills exclusive of the levy necessary to provide for indebtedness incurred prior to 1911 or incurred by a vote of the people. This last adjustment shall be certified by the budget commission pursuant to section 5649-3c. If it should thereafter appear that such school district did not so apply for such state aid or was not entitled thereto, then the adjustment first made and laid aside as above provided shall be deemed to be the final adjustment and the county auditor shall distribute, or redistribute the proceeds of tax collections in accordance with such first adjustment, or if such school district has received its distribution of the tax collections, the county auditor shall deduct from the sum due the school district on the distribution of the tax collections next following, the sum necessary to make such redistribution of tax collections."

Section 7595-1 G. C. reads in part as follows:

> "A school district may make application for state aid *to cover deficiencies in its tuition fund* by filing with the auditor of state an application therefor in such form as the auditor of state shall prescribe, and by first complying and showing compliance with the following conditions:
>
> 1. It shall place in the tuition fund at least two-thirds of the proceeds of the levy *as adjusted by the budget commission* pursuant to section 7594-1."

Answering your question direct then, it is noted that state aid is governed by the adjustment made by the budget commission as indicated in house bill 406, while senate bill 187 clearly provides that the funds arising from a levy voted under that act are not subject to *any* control of the budget commission. Hence the budget commisson cannot consider the amounts arising from proceedings under senate bill 187 in making their adjustment of two-thirds of the school levy for the tuition fund, which certification to the state auditor is necessary in order to secure state aid.

Senate bill 187, which is an emergency enactment, provides that:

1. The board of education may levy the tax not to exceed two mills for *any* purpose, that is to say the whole levy could be for one purpose, which might or might not be for tuition.

2. The rate so authorized is a levy in addition to the existing levy for *the same* purpose, and which has been passed upon by the county budget commission.

3. The levy authorized by senate bill 187 is beyond the control of the budget commission, and such commission cannot take cognizance of any proceedings under senate bill 187, for the purpose of reducing the amount of other levies below that allowed for the preceding year.

4. The emergency act (senate bill 187) is for providing additional revenues to care for deficiencies, increased operating expenses and increased compensation for teachers, and it is for each board of education to say what the increased levy shall be for, and it may be for one purpose, two purposes or all purposes.

It is therefore the opinion of the Attorney-General that funds raised under the provisions of senate bill 187 need not be divided so that two-thirds of the proceeds of such levy shall be for tuition purposes; the aggregate of such levy can be for any or all school purposes and it is for the board of education to say.

Respectfully,
JOHN G. PRICE,
Attorney-General.

569.

SHOOTING ON SUNDAY—SECTION 13048 G. C. PROHIBITS—APPLICABLE TO CIVILIAN RIFLE CLUBS.

There are no exceptions to section 13048 *G. C., prohibiting any person over fourteen years of age from engaging in shooting on Sunday and members of civilian rifle clubs may not legally engage in shooting on that day of the week.*

COLUMBUS, OHIO, August 16, 1919.

HON. ROY E. LAYTON, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department as follows:

> "There are now between fifty and sixty civilian rifle clubs in the state of Ohio, organized under the rules of and recognized by the National Rifle Association, which in turn is recognized and supported by the war department. Guns and ammunition are furnished by the federal government through these clubs. None of these clubs can be maintained or organized without the approval of the adjutant general of the state. I mention these facts in order to show their official standing.
>
> Most of these clubs have rifle ranges in the country. Is it legal for the members of these clubs to *shoot on Sunday*? That is, do you know of any reason why the members of these clubs cannot go to these ranges and shoot and practise on Sunday, in the daytime of course, shooting officially under rules and regulations of the club? If no Sunday laws are violated the only other objection that might be made by farmers within the vicinity, so far as I can see, would be to the noise. Of course all proper precautions are taken at these ranges to protect life and property."

Section 13048 G. C. of chapter 13, entitled "Sabbath Desecration," is pertinent to your inquiry. This section in part provides:

> "Whoever, being over fourteen years of age, engages in * * * shooting on Sunday, on complaint made within ten days therafter, shall be fined not more than twenty dollars or imprisoned not more than twenty days, or both."

This is a general law having uniform operation, and in the absence of special exceptions therein, in favor of the clubs or associations referred to in your letter, or in other sections of the law, would apply to and prohibit the members of such clubs from shooting on Sunday.

This department is aware of no such exceptions and this results in a negative answer to your inquiry.

Respectfully,
JOHN G. PRICE,
Attorney-General.

570

SCHOOLS—LEVIES—SECTION 3 OF SENATE BILL No. 187 (108 O. L. 924) PROHIBITS THE BUDGET COMMISSION FROM REDUCING THE AMOUNT OF OTHER LEVIES MADE BY BOARD OF EDUCATION BELOW AMOUNT FIXED BY BUDGET COMMISSION FOR PRECEDING YEAR.

By virtue of section 3 of senate bill No 187, "to authorize boards of education to levy taxes outside of all limitations," etc., the budget commission, in the event of a favorable vote of the electors on the question of making a special tax levy therein provided for, is prohibited from reducing the amount of other levies made by the board of education below the amount fixed by the budget commission for the preceding year. The rate of the levy for the preceding year is not to be taken into consideration.

COLUMBUS, OHIO, August 16, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I have been asked by the city attorney of Columbus to interpret section 3 of senate bill No. 187, (108 O. L. 924) "to authorize boards of education to levy taxes out side of all limitations," etc., with respect to the provisions thereof limiting the power of the budget commission, in the event of a favorable vote of the electors on the proposition to levy additional taxes, with respect to the adjustment of other levies made by the board.

The language in question is as follows:

> "* * * nor shall such budget commission reduce the amount of all other levies made by any board below the amount allowed such board for the preceding year.'

The question submitted is as to whether the budget commission is prohibited by this provision from reducing the amount of money produced by other levies made by the board of education for the year 1919, or whether the budget commission is prohibited from reducing the rate of the levies made for the preceding year, regard-

less of the fact that a much larger duplicate would produce a much larger tax revenue if the rate of the board of education levies were to remain the same.

This question is of such general interest that I venture to address an opinion to the tax commission in answer to it.

It is the opinion of this department that neither of the two meanings above suggested is to be given to the language in question. The clause requires in practice a comparison of two things. (1) The amount of the other levies made by the board for the year 1920, and (2) the amount allowed such board for the year 1919. This comparison is to be made by the budget commission and its action is to be guided thereby, to the end that the result shall be (3) a certain thing with respect to the official action of the budget commission.

Suppose we begin by ascertaining what the official action of the commission under the Smith one per cent law, so called, is. It is clear that under section 5649-3c G. C. this action is expressed in terms of amounts and not of rates. The following quotation from that section shows this:

> "If such total is found to exceed such authorized *amount* * * * the budget commissioners shall adjust the various *amounts to be raised* so that the *total amount* thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all of the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each * * * taxing district within the limits provided by law.
>
> When the budget commissioners have completed their work they shall certify their action to the county auditor, who shall *ascertain the rate* of taxes necessary to be levied upon the taxable property * * * of such * * * taxing district * * * and place it on the tax list of the county."

The budget commission deals with amounts, though it is true that in so doing it is enforcing limitations which according to the Smith law in its present form are expressed in terms of rates only. Having fixed amounts, its action is certified to the county auditor who determines rates. Therefore it is clear that what the budget commission is required to do under the Smith law and conversely what it is prohibited from doing under Sec. 3 of senate bill No. 187, both relate ultimately to the amount of taxes to be levied and must be expressed in terms of amount. We may therefore say that the language in question means that the budget commission shall not reduce the amount of money to be raised by levies on the grand duplicate of taxable property below a certain figure.

Obviously, if two things are to be compared, they must be capable of comparison. Therefore the thing with which the amount to be raised by property taxation, otherwise than under favor of S. B. No. 187 is to be determined, according to the provisions of Sec. 3 thereof, must, as the section itself has it, be an "amount." Here the ultimate question is encountered. The phrase is "the amount allowed by such board for the preceding year." Does this mean the amount that would be produced on the current duplicate by the rate computed by the county auditor upon the allowance for the preceding year; or does it mean the amount actually allowed for the preceding year in dollars and cents? This is the question presented.

There is another possibility suggested by the letter of the city attorney, viz., that the clause may mean the amount actually produced by the levy for the preceding year. Occasionally there is a variation between the amount fixed by the budget commissioners and translated into terms of rates on the basis of an estimated dupli-

cate and the amount actually yielded by the extension of the rate on the duplicate as ultimately fixed, which may be either greater or less than the amount fixed by the budget commission.

The opinion of this department is that the amount actually allowed by the budget commission for the preceding year is the test. Referring again to section 5649-3c G. C., it is observed that the only thing in the nature of an allowance which is provided for therein, pertains to an amount. The rate is fixed by mere calculation on the basis of the estimated duplicate and the amount so fixed. This calculation is a ministerial act to be performed by the county auditor. It is both theoretically and practically inexact to say that the budget commission or anybody else "allows" the rate. It is theoretically inexact because of the express language of section 5649-3c G. C. It is practically inexact because of the limitation expressed in section 5649-3d G. C., which prohibits the making of appropriations "for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances." That is to say, even though it should happen by reason of an unexpected increase in the duplicate on the basis of which by estimation the rates were computed, an amount of revenue from taxation should be produced in excess of that fixed by the budget commission in terms of dollars and cents, such amount is not available for appropriation and expenditure.

Sec. 3 of S. B. No. 187 does not say in terms that the criterion shall be "the amount allowed by the *budget commission*;" but inasmuch as the budget commission is the only tribunal which has any authority to allow anything, it is clear that the omitted words are inferentially in the statute.

To read into the statute the opposite meaning suggested by the inquiry of the city attorney would be to do extreme violence to its terms; whereas, to construe it as has been intimated, would give it literal effect.

It is therefore the opinion of this department, as previously stated, that the budget commission's authority to act under section 5649-3c G. C. is, in the event of a favorable vote of the electors upon the question of levying extra taxes for school purposes as authorized by S. B. No. 187, limited by section 3 of said act only to the extent that the other levies made by such board and subject to adjustment in the year 1919 shall not be reduced in amount below the amount fixed by the budget commission as the aggregate of such levies for the preceding year; and that in applying this limitation the matter of rates is to be entirely ignored.

Respectfully,
JOHN G. PRICE,
Attorney-General.

571.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS ABANDONED ROAD IMPROVEMENT PRIOR TO LETTING OF CONTRACT—ASSESSMENTS MADE INTO COUNTY TREASURY BY VIRTUE OF SECTIONS 6922 AND 6923 G. C.—HOW COUNTY SHOULD REPAY INSTALLMENTS OF SUCH ASSESSMENTS.

Where road improvement proceedings, undertaken by county commissioners, are abandoned prior to the letting of a contract but subsequent to the coming into the county treasury of accruals from an assessment made by virtue of sections 6922 *and* 6923 *G. C. the proceeds of a sale of bonds in said proceedings having been placed in the sinking fund for the redemption of such bonds,—HELD,*

That the county should repay to the persons who originally paid them to the county

the installments of such assessment, without reference to whether there has been a sale of the affected tract subsequent to the attaching of the lien of the assessment.

COLUMBUS, OHIO, August 16, 1919.

HON. LEWIS STOUT, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication submitting for an opinion the following:

> "Bonds were issued and sold for the construction of the Wapakoneta-Roundhead road in this county. Thereafter assessments were levied and three payments have been made on the assessments. No work was done on this improvement, and by resolution of the commissioners the improvement was abandoned, and this improvement was incorporated in a state road improvement. The county commissioners have ordered that the assessments be refunded.
>
> Who constitute the legal claimants for refunders on tracts of land which have been disposed of, sold or conveyed during the period covered by the payments on this improvement?"

In addition to the foregoing, it has been ascertained upon correspondence and in a personal interview with you that the proceeds arising from the sale of the bonds in question have been put into the sinking fund for the redemption of the bonds; and that the original improvement proceedings had their inception subsequent to the date on which the so-called White-Mulcahy act (107 O. L. 69) became effective.

Coming to your question: Assessments under the White-Mulcahy act are, as to improvements undertaken by the county commissioners, provided for by sections 6922 and 6923. Said section 6922, after setting forth the method of arriving at the amount of the assessment as to each tract of land concerned and the confirmation of the assessments by the county commissioners, concludes with this sentence:

> "Such assessments, when so approved and confirmed, shall be a lien on the land chargeable therewith."

Section 6923 provides for a special assessment duplicate and the payment of the assessment in twenty semi-annual installments.

Now that your county commissioners have ordered that these assessments be refunded, because of the abandonment of the original proceedings, it is quite clear that so far as the county is concerned refunder should be made to those persons who paid the assessment to the county, and this is true without regard to the present ownership of the tract of land as to which the assessment was paid. Quite clearly, any arrangements made between grantor and grantee in the case of the sale of a tract of land subsequent to the attaching of the lien of the assessment are private contractual matters with which the county has nothing to do.

As a matter of correct procedure it is suggested that claims for refunder on account of the payment of the assessment installments in question be paid only upon presentation and allowance as provided in sections 2460 and 2572 G. C.

Respectfully,

JOHN G. PRICE,

Attorney-General.

572.

SCHOOLS—"FULL TIME" TEACHER AND PART TIME TEACHER DISTINGUISHED—UNDER HOUSE BILL No. 406, (108 O. L. 431), TEACHERS CAN BE COMPENSATED FOR PERFORMANCE OF DUTIES AS PRINCIPALS OR SUPERINTENDENTS—SUPERINTENDENT OF PUBLIC INSTRUCTION SHALL CERTIFY TO SAME—WHEN TUITION FUND IS AVAILABLE FOR PAYMENT OF TEACHERS, PRINCIPALS OR SUPERINTENDENTS OR ADDITIONAL COMPENSATION PAID TEACHERS WHO PERFORM EXTRA DUTIES—SCALE OF SALARIES IN SECTION 7595-1 G. C. IS FOR TEACHING DONE BY TEACHERS AND NOT FOR DUTIES OR SUPERINTENDENT OR PRINCIPALS.

1. *A "full time" teacher is one who performs the duties of teaching during the whole of the regularly prescribed school hours in a district, and a part time teacher is one who performs hours of teaching service which are a fractional part of the whole of the regularly prescribed school hours in a school district.*

2. *Under house bill* 406, *effective August* 18, 1919, *additional salaries can be paid teachers as compensation for duties performed as principals or superintendents, but if additional salaries are paid as compensation for duties performed by teachers as principals or superintendents, the state superintendent of public instruction shall first certify that such additional duties are required and performed.*

3. *The tuition fund in a school district can be used for the payment of teachers, principals or superintendents and also additional compensation paid teachers who perform extra duties as principals or superintendents, and a district whose tuition fund is not sufficient to meet the obligations provided for in paragraph* 5, *section* 7595-1, *is entitled to state aid.*

4. *The scale of salaries provided for in paragraph* 3 *of section* 7595-1 *is a scale of salaries for the teaching done by teachers and not for performing the duties of superintendent or principal.*

COLUMBUS, OHIO, August 16, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion upon the following statement of facts:

> "Under the recently enacted Freeman law, being H. B. 406, (108 O. L. 431), and which soon goes into effect, a school district applying for state aid is required as to high schools to pay an average salary of $90.00 per month. The act also provides that the salary of principals and superintendents and part time principals and superintendents shall, under certain conditions, be paid out of the tuition fund and therefore become factors in determining the sum of state aid.
>
> We are being advised by many county boards and also boards of education that contracts have or are being entered into under which high school teachers are employed to teach full time at a salary of $90.00 per month, and are also being engaged to have general charge of the discipline of the schools, to look after playgrounds during intermissions, to prepare courses of study and hold weekly conferences with the other teachers, and also to attend meetings of the board of education.
>
> It is apparent to us that some of these duties requiring the employe to devote some time in addition to the regular time prescribed for teaching. The doubt in our mind is this:
>
> Whether or not a teacher employed for full time is employed for each school day as an entirety, or for such time as the regularly prescribed school

hours call for, and consequently whether or not he can—having been em- school day as an entirety, or for such time as the regularly prescribed school ployed as a teacher for full time—be additionally compensated for duties to be performed each school day in addition to his work as teacher. If so, can the district receive state aid for all or any part of *such* salary."

Bearing upon the above question, your attention is first invited to the fact that house bill No. 406, covering the issuance of state aid for weak school districts, is not effective as law until August 18, 1919.

You now ask whether a teacher employed for full time, as indicated in said house bill 406, is employed for each school day as an entirety or for such time as the regularly prescribed school hours call for, and whether following such employment for full time as a teacher such employe can be additionally compensated for duties to be performed each school day, in addition to his work as teacher, and if so, can the district in question receive state aid for all or any part of such salary.

Pertinent parts of such new law read as follows:

"Section 7595-1. A school district may make application for state aid to cover deficiencies in its tuition fund by filing with the auditor of state an application therefor in such form as the auditor of state shall prescribe, and by first complying and showing compliance with the following conditions:

1. It shall place in the tuition fund at least two-thirds of the proceeds of the levy as adjusted by the budget commission pursuant to section 7594-1.

2. It shall place in the tuition fund the whole sum of the state common school fund and interest on the common school fund received by the district.

3. It shall pay its teachers neither more or less than the following salaries: In elementary schools, teachers without having less than one year's professional training or less than three years' teaching experience in the state, sixty dollars per month; teachers having at least one year professional training or three years' teaching experience in the state, sixty-five dollars a month; teachers having completed the full two years course in any normal school, teachers' college or university approved by the superintendent of public instruction, or who have had five years' teaching experience in the state, seventy-five dollars a month. In high schools inclusive of joint high school districts, an average of ninety dollars a month in each high school. Such salaries shall be for full time and in high schools if any teacher be not employed full time, then, in computing the average, the salary for each hour of service paid such part time teacher shall, for the purposes of the calculation, be multiplied by the number of full time hours in each month, and the sum so ascertained shall be assumed to be the salary paid such part time teacher. In no case shall a teacher be employed at less than sixty dollars per month for full time, or at the rate of sixty dollars per month for part time.

4. It shall maintain its schools for eight months in each year.

5. It shall not transfer or cause to be transferred to any other fund any moneys that may be in the tuition fund. Nor shall it expend any moneys that may be in the tuiton fund except for the following purposes:

(a) Payment of salaries of teachers.

(b) Payment of expenses for attending institute.

(c) Payment of temporary loans incurred to meet current expenses in anticipation of revenue which would accrue to the tuition fund.

(d) That part of tuition payable to other school districts which represent the expense of teachers' salaries as computed pursuant to section 7736.

(e) Salaries of principals or superintendents, or additional salaries paid teachers as compensation for duties performed as principals or super-

intendents. Provided, however, that, if additional salaries are paid as compensation for duties performed by teachers as principals or superintendents, the state superintendent of public instruction shall first certify that such additional duties are required and performed.

6. The county auditor in making his deductions pursuant to section 4744-3 of the General Code shall deduct two-thirds of the total sum from the two-thirds yield of the tax levy which is distributable to the tuition fund pursuant to this section, and the remaining one-third from the remaining part of the yield of such tax levy.

Sec. 7595-2. The application to the state auditor for state aid shall be filed between the first day of September and the first day of October for the then current school year, and upon demand of the state auditor the books or any records of the school district shall be transmitted to the auditor of state. The application shall be accompanied by the copy of the distribution of the county auditor made on the preceding August settlement, and an estimate of the county auditor showing the probable yield and distribution of the taxes, state common school fund and interest on the common school fund to be distributed to such district on the February settlement next following, together with a copy of his balance sheet as the same appears on his school fund distribution record for the school year for which such application is made.

Sec. 7595-3. Upon receipt by the auditor of state of such application, and satisfying himself in all things essential to his proper determination of the right of such district to have aid from the state, he shall determine the probable deficiency that will exist in the tuition fund of such school district. Should there be ascertained to be a probable deficiency therein the state auditor shall issue his voucher for the issuance of a warrant on the treasurer of state in favor of such school district for the sum of such probable deficiency, against any funds appropriated for such purposes then being in the state treasury. Should the fund available for the payment of such state aid be insufficient to pay the total sums so found due the several districts making application for and entitled to such aid, the auditor of state shall apportion the whole available fund among the districts entitled to such aid.

Sec. 7595-4. Whenever two or more school districts have joined pursuant to section 7669 to establish a joint high school, and one or more of such school districts makes application for such state aid to cover a probable deficiency in the tuition fund, then a condition precedent to the determination and rendering of such state aid the high school committee shall place in the tuition fund that part of tuition received from other districts which represents the expense for salaries of teachers as computed pursuant to section 7736. And the school district applying for such aid shall, in placing in a separate fund its contribution to the high school committee pursuant to section 7671, pay out of its tuition fund only that part of the total contribution which represents the needs of the high school committee for salaries of the high school teachers. And such high school committee in its disbursements of moneys from the tuition fund shall be governed by the limitations of section 7595-1 of the General Code."

It will be noted that under section 7595-1 a school district may make application for state aid to *cover deficiencies in its tuition fund* and the law does not treat upon any deficiencies that may exist in any other fund, the view being to keep the tuition fund as strong as possible in any district by rendering state aid where the school district in question is not able to pay the salaries indicated in the scale mentioned in paragraph 3 of such section. Bearing upon your direct question, paragraph 3 says:

"It shall *pay its teachers* neither more nor less than the following salaries: * * * *Such salaries shall be for the full time* and in high schools if any teacher be not employed full time, then in computing the average, the salary *for each hour of service paid such part time teacher* shall, for the purposes of the calculation, be multiplied *by the number of full time hours in each month,* and the sum so ascertained shall be assumed to be the salary paid *such part time teacher* * * *."

Paragraph 5 says in part:

"* * * Nor shall it expend any moneys that may be *in the tuition fund* except for the following purposes:

(a) Payment of salaries of teachers.

* * * * * * * * *

(e) *Salaries of principals or superintendents, or additional salaries paid teachers as compensation for duties performed as principals or superintendents.* Provided, however, that, *if additional salaries are paid* as compensation for duties performed *by teachers as principals or superintendents,* the state superintendent of public instruction shall first certify that *such additional duties* are required and performed."

Bearing upon your question as to what is meant by the words that such salaries shall be for full time, it is noted that in the same paragraph 3, wherein such language occurs, the law speaks of a part time teacher whose salary shall be paid on the basis indicated therein by computing *one hour of service.* It is clear that the "full time" indicated in such paragraph does not mean each school day as an entirety, or twenty-four hours, but does mean the recognized and prescribed school hours in each school day. Thus if in a high school a teacher becomes a part time teacher under paragraph 3, and teaches for instance three hours in each school day, and is allowed half time, or approximately so, for teaching, it must follow that if three hours is half time or a part time that may be called three-sixths, then six hours of teaching would be full time, that is to say, if the section speaks of hours of service, it necessarily means the prescribed school hours in any certain district, and if part time is a fractional part, as indicated above, of full time, and computed by hours of service, then full time must necessarily be the whole fraction or the unit which is divided into hours, to establish what is part time; and from this it can be seen that the law does not contemplate the school day as an entirety, which might be twenty-four hours, or possibly twelve daylight hours, as one might care to calculate. You further desire to know whether the teacher employed for full time, that is, the prescribed school hours in a district, can be additionally compensated for duties to be performed each school day, in addition to his work as teacher, and paragraph (e) of section 7595-1, as above quoted, provides that additional salaries may be paid teachers for duties performed as principals or superintendents, but that if additional salaries are paid to such teachers, it must be only for services that can come under the head of principals or superintendents, and the state superintendent of public instruction shall first certify that such additional duties are both required in such district and performed by the teacher.

The state aid law for weak school districts is purely a measure to strengthen the tuition fund, as before indicated, and paragraph 5 of section 7595-1 provides just how the tuition fund may be spent and for no other purposes; it mentions first in paragraph (a), payment of salaries of *teachers,* and then in (e) additional salaries paid teachers for duties performed as principals or superintendents.

As the tuition fund is available and intended for the five things mentioned in paragraph 5 of the section under discussion, the same being marked (a), (b), (c), (d) and (e), it must follow from a readir g of paragraph (e) that duties performed as prin-

cipals or superintendents by a person who is also a teacher, can be paid for from the tuition fund, and compensation paid to persons for the duties mentioned in paragraph (e) is a legitimate claim upon the tuition fund, part of which in weak school districts comes from the auditor of state as state aid for weak school districts.

It is, therefore, the opinion of the Attorney-General that:

(1) A "full time" teacher is one who performs the duties of teaching during the whole of the regularly prescribed school hours in a district, and a part time teacher is one who performs hours of teaching service which are a fractional part of the whole of the regularly prescribed school hours in a school district.

(2) Under house bill 406, effective August 18, 1919, additional salaries can be paid teachers as compensation for duties performed as principals or superintendents but if additional salaries are paid as compensation for duties performed by teachers, as principals or superintendents the state superintendent of public instruction shall first certify that such additional duties are required and performed.

(3) The tuition fund in a school district can be used for the payment of teachers principals or superintendents and also additional compensation paid teachers who perform extra duties as principals or superintendents and a district whose tuition fund is not sufficient to meet the obligations provided for in paragraph 5 section 7595-1. is entitled to state aid.

(4) The scale of salaries provided for in paragraph 3 of section 7595-1 is a scale of salaries for the teaching done by teachers and not for performing the duties of superintendent or principal.

Respectfully,
JOHN G. PRICE,
Attorney-General.

573.

APPROVAL OF BOND ISSUE OF LIBERTY UNION VILLAGE SCHOOL DISTRICT IN THE AMOUNT OF $20,000.00

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, August 18, 1919.

574.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HARRISON, LORAIN, MERCER, SCIOTO, SHELBY, SUMMIT AND WOOD COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, August 18, 1919.

575.

UNINCORPORATED ASSOCIATION—WHEN SUCH AN ASSOCIATION CANNOT TRANSACT BUSINESS IN THIS STATE—AFTER THE MANNER OF A CORPORATION—SEE SUPPLEMENTAL OPINION No. 597, AUGUST 30, 1919.

An unincorporated association of persons organized to carry on business in such manner as is calculated to impress the general public with the belief that it is a corporation, and whose intended acts are such as appertain to or are to be done after the manner of corporations, cannot transact business in this state.

COLUMBUS, OHIO, August 19, 1919.

HON. P. A. BERRY, *Commissioner of Securities, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date with which you enclosed a copy of the trust agreement under which the Investors Research Syndicate has been organized and proposes to operate, and requesting an opinion as to whether or not individuals can organize in such manner and conduct business in this state, was duly received.

The syndicate mentioned is a voluntary unincorporated association of individuals formed for the purpose of acquiring property to be held by a trustee, who, pursuant to the terms and in the manner authorized by the trust agreement, is to engage the property and its income and proceeds in conducting a multitudinous and almost unlimited line of business. The purpose clause of the trust agreement reads as follows:

> "The trustees hereby declare that they will hold such property to be transferred to them, as well as other property which they may acquire as trustees, together with the proceeds thereof, in trust, to engage such property and funds to do a commercial engineering and mercantile business; to manufacture, prepare for market, transport, import, export, purchase and otherwise acquire and own, sell or trade in and with goods and merchandise of every nature and description to acquire, hold, own, improve, sell or otherwise deal in rights, privileges, franchises, real estate or personal property, devices and methods suitable or convenient for the purposes mentioned; to purchase, construct, or improve mills, factories, store houses, offices, buildings, roads, including railroads and tramways, boats, docks, or any means or methods for transportation on land, on water or in the air; to engage, appoint or discharge agents; to acquire, own, handle or control letters patent and inventions; and in general to do and perform such acts and things and transact such business not inconsistent with law, as they may deem to advantage of their trust."

The trust agreement is somewhat lengthy and for that reason will not be incorporated into this opinion. It has been carefully examined and analyzed and the controlling features, so far as necessary to a proper determination of your inquiry, are hereinafter referred to and succinctly stated. Suffice it to say that from practically every paragraph and sentence it clearly appears that the acts in which the association or syndicate intends to engage, are such as appertain to corporations or are to be done after the manner of corporations.

It should be borne in mind at the outset that Ohio determines its own public policy and has ample power to control the activities of its own citizens and those of other states coming within its borders, subject only to constitutional limitations. A claim from either group of citizens that they can without restraint or limitation, engage in acts such as appertain to corporations, or conduct their affairs after the

manner of corporations, finds nc support in the law of this state, no matter what name may be assumed or how ingenious the plan under which they claim or propose to act. Persons who assume such authority and act in such a manner without being legally incorporated, bring themselves within the terms of section 12303 G. C., which provides that a proceeding in quo warranto may be brought against any association of persons who act as a corporation within this state without being legally incorporated, and subject themselves to a judgment of ouster. This was declared to be the law of Ohio a quarter of a century ago in State vs. Ackerman, 51 O. S., 163. In that case the court held:

> "To come within the purview of that provision of section 6760, of the Revised Statutes, which authorizes an action in quo warranto to be brought 'against an association of persons who act as a corporation within this state without being legally incorporated,' it is not necessary that the association, or persons composing it, avow a purpose to act as a corporation, or assume to do so; it is sufficient if the acts are such as appertain to corporations, or are done after the manner of corporations."

The claim was made in that case, as it has been in this, that the association was not exercising a franchise or acting as a corporation, or even assuming or avowing to do so, but that its members were pursuing as individuals a business or occupation, in which any person may of natural and common right engage, without abridgement or interference from any source; hence the conclusion that such an association or its members are not subject to the conditions and regulations imposed by laws applicable to corporations. But such contention and conclusions were denied, the court, holding as above indicated, that an association of persons need not avow a purpose to act as a corporation, or even assume to do so, but that it is sufficient to warrant a judgment of ouster if the acts complained of are such as appertain to corporations or are done after the manner of corporations.

No useful purpose will be served by enumerating in this opinion the numerous acts committed or performed by the association involved in the case of State vs. Ackerman, supra, but suffice it to say that some of the acts and transactions complained of, and which supported the judgment of ouster in that case, were practically the same in effect if not in form as those contemplated and provided for in the trust agreement now under investigation, and it is my opinion that the doctrine of that case applies with equal force to the Investors Research Syndicate.

That the association now under investigation intends, and is authorized by the agreement, to conduct its business after the manner of corporations, etc., and that its characteristics and mode of conducting its business are calculated to impress one who does not make a critical examination with the belief that it is a corporation, is clearly shown by the express terms of the trust agreement itself and particularly in the following respects:

> "In addition to the adoption and use of a fictitious name, the syndicate is to have a capital stock divided into common and preferred shares, to be represented by negotiable certificates which will express the respective proportionate interest of the holders. Lost or destroyed certificates are to be replaced by the issue of new ones.
>
> Provision is made for increasing the capital stock by the issue and disposal of non-voting redeemable preferred shares of the par value of $100 each, the proceeds of such issue to be used to provide funds to accomplish the purposes of the syndicate. The holders of the preferred shares are to have such preference over the common shares as may be expressed in the certificates, etc.

The voting power of the common shares is also provided for, the stipulation being that each shareholder shall be entitled to one vote for each share held, that each shareholder may vote by proxy, etc.

Annual meetings of the shareholders for the election of a board of trustees, and the transaction of other business, and also for the calling and holding of special meetings at any time, are also provided for.

The election of a board of trustees by the shareholders, clothed with power and authority to manage and control the syndicate's property and business for the benefit of the shareholders, their tenure of office, etc., are also provided for; and in addition to the general grant of authority, it is specifically provided that the trustees may adopt and use a common seal, employ counsel, borrow money under certain restrictions, and make, amend and repeal by-laws. The filling of vacancies on the board of trustees is also cared for.

The board of trustees is also required to hold at least stated monthly meetings, and provision is also made for the holding of special meetings.

Officers are to be elected by the trustees who shall have the authority and duties 'usually incident to like officers in corporations,' etc.

The shareholders do not have title to the syndicate property or the right to call for a division of assets among themselves.

The shareholders are not to be personally liable for the syndicate's debts, and the same immunity is also granted the trustees, and it is expressly provided that the trustees have no power to bind the shareholders personally, and that creditors must look only to the syndicate property.

The death of a shareholder does not dissolve the syndicate, nor entitle his personal representative to an accounting, but such representative or his assigns succeeds to the right of the decedent.

Provision is also made for the declaration and payment of dividends out of net earnings.

After the manner of some statutes, such as those governing real estate companies, the life of the syndicate is limited to twenty years, but with the provision, however, that its existence may be prolonged by the vote of two-thirds of its shares.

Upon the termination of the syndicate's existence the last board of trustees is to continue in control and authority of the property and business for the purpose of winding up its affairs."

Based upon the so-called trust agreement itself, the conclusion cannot be escaped that the Investors Research Syndicate has the appearance of a corporation, that the mode of conducting its business and affairs is such as is calculated to impress the general public with the belief that it is a corporation, and that its acts and mode of organization and control are such as appertain to corporations, or are done after the manner of corporations. Such being the case, the syndicate comes squarely within the doctrine of State vs. Ackerman, supra, and, therefore, cannot transact business under the agreement in this state.

Persons interested in the Investors Research Syndicate specially rely upon the case of Eliot vs. Freeman, 220 U. S. 178, as authorizing its organization and manner of operation, but that case when properly considered does not support their contention.

The pertinent question in that case was whether certain real estate and department store trusts created and operating under trust agreements, and possessing some of the characteristics of the Investors Research Syndicate, were corporations or joint stock associations organized under the laws of Massachusetts, within the meaning of the Federal corporation tax act, which applies only to corporations and joint stock

associations "organized under the laws of the United States, or of any state or territory of the United States," etc. In the opinion, at page 186, the court said:

> "The description of the corporation or joint stock association as one organized under the laws of a state at once suggests that they are such as are the creation of statutory law, from which they derive their powers and are qualified to carry on their operations. A trust of the character of those here involved can hardly be said to be organized within the ordinary meaning of the term; it certainly is not organized under statutory laws as corporations are."

The Federal supreme court therefore answered the question in the negative, and held that the trusts involved were not creatures of statutory law, and hence could not be corporations or joint stock associations organized under and deriving their powers from such laws. That is one of the principal shortcomings of the Investors Research Syndicate. Not being a creature of statutory law, but owing its origin and existence entirely to contract, its members nevertheless are engaged in and carrying out acts such as appertain to corporations, or such as are done after the manner of corporations.

Respectfully,
JOHN G. PRICE,
Attorney-General.

576.

TOLEDO MUNICIPAL COURT—COSTS AND FINES IN STATE CASES COLLECTED UNDER SECTION 4599 G. C. PAYABLE INTO COUNTY TREASURY—SAME RULE APPLICABLE IN POLICE COURTS OR MUNICIPAL COURTS SUCCEEDING SUCH POLICE COURTS IN ABSENCE OF SPECIFIC PROVISIONS.

1. *Under section 4599 G. C., in state cases the costs and fines collected are properly payable to the county treasurer by the clerk of the municipal court of Toledo.*

2. *In police courts, or municipal courts succeeding such police courts, in the absence of specific provision to the contrary, under section 4599 G. C. the fees and costs imposed and collected by the court in state cases go into the county treasury.*

COLUMBUS, OHIO, August 19, 1919.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

> "1. Under section 39 of the Toledo municipal court law (107 O. L., 716), do the costs and fees collected in state cases go to the county treasury?
> 2. In police courts, where the laws make no specific provision to the contrary, under section 4599 G. C. do the fees and costs imposed and collected by the courts in state cases go into the county treasury?"

Your first question involves a consideration of the Toledo municipal court act, passed March 21, 1917, and found in 107 O. L., p. 704, being section 1579-276 G. C.

et seq. Pertinent parts of section 39, page 716, supra, relating to the clerk of the municipal court, are:

> "He shall receive and collect all costs, fees, fines and penalties and shall pay the same monthly into the treasury of the city of Toledo and take a receipt therefor, *except as otherwise provided by law,* * * * He shall succeed to and *have all the powers and perform all the duties of police clerks.*"

Section 53 (p. 720 supra) in part provides:

> "The municipal court shall be the successor of the police court of the city of Toledo."

Section 4599 of chapter 3, relating to clerks of police courts, provides that

> "On the first Monday of each month, he (clerk of the police court) shall make * * * to the city auditor, a report of all fines, penalties, fees and costs imposed by the court in city cases * * *. *He shall make a like report to the county auditor as to state cases. 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."

It will be observed that the municipal court succeeds the police court of the city of Toledo, and that the clerk of the municipal court received all the powers and is obliged to perform all the duties of police clerks (among which are those above indicated in section 4599), and that section 39, partially quoted above, after specifically providing for the accounting on the part of the clerk to the city for moneys collected in city cases, contemplates other provisions of the law relating to payment of monies collected. This is evidenced by the provision in that section that he shall pay over "all moneys received by him as clerk * * *, *except as otherwise provided by law.*"

Section 4599, requiring that such moneys collected in state cases should be paid to the county treasurer, is the exception referred to in section 39, "as otherwise provided by law."

From these considerations it is concluded that in the creation of the Toledo municipal court, there is no evidence of a legislative intention to thereby change the well recognized and long established legislative policy of requiring such moneys collected in state cases to be paid into the county treasury. Examination has been made of a number of other municipal court acts and similar provisions are found in each of them, clearly recognizing that the provision for the accounting for and payment of moneys collected in state cases is made in section 4599. It is to be noted also that by the terms of section 38, the county pays a part of the salary of the clerk of the municipal court in consideration of the services rendered in state cases.

It is, therefore, the opinion of this department that costs and fees collected in state cases in the municipal court of Toledo, Ohio, are properly payable to the county treasury.

Your second question is:

> "In police courts, where the laws make no specific provision to the contrary, under section 4599 G. C. do the fees and costs imposed and collected by the court in state cases go into the county treasury?"

It is to be observed that this is a general statute applicable to all clerks of police courts in the state and there is no apparent reason for concluding that in the absence of specific provision in special acts creating municipal courts which succeed such police courts and cast the same duties upon the clerks thereof, that section 4599 does not

govern the distribution of the fines, penalties, fees and costs imposed and collected in such courts, and answering your question specifically, the fees and costs imposed and collected by the court in state cases go into the county treasury. In police courts, however, section 3056 must not be overlooked with reference to the disposition of fines and penalties collected in state cases. This section provides in such courts for a part of such fines and penalties being paid to law library associations.

Respectfully,
JOHN G. PRICE,
Attorney-General.

577.

BOARD OF EDUCATION—TUITION FROM FOREIGN PUPILS—SCHOOL MONTH FOR SUCH PURPOSE—WHERE SCHOOL TERM ENDS IN FRACTIONAL PART OF MONTH—HOW TUITION DETERMINED.

1. *A board of education is entitled to tuition from foreign pupils for each and every school month in which there was any attendance, and it is for such board of education to say when its school months begin, counting four school weeks as a school month, starting with the opening date of the school term in September.*

2. *Where a school term ends in a fractional part of a month and no service is offered for the remainder of such school month, the charge for tuition should be for the fractional part of the school month during which service was actually available, but where a school is in operation for the whole of a school month, then an attendance for any part of such school month will create a liability for the whole of such school month.*

COLUMBUS, OHIO, August 19, 1919.

HON. ROBERT B. MCMULLEN, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

> "I would like to have your opinion on certain questions relating to the payment of tuition for non-resident pupils, which questions have arisen as a result of the epidemic of influenza
>
> In order that you may fully understand the situation, I submit the following facts:
>
> The H schools opened on Monday, September 9th, 1918, and were in session until October 4th The schools were then closed on account of the influenza until November 18th On November 18th they reconvened and were in session until November 22d, when they were again closed on account of influenza. They were not again opened until Janauary 6, 1919, and from that date continued in session until June 13th The last two weeks taught were to make up a part of the lost time.
>
> On December 23d the board of education declared a two weeks vacation, beginning December 23d. The schools were in actual session only 139 days but the pupils were given credit in their work for a full term of nine months The board of education for the H schools claimed tuition should be paid for the full nine months
>
> You will observe that if the schools had not been interrupted by the epidemic they would have closed on May 16th, if there had been no vacation, or on May 30th, allowing for the two weeks vacation

You will also observe that if there had been no epidemic or vacation, December 27th would have been the end of a school month The time taught from June 2d to June 13th was by agreement of the teachers for the purpose of making up a part of the lost time You will note the extra time taught was not a full month and school was not closed on June 13th, on account of an epidemic

Now the question on which I would like to have your opinion is, to how many months tuition is the H. board of education entitled for the attendance of non-resident pupils?

I may say that the things that puzzle me are, first, to determine just what effect the vacation period would have on computing the school months, and, second, whether or not the extra two weeks taught should be regarded as a full school month for the purpose of determining the amount of tuition due."

Attention is invited to opinion No. 66, rendered by the Attorney-General February 24, 1919, in which the holding was as follows:

"Liability for tuition rests upon attendance in the light of sections 7736 and 7747 G. C., and if there was no school during a particular school month, there could be no attendance, but if there was school during part of a particular school month, and there was attendance during any part of such month, on the part of a foreign pupil, even for a day, there becomes due the tuition of that pupil for that entire school month and such tuition actually due under sections 7736 and 7747 can be collected."

The statutes provide that the school month shall consist of four school weeks and a school week is composed of five school days. You say that H. school opened on Monday, September 9th, and such day would be the beginning of the first school month which would end with the 4th week thereafter or on October 7, 1918; the second school month would then run until November 4, 1918, because each succeeding period of four school weeks is considered a school month and the days would not be uniform in all districts because of the day of beginning the school term. You state that the school in the district in question, which furnished tuition to foreign pupils, maintained a term of nine months of school, that is, thirty-six weeks, as the period intended in normal years, but this year there was an extra two weeks, or a total session covering a period of thirty-eight weeks. In practice teachers are usually paid at the end of each school month and pupils receive their report cards prepared by the teachers for each school month, thereby establishing in each school district the school month as regards the beginning and closing day of such month in that particular district, and from such record of school months, starting with September 9, 1918, it could be ascertained in just what school months school was held.

Going into your particular case by an analysis of the dates given, it is found that your first school month closed four weeks after September 9th and schools were not closed during that month and thereafter tuition would accrue from foreign pupils. The next school month began on October 7th and ended four weeks thereafter, or on November 1st; in this particular school month your statement shows that the H. schools were not in session, for they reconvened on November 18th in the third school month, but were in session only until November 22d, which, however, would constitute attendance for that particular school month. It is found that the third school month, from the date of the beginning of the H school term, would be on December 2, 1918, and would have ended on December 27, 1918, and it is noted that during that particular school month there was no school at all in the district in question, hence there could be no attendance on the part of foreign pupils. It is for the board

of education maintaining the schools in question to say when its school months in that particular district begin and end; if teachers were paid for the two weeks beginning December 23d, and which two weeks the board of education declared to be at holiday vacation, then such vacation period would seemingly be considered a part of a school month and should so be used in computations; but the system in the local board of education might omit such two weeks as being a part of a school month, in which event the fourth school month would end on January 13th.

Section 7747 G C. in part says

> "An attendance any part of the month will create a liability for the whole month."

This necessarily means a school month in that particular district, which includes the four weeks following the opening day of school and the same computation should be carried throughout the remainder of the term. The school records should show whether school was not held in any one particular school month and if no school was held in that particular school month no tuition liability would accrue, for there could be no attendance. But under the section quoted if there had been school even for a day in that particular school month, then liability for tuition would accrue on the part of those who had been in attendance during such school month even once. It, is not believed that where a district has a two weeks' holiday vacation in December that the board of education maintaining a school, at which foreign pupils attend should charge tuition for the two weeks' holiday vacation when during such two weeks they rendered no service to their own pupils. In your case you indicate that there was an extra two weeks taught by the teachers at the end of the term, and this might offset a two weeks missed during the holiday vacation, but in your particular district there was no school at all during the month of December, so there could be no liability for any time during such month. It would seem, therefore, that your rule should be, in computing this tuition, to first establish what are the recognized school months in the H. school district and then establish in which of those school months there was no school, and hence could be no attendance, and for any school month in which there was no school at all, the board of education of the H. school district would have no claim for foreign tuition. Seemingly you have had school running over a period of thirty-eight weeks, and there would therefore be due the tuition for nine and one-half school months, provided that school was held in each and every one of such months, which in your case was not true, because there was no school during the October school month or during the December school month. Hence, from such figures, for nine and one-half school months, at the tuition rate agreed upon, there should be deducted the school months in which there was no school, and it must be remembered also that, from a strict legal standpoint, if the tuition is based upon so much per pupil, the amount for various pupils might not be the same. For instance, there was school from November 18th to November 22d, a period of four days, and if any foreign pupil attended on any one of these days, there would be due from the board of education of the district in which such pupil resided tuition for the whole of that school month; but some other pupil might not have attended either of these four days, in which event the sending district could not be charged with the month's tuition for that pupil, because there had been no attendance.

There is herewith enclosed, for your proper perusal, copies of opinion No. 66, rendered by this department February 24, 1919, and opinion 32, rendered February 7, 1919, the latter treating upon the holiday vacation. It would seem that the records of attendance, which are kept by the superintendent of schools of the H. school district, would establish the school months in which school was held; the pupils who attended any part of that particular school month thereby causing liability for tuition for those pupils to accrue, and from this basis of calculation the number of months'

tuition to which the H. board of education would be entitled for the attendance of non-resident pupils could be properly computed. In considering the extra two weeks taught, it would hardly be proper to consider such two weeks as a full school month, because the teachers taught for half of a school month, and had they been paid would have been paid for but one-half of a school month.

The case presented by you is rather unusual in that the teachers voluntarily taught two weeks beyond the stipulated school term, that is, one-half month for which they were not paid, hence the board of education of the H. district had no expense in the matter of payment of teachers for this two weeks, but at the same time the H. board of education operated the school and the teachers in question were the employes of said board of education and were rendering this two weeks service as a gift to the H. board of education because they had in previous weeks been paid a considerable amount of salary for school weeks in which the schools were not in operation. It this two weeks extra teaching is to take the place of some particular two weeks in some past school month to fill in a certain two weeks in which there was no school in that month, then no tuition would be due for this extra two weeks, which changes the school term from 36 weeks to 38 weeks of operation. It would seem that the matter of these extra two weeks present an unusual angle in the payment of tuition and could be amicably adjusted by the two boards, all things considered. The point might be raised as to whether there could be a half month tuition charge, in view of the following language in section 7747 G. C., which says in part:

> "An attendance any part of the month will create a liability for the whole month."

On the face of such language above quoted, it appears that there could not be such a thing as a half month tuition. But let us take for instance a school that is in operation for eight and a half month, or one for nine and a half month, which has frequently been the case in Ohio in past years. It is the principle of law that in every contract there must be a consideration, and it would hardly seem equitable that a school operating for nine and a half months could charge tuition for foreign pupils for ten full months, that is, charge for forty weeks of service when but thirty-eight weeks of service were rendered, and there was no intent to render any more than thirty-eight weeks. It would seem, therefore, that the language in section 7748 G. C., in equity to all concerned, would mean that while an attendance any part of the month will create a liability for the whole month, in fact intends that an attendance any part of the month will create a liability for the whole of the school service that is offered in that particular school month, that is to say, if at the end of a term of school there was a half month left over beyond the full unit of tuition months, and there was no intent to have school the other half of the school month, clearly the liability would be for the whole of the school service rendered in that school month, which if a complete school month would naturally be four school weeks. Any other construction put upon the language of section 7747 would mean that the schools, in order to render the exact amount of service that is paid for, would have to have either thirty-two weeks, thirty-six weeks or forty weeks, and the board of education would thus have taken from it its privilege of having any odd number of weeks appearing between thirty-two weeks and forty weeks.

It has been previously held by this department that an attendance any part of the month would create a liability for the whole month, but what was in contemplation was that the school which was collecting the tuition should always be in the position of furnishing four full school weeks of service for four full school weeks tuition paid. At the H. school the board operated the schools for forty weeks instead of thirty-eight weeks, and there would be ten school months tuition due less the time lost, but between the thirty-eighth week and the fortieth week there was no intent to render any service and hence for services not even offered a charge could not be made.

It is, therefore, the opinion of the Attorney-General that:

1. A board of education is entitled to tuition from foreign pupils for each and every school month in which there was any attendance, and it is for such board of education to say when a school month began, counting four school weeks as a school month, starting with the opening day of the school term in September.

2. Where a school term ends in a fractional part of a school month and no service is offered for the remainder of such school month, the charge for tuition should be for the fractional part of the school month during which service was actually available, but where a school is in operation for the whole of a school month, then an attendance for any part of such school month will create a liability for the whole of such school month.

Respectfully,
JOHN G. PRICE,
Attorney-General.

578.

MUNICIPAL CORPORATION—AN UNSATISFIED JUDGMENT AGAINST CITY IS AN INDEBTEDNESS FOR WHICH BONDS MAY BE ISSUED UNDER SECTION 3916 G. C.

An unsatisfied judgment against a city is an indebtedness for which bonds of the city may be issued under section 3916 *so as to change but not increase the indebtedness.*

COLUMBUS, OHIO, August 19, 1919.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion of this department as follows

> "Under the provisions of section 4517 G. C., final judgments against a corporation, except in condemnation cases, are payable by the sinking fund trustees. When through negligence and improper levies the funds of the sinking fund are depleted and the amounts of money which should be on hand are not on hand purely through disregard of the provisions of article XII, section 11, of the constitution of Ohio, together with section 5649-1 of the General Code and suit is brought against the city and the city confesses judgment,
>
> Can funding bonds legally be issued by the municipality to meet the amount of such judgment?"

It is noted that the reasons be given in your letter for the depletion of the sinking funds are stated to be in reply through disregard of the provisions of article XII, section 11, of the constitution of Ohio, together with section 5649-1 of the General Code." It is suggested, however, that the solution of your question lies in determining whether the judgment is an indebtedness within the meaning of section 3916, under which the issuance of funding bonds by municipalities are authorized. It is suggested, also, that the claim against the city having been reduced to a judgment which remains unmodified and unsatisfied, the question of its validity cannot collaterally be inquired into. Such an inquiry would seem unnecessary in any event, as your statement shows that the city confessed judgment.

Sections 3916, 3917, 4506 and 4517 G. C. are pertinent. In part section 3916 is:

"For the purpose of extending the time of payment of an indebtedness, which from its limits of taxation the corporation is unable to pay at maturity, or when it appears to the council for the best interest of the corporation, the council thereof may issue bonds of the corporation * * * so as to change but not increase the indebtedness."

Section 3917 G. C., as a conditionprecedent to such refunding or extending, require the determination by a formal resolution of the council that the debt to be funded or extended is an existing, valid and binding obligation of the corporation. The effect of reducing a claim to judgment, as determining its character as an indebtedness under section 3916, was considered in an opinion rendered by the Attorney-General April 11, 1913, to Hon. Marshall G. Fenton, city solicitor, Chillicothe, Ohio, and found in Vol. 2 of the Opinions of the Attorney-General for 1913, page 1485, in which it is indicated that the reduction of the claims to judgment makes it such an indebtedness. Section 4507 gives the municipality power to levy taxes to pay a final judgment against a city, except in condemnation cases.

Section 4517 makes it the duty of the trustees of the sinking fund to "provide for the payment of all judgments final against the corporation, except in condemnation of property cases." From your letter it may be fairly inferred that the judgment was not confessed in a condemnation of property cases.

Is such a judgment an indebtedness for which such bonds may be issued?

While not rendered on the precise question involved herein, Opinion No. 518 of the Opinions of the Attorney-General, rendered under date of July 24, 1919, and directed to your bureau, defines generally the debts which may be the basis of a bond issue under section 3916.

Such debts are defined on page 9 of that opinion to be:

"Section 3916 is available in a municipality only in that very limited class of cases * * * those cases, in short, in which the municipality is actually bound by an obligation created without reference to the adequacy of the revenues through which it is to be discharged."

In Newton vs. Toledo, 18 O. C. C., 756, affirmed by the supreme court without report in 52 O. S., 649, the then circuit court, after quoting section 2701 R. S. (practically the same as present section 3916 G. C.), states one of the points in that case as follows:

"It is argued by counsel for the plaintiffs that the mere existence of claims against the city for which in some manner it may be made or is liable, is not sufficient basis for the lawful issue of bonds under this section, but that the indebtedness must be such as the city has power to levy a tax to pay, and must be already evidenced by bonds of the corporation, or must be such that, on account of it, the city had power to issue its bonds when the debts were contracted",

and the court then proceeds to inquire into and determine the validity of the alleged indebtedness against the city, and on page 769, finding the alleged indebtedness to be invalid and not binding on the city, granted the relief prayed for by the plaintiff and enjoined the issuance of the refunding bonds of the city of Toledo.

Consideration of the duty imposed upon the sinking fund trustees by section 4517 and measured by the above quoted definitions it can hardly be claimed that a final judgment rendered against the city is not an indebtedness and the opinion of this department is, therefore, that funding bonds legally may be issued by a mu-

nicipality for the purpose of paying a final judgment rendered against the municipality under section 3916 G C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

579.

BOARD OF EDUCATION—WITHOUT AUTHORITY TO LET CONTRACTS FOR FURNISHING LABOR ON SCHOOL BUILDING AT TEN PER CENT OF COST OF MATERIAL—COMPETITIVE BIDDING AS REQUIRED BY SECTION 7623 G. C., NECESSARY.

Boards of education are without authority to let contracts for the furnishing of labor on a school building at ten per cent of the cost of material, and all contracts exceeding fifteen hundred dollars in city districts and five hundred dollars in other districts, let by boards of education for such labor, must be by competitive bidding and in compliance with section 7623 G C.

COLUMBUS, OHIO, August 19, 1919.

HON. G. F. CRAWFORD, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

"Monroe township, in this county, has taken a vote which resulted in favor of issuing bonds and constructing a centralized school. The board advertised for bids, which were rejected, for sufficient reasons, principally because they were much higher than the estimate of the architect.

The board can procure a contractor who will furnish the labor on the building at 10 per cent of the cost on material, the board to buy the material, which is considered by them to be very much cheaper than the bids they are able to procure

They have asked my advice as to whether or not they have power to contract in this way. I have advised them that they have not for the reason that every purchase they make must be made in strict accordance with the statute (7623 G. C.), and when any purchase exceeds $500.00 they will have to advertise for competitive bids and proceed strictly according to the statute.

The board does not seem to be satisfied with this advice and have asked me to procure an opinion from your office."

Section 7623 of the General Code reads as follows:

"When a board of education determines to build, repair, enlarge or furnish a schoolhouse or schoolhouses, or make any improvement or repair provided for in this chapter, the cost of which will exceed in city districts, fifteen hundred dollars, and in other districts, five hundred dollars, except in cases of urgent necessity, or for the security and protection of school property, it must proceed as follows:

1. For the period of four weeks, the board shall advertise for bids in some newspaper of general circulation in the district, and two such papers, if there are so many. If no newspaper has a general circulation therein,

then by posting such advertisement in three public places therein. Such advertisement shall be entered in full by the clerk, on the record of the proceedings of the board.

2. The bids, duly sealed up, must be filed with the clerk by twelve o'clock, noon, of the last day stated in the advertisement.

3. The bids shall be opened at the next meeting of the board, be publicly read by the clerk, and entered in full on the records of the board.

4. Each bid must contain the name of every person interested therein, and shall be accompanied by a sufficient guarantee of some disinterested person, that if the bid be accepted, a contract will be entered into, and the performance of it properly secured.

5. When both labor and materials are embraced in the work bid for, each must be separately stated in the bid, with the price thereof.

6. None but the lowest responsible bid shall be accepted. The board in its discretion may reject all the bids, or accept any bid for both labor and material for such improvement or repair, which is the lowest in the aggregate.

7. Any part of a bid which is lower than the same part of any other bid, shall be accepted, whether the residue of the bid is higher or not; and if it is higher, such residue must be rejected.

8. The contract must be between the board of education and the bidders. The board shall pay the contract price for the work, when it is completed, in cash, and may pay monthly estimates as the work progresses.

9. When two or more bids are equal, in the whole, or in any part thereof, and are lower than any others, either may be accepted, but in no case shall the work be divided between such bidders.

10. When there is reason to believe that there is collusion or combination among the bidders, or any number of them, the bids of those concerned therein shall be rejected."

Section 2362 G. C. reads as follows:

"An officer, board or other authority of the state, a county, township, city, village, school or road district or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration or rebuilding of a public building, institution, bridge, culvert or improvement and required by law to advertise and receive proposals for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work or both in their discretion, for each separate and distinct trade or kind of mechanical labor, employment or business entering into the improvement."

Section 2363 G. C. reads as follows:

"When more than one trade or kind of mechanical labor, employment or business is required no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required or the bids for the whole or for two or more kinds of work or materials are lower than the separate bids therefor, in the aggregate."

A reading of the above sections indicates clearly that there must be a bidding where a school board is proposing to construct a school building and the law goes very carefully into the matter of just how that bidding shall be conducted and stipu-

lates clearly that such bidding on the building, as a whole, or on materials and labor taken separately, or parts of such labor or parts of such material, *shall be competitive.*

You say that the board has indicated its desire to buy the material which it has full authority to do, but such purchase of material must be made through competitive bidding and the law provides that "none but the lowest responsible bid shall be accepted."

You further say that the board, after it buys the material, presumably at the lowest bid, can then procure a contractor who will furnish the labor on the building at ten per cent. of the cost of material. It is apparent at once that if the board is dealing with one contractor who *has* made such an offer, then there is no competition as between bidders and again, if such bid is ten per cent of the cost of material, there would be no advantage in having such bid "duly sealed up," for the reason that the board, or any one else who might care to make the computation, would know the figures contained in the bid, whether sealed or not, for it would be ten per cent. of the amount paid for materials, of which the board must have knowledge as regards its total.

The contemplation of the law is that all public improvements of this nature must be thrown open to bids that are actually competitive and the mere fact that the board has in mind a contractor who will furnish the labor on the building at ten per cent of the cost of the material, does not indicate that some other person might not contract to furnish such labor at eight or nine per cent. of the cost on material, and even if this system were established and bids were made on the basis of percentages, then if the cost of the material was known, every contractor would know by computation the amount in money of the bid of his competitors and the element of competition, in the true sense, would be removed. The contemplation of the law is that where bids are required to be made, such bids must be made in exact figures in money and they must be sealed and filed and opened up at a specified time, all of which would be unnecessary if the board were permitted to give the contract to a contractor who would furnish the labor on the building at ten per cent of the cost of material. The provisions of section 7623 G. C., in its ten specific paragraphs, must be carried out absolutely, and there should be no deviation therefrom. There is no provision in such statute for a board of education to let a contract for the furnishing of labor on a school building at ten per cent. of the cost of material, and all contracts let by boards of education must be in compliance with such section.

Respectfully,
JOHN G. PRICE,
Attorney-General.

580.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY IN THE AMOUNT OF $32,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, August 20, 1919.

581.

APPROVAL OF BOND ISSUE OF STARK COUNTY IN THE AMOUNT OF $30,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, August 20, 1919.

582.

GOVERNOR—PARDONING POWER—EXTENDS TO ALL CRIMES AND OFFENSES—TREASON AND CASES OF IMPEACHMENT EXCEPTED

The pardoning power is vested solely and exclusively in the Governor by section 11 *of article III of the state constitution, and extends to all crimes and offenses except treason and cases of impeachment. Such power cannot be conferred upon or exercised by any other authority.*

COLUMBUS, OHIO, August 20, 1919.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—The pardoning power is vested solely and exclusively in the governor and extends to all crimes and offenses except treason and cases of impeachment. The governor may grant pardons on such conditions as he may think proper, subject only to such regulations as to the manner of applying for pardons as may be prescribed by law.

The pardoning power is conferred upon the governor by section 11 of article III of the state constitution, and, as above stated, such power can not be lodged with or exercised by any other authority.

The constitutional provision above referred to, so far as pertinent, reads as follows:

> "He shall have power, after conviction, to grant reprieves, commutations and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations as to the manner of applying for pardons, as may be prescribed by law."

In Jiha vs. Berry, 16 Ohio Dec. 33, the Cuyahoga county common pleas court decided that by reason of the foregoing constitutional provision—

> "the whole pardoning power, except as to treason and cases of impeachment, is vested in the governor exclusively, and can not be exercised directly or indirectly by any other authority."

The foregoing case was affirmed by the circuit court and Judge Caldwell, in announcing the affirmance, said:

> "We have carefully examined the opinion in this case in the court of common pleas and we come to the same conclusion that Judge Dissette came to in that case, and we think we can not give any better reasons than were given in that opinion."

The power to parole should not be confused with the power to pardon, for there is a vital distinction between the two powers, and it was by reason thereof that the constitutionality of the act of May 4, 1885, which authorized the board of managers of the Ohio penitentiary to allow prisoners to go upon parole, was sustained, the court holding that the act was not in conflict with the constitutional provision above quoted, vesting the pardoning power exclusively in the governor. See State vs. Peters, 43 O. S. 629.

Confining this opinion strictly to the subject of the pardoning power, it is my

opinion that such power is lodged exclusively with the governor, and that any statute undertaking to confer such power upon any other officer or board will be unconstitutional.

It may not be improper for me to add that it is for the governor alone to finally determine in what cases he will or will not exercise the pardoning power.

Respectfully,
JOHN G. PRICE,
Attorney-General.

583.

FALSE OR SHORT MEASURE IN SALE OF OIL DELIVERED FROM ONE COUNTY TO ANOTHER UNDER CERTAIN AGREEMENT FOR SALE OF PROPERTY—WHERE PROSECUTION IS TO BE HAD.

1. *Where an agreement for the sale of property is made in "P" county, Ohio, one of the terms of which is that the purchaser shall pay for it f. o. b. cars in "C" county, Ohio, and such property is not shipped c. o. d., and in "C" county, Ohio, the seller makes or gives a short measure thereof, and there delivers it on board cars as agreed upon, one of the offenses defined in section* 13106 *G. C. is consummated in the latter county and that county is the proper venue for the prosecution of such offense.*

2 *The seller in such case being a corporation, its mananger, as well as its employes, who knowingly make or give such false measure, in the usual course of their employment, may be prosecuted.*

COLUMBUS, OHIO, August 21, 1919.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for the opinion of this department as follows:

> "The B. Oil Company, of Cleveland, Ohio, sold to J. W. W., of Circleville, Ohio, through their agent, two drums of oil which were found by our inspector to contain less than the amount which was sold to and paid for by J. W. W. Freight on said oil was paid by Mr. J. W. W. in Circleville.
>
> "We desire to file prosecution against the B. Oil Company. Please advise against whom the affidavit should be drawn and where the same should be filed."

By personal conference it is learned that your department contemplates a criminal presecution under section 13106 G. C., as amended in 103 O. L., 499, charging the giving of a false or short measure in the sale of oil. That section is as follows:

> "Whoever, in buying or selling any property, or directing or permitting an employe so to do, makes or gives a false or short weight or measure; or whoever has charge of scales or steelyards fixed for the purpose of misweighing an article bought or sold, or, having scales or steelyards for the purpose of weighing property, reports a false or untrue weight; or whoever uses in the sale of a commodity a computing scale or device indicating the weight and price of such commodity upon which scale or device the graduations or indications are false, or inaccurately placed, either as to weight or price, shall be fined not more than fifty dollars."

It is to be noted that among the things which this statute makes punishable is

the making or giving a false or short weight or measure, as therein provided, in "buying or selling any property or directing or permitting an employe so to do." The offense may be committed in purchasing as well as selling and by short weighing or measuring, but in your question relating to short measuring the statute will be further quoted and considered only as affecting such measuring and selling.

To properly distinguish this statute from other statutes construed by the courts of this state, it is proper to note that offering for sale or having short measured property in possession is not an offense, but under this section the offense is committed in "buying * * * any property."

In establishing the venue in a prosecution under this section on the facts as stated in your letter, it becomes necessary to determine whether a sale was made and where the false measuring was done, for this is the gist of the offense.

It must be borne in mind that the evil thing prohibited is false measuring in the sale of property; the acts constituting the sale of property are the surrounding circumstances of the offense, furnishing, it might be stated, the opportunity for such false measuring. True, unlawful acts culminate in a sale on the part of the offender and the offense is not consummated unless a sale occurs. But it cannot be said that the offense is committed where the agreement of sale occurs, as the object of this law is not to discourage or prevent sales of property, but to prohibit and make unlawful the giving of a false measure in such sales.

The case of State vs. Bissman, 54 O. S., 243, to which you direct attention in personal conference, has been considered. The sections under which the prosecution in that case was made differ materially from the section involved in this case. The Bissman case was a prosecution under the adulteration of food statutes and, unlike section 13106, makes it an offense to offer the prohibited article for sale as well as the actual selling, and because of this and other differences in the terms defining the offenses, that case cannot be safely relied upon as furnishing a precedent in the present question. To constitute an offense under section 13106, the facts must establish two main elements: (a) the giving of a short measure, and (b) in the sale of property. Consideration of the terms and purpose of this section convinces this department that such false measuring being done in "C" county, the affidavit, charging the seller with an offense under that section, should be filed in that county.

Your second question may be stated to be:

> "Against whom should the prosecution be brought?"

it being observed that the sale was made by an agent in behalf of a corporation. In the Bissman case, supra, the second syllabus is:

> "The manager of a mercantile corporation is subject to a fine under the provisions of the 'act to provide against the adulteration of food and drugs,' when the adulterated article is sold or offered for sale by an agent of such corporation acting within the scope of his authority, and the offense is triable in the county in which such article is sold or offered for sale by such agent."

This was a prosecution for the sale of adulterated ketchup and it was based on a statute in some respects dissimilar to section 13106, the same general principle as to the liability of the principal for the agent's acts is applicable and the facts as stated at page 243 of the report of that case, are very similar to the facts under consideration:

> "The jury were instructed that of the accused, as manager of the corporation, sent an agent from Richland county to Hardin to sell the article of food in question, and it was so sold, the defendant was liable as though he had been personally present making the sale, and was triable in Hardin

county. The accused excepted to the charge. After the verdict of guilty a fine of $100 was imposed."

In sustaining the judgment of the trial court, on page 244 the supreme court says:

"The statutory provisions governing these cases do not exempt any one who sells or offers to sell the articles prohibited, because of his relation to the transaction whether it is that of agent or principal."

In this connection it should be remembered that bearing on the principal's liability, section 13106 makes it an offense to direct or permit an employe to give a false measure in the sale of property. What the court held as to those sections relating to the liability of the principal, is equally true of section 13106, viz.,

"The agent is within the terms of the statute because he personally participated in its violation; *and the principal is responsible for what he does by another.* Any other construction of the statute would afford an easy method for defeating its purpose;"

Section 12350 G. C. provides:

"Whoever aids, abets or procures another to commit an offense, may be prosecuted and punished as if he were the principal offender."

So it may be concluded that the manager of the corporation may be prosecuted for the giving of short measure in such a sale by his employe, in the usual course of his employment, and that the employe, who knowingly gives such false measure, may also be prosecuted.

Respectfully,
JOHN G. PRICE,
Attorney-General.

584.

RELIGIOUS GERMAN CATECHISM SCHOOLS—NOT VIOLATION OF AMENDED SENATE BILL No. 137.

Citizens can conduct strictly religious German catechism schools for the study of the Bible and church history and such instruction is not a violation of amended senate bill No. 137.

COLUMBUS, OHIO, August 21, 1919.

HON. GEORGE S. MAY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following question:

> "I would like to inquire whether the Ake bill renders it unlawful to conduct strictly religious German catechism schools during the summer months, at which schools all the instruction that is given is Bible and church history instruction, together with such instruction in the reading of German as would tend to make the religious instruction more intelligible."

The Ake bill, to which you refer, is amended senate bill 137 and is effective on and with September 5, 1919. Such new law upon the teaching of the German language in the public, private and parochial schools of the state, reads as follows:

> "An act to supplement section 7762 of the General Code, by the addition of supplemental sections to be known as sections 7762-1, 7762-2, 7762-3 and 7762-4, and to repeal section 7729, concerning elementary, private and parochial schools and providing that instruction shall be in the English language.
>
> BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:
>
> Section 1. That section 7762 be supplemented by sections 7762-1, 7762-2, 7762-3 and 7762-4 to read as follows:
>
> Sec. 7762-1. *That all subjects and branches taught in the elementary schools* of the state of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all the branches named in section 7648 of the General Code. Provided, *that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.*
>
> Sec. 7762-2. All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct *pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only,* and the person or persons, trustees or officers in control shall cause to be taught in them such branches of learning as prescribed in section 7648 of the General Code or such as the advancement of pupils may require, and the person or officers in control direct; provided, that the German language shall not be taught below the eighth grade in any such schools within this state.
>
> Sec. 7762-3. Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each sep-

arate day in which such act shall be violated shall constitute a separate offense.

Sec. 7762-4. In case any section or sections of this act shall be held to be unconstitutional by the supreme court of Ohio, such decision shall not affect the validity of the remaining sections.

Section 2. That section 7729 of the General Code be, and the same is hereby repealed."

Article I, section 1 of the constitution of the state of Ohio reads as follows:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Article I, section 3, of the constitution of Ohio, reads:

"The people have the right to assemble together, in a peaceable manner, to consult for the common good; * * *"

Article I, section 7, of the constitution of Ohio reads as follows:

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; *nor shall any interference with the rights of conscience be permitted.* * * * Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws *to protect every religious denomination in the peaceable enjoyment of its own mode of public worship* * * *."

It must be presumed that the general assembly had full knowledge of the above quoted provisions appearing in the constitution of the state of Ohio, when it enacted senate bill 137, with a view of eliminating the teaching of the German language below the eighth grade in the elementary, private and parochial schools within this state.

Sections 7762-1 and 7762-2, appearing in amended senate bill 137, both refer to the branches named in section 7648 of the General Code, which reads as follows:

"An elementary school is one in which instruction and training are given in spelling, reading, writing, arithmetic, English language, English grammar and composition, geography, history of the United States, including civil government, physiology, and hygiene. Nothing herein shall abridge the power of boards of education to cause instruction and training to be given in vocal music, drawing, elementary algebra, the elements of agriculture and other branches which they deem advisable for the best interests of the schools under their charge."

This section, while not amended directly by the general assembly, has been amended indirectly by the following new language appearing in amended section 7645 G. C., which reads as follows:

"Boards of education are required to prescribe a graded course of study

for all schools under their control in the branches named in section seventy-six hundred and forty-eight, subject to the approval of the superintendent of public instruction. The course of study mentioned in this section shall include American government and citizenship in the seventh and eighth grades."

The above section was amended in amended senate bill 140, effective September 5, 1919, and the following amended section, 7762 G. C., appearing in such senate bill 140, is also pertinent at this time and reads as follows:

"Section 7762. All parents, guardians and *other persons who have care of children,* shall instruct them or cause them to be instructed in reading, spelling, writing, English grammar, geography, arithmetic, United States history, *American government and citizenship.*"

A careful analysis of the several amendments to the General Code bearing upon the elimination of the Germar language in public, private and parochial schools of the state indicates that it was the intent of the legislature that the German language should be prohibited in the teaching of the subjects mentioned in section 7648 of the General Code and had no reference to any religious instruction that might be given by any religious denomination in the carrying out of their own mode of worship which is protected by the state constitution. The bill in question provides that in the elementary schools of the state, that is. the public school system, all instruction below the eighth grade shall be given in the English language only, but under the provisions of this new act as appearing in section 7762-1, the German language can be taught in the eighth grade in any of the elementary schools of the state and also in all grades of the public high schools. As regards private and parochial schools, and those schools maintained in connection with state benevolent or correctional institutions, unless a pupil in such schools shall have completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of the state, he shall be taught in the English language only, but if such pupil attending either of these kinds of schools has completed the first seven grades, then there is nothing in the new law which prevents his instruction in the German language or any other language, the main prohibition of both sections being that the German language should not be taught to pupils below the eighth grade, or its equivalent

You indicate in your question that the schools you have in mind are strictly religious schools held during the summer months and that all the instruction that is given is religious in its nature, being upon the Bible and church history. The constitution provides that every religious denomination shall be free to exercise the peaceable enjoyment *of its own mode of public worship* and that the General Assembly shall pass suitable laws to protect each and every denomination in its mode of worship. These modes of worship might vary considerably and do vary. The religious instruction in one instance might be read in Hebrew, in another instance in Latin and in another instance in German. Such mode of worship might be the only one that the parents of the children would know. If the children are prevented from enjoying the same mode of worship as the parents. then it might be said that such child is being compelled to maintain a form of worship against his consent, which is prohibited in section 7 of article I of the constitution of Ohio, as well as being an interference with the rights of conscience, which are protected in the same section.

Any other construction put upon amended senate bill 137 might give rise to the question of its constitutionality, in view of the quotations from the constitution above given.

It is, therefore, the opinion of the Attorney-General that citizens can conduct

strictly religious German catechism schools for the study of the Bible and church history and such instruction is not a violation of amended senate bill No. 137.

Respectfully,
JOHN G. PRICE,
Attorney-General.

585.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN GALLIA, JACKSON, MONTGOMERY, PERRY, TUSCARAWAS AND VINTON COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, August 21, 1919.

586

APPROVAL OF FINAL RESOLUTION FOR ROAD IMPROVEMENT IN ERIE COUNTY.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, August 23, 1919

587.

COUNTY TREASURER ELECT DIES BEFORE BEGINNING OF TERM—NO VACANCY—PRESENT INCUMBENT CONTINUES IN OFFICE.

1. *The death of the treasurer-elect before the beginning of the term for which he was elected, does not create a vacancy in the office for the ensuing term, when the present incumbent is not disqualified under the constitution from continuing in office.*
2. *The present incumbent of the office of county treasurer of Delaware county is entitled to continue in office until the first Monday in September,* 1921.

COLUMBUS, OHIO, August 25, 1919.

HON. D. M. CUPP, *Assistant Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—Your letter requesting my opinion as to whether or not the death of the treasurer-elect of Delaware county after the last November election, has created a vacancy in the office, etc., was duly received, and reads as follows:

> "At the November election, 1916, A. E. Baldwin was elected county treasurer of Delaware county, qualified and is now serving on his first term as such treasurer. At the November election in 1918, F. D. White was elected to succeed him. On December 19, 1918, said F. D. White died. The question has arisen whether the death of said White will have created

a vacancy in said office of county treasurer, at the expiration of Mr. Baldwin's term, such as would require an appointment by the county commissioners of Delaware county, or whether no vacancy will exist, and Mr. Baldwin continue to hold such office as county treasurer for the term beginning the first Monday in September, 1919, and ending the first Monday in September, 1921.

No commission was ever issued to said F. D. White, and he had not qualified as such treasurer by taking the oath of office or filing a bond."

The term of office of the county treasurer is fixed by section 2632 G. C. at

"two years from the first Monday of September next after his election,"

and by section 8 G. C., which provides that a person holding an office of public trust shall continue therein

"until his successor is elected or appointed and qualified unless otherwise provided in the constitution or laws"

See State vs. Speidel, 62 O. S., 156, 160, holding that section 8 G. C. must be read into the officer's commission.

It will thus be seen that "unless otherwise provided in the constitution or laws" the term of office of county treasurer is for two years from the first Monday of September next after his election, and until his successor is elected or appointed and qualified.

In State vs. Metcalfe, 80 O. S. 244, the court held, and the cases therein cited sustain the proposition, that under the present law of the state, an office cannot be regarded as vacant while filled by one lawfully entitled to hold it, and that the death of a person elected to an office before he qualifies does not create a vacancy where the law provides that the incumbent shall hold over until the election and qualification of his successor.

While the court in that case was construing constitutional provisions, nevertheless the doctrine of the case is equally applicable in the construction of statutory provisions. That this is true is evidenced by the fact that the court refers to and quotes from several cases involving statutory terms of office in support of the point actually decided. See State vs. Speidel, supra, which holds that:

"When one who is holding the office of sheriff, and is a candidate for election to succeed himself, dies before entering upon the new term, a vacancy is thereby created in the term in which he was serving, but not in the term for which he was a candidate and upon which he had not entered."

Referring again to section 8 G. C., the question arises as to whether or not there is any constitutional provision or law prescribing a different rule with respect to the county treasurer, because, in the absence of a constitutional provision or law to the contrary, that section cannot be disregarded, but must be applied.

There are two constitutional provisions pertinent to the present inquiry which are in direct conflict with respect to the maximum term of office of county officers, viz., section 2 of article X (adopted October 13, 1885), which provides that county officers shall be elected for terms,

"not exceeding *three* years, as may be provided by law,"

and section 2 of article XVII (adopted November 7, 1905), which, among other things, provides that such officers shall be elected for terms,

"not exceeding *four* years, as may be so prescribed." (That is, prescribed by the general assembly.)

Under the first constitutional provision the term cannot exceed three years, while under the latter provision the term cannot extend beyond four years, for, as held in State vs. Brewster, 44 O. S. 589,

> "Where the term of office is fixed and limited by the constitution, there is no power in the general assembly to extend the term or tenure of such office beyond the time so limited."

There being a conflict between these two constitutional provisions with respect to the term of office of county officers, section 2 of article XVII, being the latest expression of the people on the subject, must govern. Such also was the opinion of the former Attorney-General (1917 Opinions of Attorney-General, Vol. 2, p 1476). See also State vs. Creamer 83 O. S. 412, in which the court held:

> "The doctrine relating to repeals and amendments by implication applies alike to constitutions and statutes, and it requires that earlier expressions yield when it is necessary to give effect to the latest expression of the intention of those whose intention is entitled to control."

Under article XVII the general assembly is clothed with exclusive power to fix the term of office of county officers, subject to the limitation that the term shall not exceed four years. In the exercise of constitutional power the general assembly has provided that the term of the county treasurer shall be two years from the first Monday of September next after his election (section 2632 G. C.), and until his successor is elected or appointed and qualified "unless otherwise provided in the constitution or laws" (section 8 G. C.) and the only limitation on this term is the constitutional provision that it shall not exceed four years.

It is contended that section 8 G. C. has no application to the present situation because it is "otherwise provided" with respect to the county treasurer by sections 2634 and 2636 G. C. The statute first mentioned (2634) provides that if a person elected to the office fails to give bond on or before the date of the commencement of his official term the office shall become vacant; and the latter statute (2636) provides that when the office becomes vacant by death, removal, resignation, neglect to give bond or other cause the commissioners shall forthwith appoint a suitable person to fill such vacancy. But these statutes in my opinion must be read and construed in connection with section 8 G. C. and the decision of the supreme court defining vacancy or prescribing rules for determining when a vacancy exists. When so considered the conclusion must be that section 2634 G. C. has reference to cases such as Kelly vs. State 25 O. S. 577, hereinafter referred to or where the incumbent has held the office for the full constitutional period and that the death of a treasurer-elect before the beginning of the term for which he was elected does not create a vacancy in the office when the present incumbent is not disqualified by the constitutional limitations (section 3 of article X and section 2 of article XVII) from holding over.

Cases such as Adams vs. Hopkins, 10 O. S., 509; Kelly vs. State, 25 O. S., 577, and State vs. Brewster, 44 O. S., 589, which are cited in support of the contention that section 8 G. C., has no application to the office of county treasurer, when properly considered, are not opposed to the conclusion at which I have arrived.

In Adams vs. Hopkins, supra, the incumbent had served two full terms of two years each, and was therefore disqualified by the four year limitation prescribed by section 3 of article X of the constitution from continuing longer in office. And, also, there

was no statute in existence at the time authorizing or permitting an incumbent to hold over after his term—section 8 G. C. not having come into our statute law until 1880. Hence the statement in the opinion that there was no person entitled to take and hold the office during the ensuing term, while true and controlling in 1860 when the opinion was written, has no application under the present state of our statutory law. The case was also distinguished in State vs. Metcalfe, supra.

In Kelly vs. State, supra, the question now under consideration was not involved, and the case is therefore not an authority either for or against my conclusion. In that case the treasurer, who had entered upon and was serving his second term, had failed to give bond or take the oath of office on or before the beginning of such term. That case, like Adams vs. Hopkins, supra, was also decided prior to 1880.

State vs. Brewster, supra, decides that when an officer has served the full time allowed by the constitution, he cannot continue in office until a successor is elected and qualified. In such a case section 8 G. C., by reason of the express constitutional limitation, necessarily becomes inoperative, and it was so held in that case. No such situation is presented here, for the present incumbent is now serving his first term.

Since there will be no vacancy in the office of county treasurer of Delaware county on the first Monday of September, 1919, to be filled under section 2636 G. C. (assuming that the present incumbent will be alive and in office on that day), and in view of the fact that there is no provision for the election of a successor until the general election in November, 1920, and then only for the term beginning on the first Monday in September, 1921 (section 10 G. C. not being applicable to the present situation), it is my opinion that the present incumbent, who is serving his first term, and therefore not disqualified under section 3 of article X and section 2 of article XVII of the state constitution from continuing in office, is entitled to hold over until the first Monday in September, 1921. See 1917 Opinions of Attorney-General, Vol. 2, p. 1476.

Respectfully,
JOHN G. PRICE,
Attorney-General.

588.

APPROVAL OF SALE OF CANAL LANDS IN CITY OF DAYTON, OHIO, TO CHARLES E. COMER.

COLUMBUS, OHIO, August 26, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of August 23, 1919, transmitting in duplicate form findings and resolution pertaining to the sale of a portion of abandoned canal basin in the city of Dayton, Montgomery county, Ohio, to Charles E. Comer, the price to be paid, in the sum of $500.00, representing the value of the land as appraised by you.

I note that the heirs of Margaret B. Stoppelman are paying the purchase money, but have requested that the deed be made direct to Charles E. Comer; and under the circumstances as related by you I agree with you that there is no objection to the state's complying with this request.

I have carefully examined said findings and resolution, find them correct in form and legal, and am, therefore, returning the same to you with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

589.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN JEFFERSON, LAWRENCE, PORTAGE, ADAMS, NOBLE AND JACKSON COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, August 28, 1919.

590.

INSOLVENCY COURT IN HAMILTON AND CUYAHOGA COUNTIES—PROBATE COURTS OF ALL COUNTIES HAVING MORE THAN 70,000 INHABITANTS AND THREE COMMON PLEAS JUDGES—CONSTABLES MAY BE APPOINTED—ALSO PERFORM DUTIES OF ASSIGNMENT OF CASES—COMPENSATION.

1. *In the insolvency court in Hamilton and Cuyahoga counties, and in the probate courts of all counties having more than* 70,000 *inhabitants and wherein more than two common pleas judges regularly hold court at the same time, one or more constables may be appointed to preserve order, attend the assignment of cases and discharge such other duties as the court requires.*

2. *Such constable or constables shall receive such compensation as is fixed by the judge of the court making the appointment, subject to the scale of limitations established by section* 1693 *G. C. (H. B.* 515, *effective July* 22, 1919). *By virtue of such section, additional compensation, not to exceed* $1,500.00 *per year, is allowable for the work of such constable* or *constables incident to the assignment of cases.*

COLUMBUS, OHIO, August 28, 1919.

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

GENTLEMEN:—Your letter of recent date reads as follows:

> "In view of opinions of Attorney-General to be found in the Opinions of the Attorney-General, 1916, volume I, page 908, and 1917, volume I, page 1067, and the provisions of section 1692 G. C. as amended, 103 O. L. 417, and section 1693 G. C., as amended, 107 O. L. 689, and as again amended in 1919, in house bill 515, we would ask your opinion as to what the maximum amount is that can be allowed a court constable in the courts of insolvency (Cuyahoga and Hamilton counties) and in probate courts in counties having a population of 70,000 or more? Can constables in the insolvency courts and in the probate courts in counties having a population of 70,000 or more be placed by the court in charge of the assignment of cases with additional compensation therefor? "

It is considered that both of your questions relate to one and the same thing and come to this: Have judges of the insolvency courts, and of probate courts in counties having more than 70,000 inhabitants. the right to appoint one or more constables to attend and assume charge of the assignment of cases in their respective courts, and to allow such constables additional compensation therefor?

Section 1692 G. C. (103 O. L. 417) says:

"When, in the opinion of the court the business thereof so requires, each court of common pleas, court of appeals, superior court, insolvency court, in each county of the state, and, in counties having at the last or any future federal census more than seventy thousand inhabitants, the probate court may appoint one or more constables to preserve order, attend the assignment of cases in counties where more than two common pleas judges regularly hold court at the same time and discharge such other duties as the court requires. When so directed by the court, each constable shall have the same powers as sheriffs to call and impanel jurors, except in capital cases."

Section 1693 G. C. (amended in 108 O. L. *162*, being H. B. No. 515) says:

"Each constable shall receive the compensation fixed by the judge or judges of the court making the appointment. In counties where four or more judges regularly hold court, said compensation shall not exceed eighteen hundred and twenty dollars each year, in counties where two judges and not more than three judges hold court at the same time, not to exceed twelve hundred and fifty dollars each year, and in counties where only one judge holds court, such amount, not to exceed one thousand dollars each year, as may be fixed by the court, and shall be paid monthly from the county treasury on the order of the court. Such court constable or constables when placed by the court in charge of the assignment of cases, may be allowed further compensation not to exceed one thousand five hundred dollars per year, as the court by its order entered on the journal determines. In counties where only one judge holds court the constable provided for herein, when not attending the common pleas court, shall upon the order of the judge of such common pleas court, and without additional compensation, attend the probate court and the court of appeals of said county."

It has been heretofore held by this department that the first of the above quoted sections is the enabling statute in respect of the appointment of court constables to attend the assignment of cases; that section 1693 G. C. does not confer authority upon the court to impose the duty of assigning cases upon court constables, but only authorizes an extra allowance to court constables when the latter have been given that duty by virtue of an order made by the court under favor of section 1692 G. C. See 1916 Opinions of Attorney-General, Vol. I, p. 908; also 1917 Opinions of Attorney-General, Vol. II, p. 1067.

By reason of section 1692 G. C., the judge of an insolvency court may appoint one or more constables to attend the assignment of cases, provided only that the county wherein such court is held is one "where more than two common pleas judges regularly hold court at the same time." This same proviso and one other as well attaches to the right of a probate judge to appoint one or more constables to attend the assignment of cases; that is to say, the county in which such probate judge holds court must be one "where more than two common pleas judges regularly hold court at the same time," and such county must, at the last or any future federal census, have had or have more than seventy thousand inhabitants.

It is apparent from the sections under consideration that the legislature has made the appointment of "assignment constables," and the compensation of constables, generally, dependent upon the state or condition of business in the county, as disclosed by the fact of the number of common pleas judges regularly holding court in that county.

By section 1692 G. C. the legislature has made, as an arbitrary measure or gauge of the necessity for the appointment of one or more constables to attend the assignment of cases in the courts therein specified, the fact that there are more than two common pleas judges in a county regularly holding court at the same time.

You will notice that that part of section 1693 G. C. which fixes the compensation of constables, to-wit, the part reading:

> "In counties where four or more judges regularly hold court, said compensation shall not exceed eighteen hundred and twenty dollars each year, in counties where two judges and not more than three judges hold court at the same time, not to exceed twelve hundred and fifty dollars each year, and in counties where only one judge holds court, such amount, not to exceed one thousand dollars each year, as may be fixed by the court, and shall be paid monthly from the county treasury on the order of the court,"

does not expressly speak of common pleas judges. That is, it does not say "In counties where four or more *common pleas judges* regularly hold court," etc. Yet it is evident that "judges" in this connection means common pleas judges; othewise the word is meaningless, for we have no counties in Ohio where four or more court of appeals judges regularly hold court, nor any wherein four or more superior court or insolvency court or probate court judges regularly hold court. In only one county of the state (Hamilton county) is there a court known as the "superior court;" and but two counties have an "insolvency court," to-wit, Hamilton and Cuyahoga counties. In both Hamilton and Cuyahoga, the number of common pleas judges is in excess of four.

You are therefore advised:

(1) That the court of insolvency in Hamilton and in Cuyahoga counties may in its discretion appoint one or more constables to preserve order, *attend the assignment of cases* and discharge such other duties as the court requires; that the compensation of such constable or constables in said court of insolvency shall be that fixed by the judge making the appointment, such compensation not to exceed eighteen hundred and twenty dollars each year, together with such additional compensation, for the work of attending the assignment of cases, not to exceed one thousand, five hundred dollars per year, as the judge determines.

(2) That in all counties having at the last or any future federal census more than seventy thousand inhabitants, the probate court may, if the county is one wherein more than two common pleas judges regularly hold court at the same time, appoint one or more constables to preserve order, *attend and take charge of the assignment of cases* in such court and discharge such other duties as the court requires. The compensation of such constable or constables shall be that fixed by the probate court, on the following basis: If the county wherein such probate court is held is one wherein four or more common pleas judges regularly hold court, said compensation shall not exceed eighteen hundred and twenty dollars each year, together with whatever further compensation (not to exceed one thousand, five hundred dollars per year), the court may allow for the work of such constable or constables in connection with the assignment of cases; if the county wherein such probate court is held is one wherein three, that is to say, *more than two* and *not more than three* common pleas judges hold court at the same time, said compensation shall not exceed twelve hundred and fifty dollars each year, together with whatever further compensation (not to exceed one thousand, five hundred dollars per year), the court may allow for the work of such constable or constables in connection with the assignment of cases.

The phrase "more than two and not more than three common pleas judges" is used in the paragraph immediately preceding, out of regard for certain provisions found in section 1692 and 1693 G. C. According to section 1692 G. C., the duty of attending the assignment of cases can not be legally imposed upon a court constable unless said court is held in a county wherein *more than two* common pleas judges regularly hold court; and according to section 1693 G. C., which fixes the compensation of court constables, such compensation shall not exceed twelve hundred and fifty dollars "in counties where *two judges and not more than three judges* hold court at the same time,"

with additional compensation incident to the assignment of cases. In other words, both of the provisions just quoted must be borne in mind in fixing the salary of a constable in a "three-judge" county.

Respectfully,
JOHN G. PRICE,
Attorney-General.

591.

COUNTY SURVEYOR—UNDER PROVISIONS OF SECTIONS 2787 AND 2788 G. C. NUMBER OF ASSISTANTS DETERMINED BY SAID OFFICER.

Under the provisions of section 2787 and 2788 G. C. it is the duty of the county surveyor and not of the county commissioners to determine the number of assistants to be employed by the surveyor.

COLUMBUS, OHIO, August 28, 1919.

HON. HOMER HARPER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date submitting for opinion the following:

> "On the first Monday of June, 1918, the county surveyor of Lake county filed with the county commissioners a statement of necessary deputies, draftsmen, inspectors and employes in his office, eight (8) in number, for the year beginning September 1, 1918. The county commissioners fixed the aggregate compensation to be expended for such year at $9,650.00, for said eight persons. This is under the General Code, section 2787.
>
> The county surveyor has expended but about half that sum. He now presents a bill for eighteen employes and claims that inasmuch as their pay does not exceed the aggregate amount fixed by the county commissioners, that the auditor should draw his warrant under the provision of section 2788 for the eighteen.
>
> The auditor refused to draw his warrant under 2788, because the number of employes exceeds the number filed with the commissioners under 2787, although the aggregate amount fixed by the county commissioners is not exceeded.
>
> Will you please advise me whether on this statement of fact the auditor should draw his warrant for the eighteen employes?"

Your inquiry has reference to sections 2787 and 2788 G. C. which read respectively as follows:

> "Section 2787. On or before the first Monday of June of each year, the county surveyor shall file with the commissioners of such county a statement of the number of all necessary assistants, deputies, draughtsmen, inspectors, clerks or employes in his office for the year beginning on the first Monday of September next succeeding and their aggregate compensation. The county commissioners shall examine such statement and, after making such alterations therein as are just and reasonable, fix an aggregate compensation to be expended therefor for such year. Provided, however, that if at any time any county surveyor requires an additional allowance in order to carry on the business of his office, such county surveyor may make application to a judge

of the court of common pleas of the county wherein such county surveyor was elected; and thereupon such judge shall hear said application, and if upon hearing the same said judge shall find that such necessity exists he may allow such a sum of money as he deems necessary to pay the salaries of such assistants, deputies, draughtsmen, inspectors, clerks or other employes as may be required. Notice in writing of such application and the time fixed by such judge for the hearing thereof shall be served by the county surveyor five days before said hearing upon the board of county commissioners of such county; and said board shall have the right to appear at such hearing and be heard upon said application and evidence may be offered both by the county surveyor and the county commissioners."

"Section 2788. The county surveyor shall appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office, and fix their compensation; but compensation shall not exceed in the aggregate the amount fixed therefor by the county commissioners or allowed by a judge of the court of common pleas of the county. After being so fixed such compensation shall be paid to such persons in monthly installments from the general fund of the county upon the warrant of the county auditor. The county surveyor may require such of his assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems proper to give bond to the state in an amount to be fixed by the county surveyor with sureties approved by him, conditioned for the faithful performance of their official duties. Such bond with the approval of the county surveyor, indorsed thereon, shall be deposited with the county treasurer and kept in his office."

These statutes nowhere state that the commissioners are to determine the number of employes or to fix the compensation of an individual employe. On the other hand, section 2788 plainly provides that the county surveyor shall appoint "such assistants * * * as he deems necessary for the proper performance of the duties of his office and fix their compensation."

When we construe the two statutes together, as they must be construed, the result is that provision in the first sentence of section 2787 to the effect that the county surveyor shall file with the commissioners a statement of all necessary assistants, deputies, etc., must be taken merely as requiring that certain data be furnished to the commissioners as a basis for action on their part in determining the total amount which may be expended by the surveyor for the year, subject, of course, to the right of the surveyor to make application to a judge of the common pleas court for additional allowance if the aggregate amount allowed by the commissioners proves in practice to be insufficient. In other words, the purpose of the two sections is to fix an aggregate amount that may be expended by the surveyor in a given year rather than to permit the commissioners to say what number of persons shall be employed by the surveyor and what compensation shall be paid to them.

The two sections in question follow the general plan of sections 2980, 2980-1 and 2981 of the General Code. These several sections were passed upon by the common pleas court of Henry county in the case of County Commissioners vs. Rafferty, et al., 19 O. N. P. (n. s.) 97. In that case the court held, as shown by the syllabus:

"County commissioners are without power to fix the compensation of deputies and assistant clerks of county auditor, treasurer, probate judge and recorder. The authority to fix such compensation is vested in these several officers, with the limitation that the aggregate compensation to be paid in each office shall not exceed the amount allowed by the county commissioners for such offices."

The court in the course of the opinion at page 102 refers to the case of Theobald vs. State of Ohio, ex rel. 10 O. C. C. (n. s.) 175 in which case the constitutionality of the so-called county salary law was considered and quotes the following language from the opinion of Judge Smith in said case:

> "It must not be overlooked that the officer fixes the compensation of each particular employe as well as the number of employes. With that the board has nothing to do save that it may limit the aggregate that may be thus expended."

You are therefore advised that under the statement of facts submitted by you the auditor should draw his warrant in payment of the compensation of the eighteen employes.

Respectfully
JOHN G. PRICE
Attorney-General.

592.

COMMISSIONER OF DEEDS IN ANOTHER STATE—WOMEN ELIGIBLE

The acknowledgment of an instrument for the conveyance or incumbrance of lands, tenements or hereditaments situate within this state may lawfully be made without this state before a woman resident of another state appointed as commissioner by the governor of Ohio under the provisions of section 132 G. C

COLUMBUS, OHIO, August 28, 1919.

HON. JAMES M. COX *Governor of Ohio, Columbus Ohio.*

MY DEAR GOVERNOR:—Some question has arisen as to the validity of deeds acknowledged before women residents of other states and appointed by yourself and your predecessors to act as commissioners of deeds in these states.

The appointments were made under sections 132 and 8515 G C which are as follows:

> "Section 132. The governor is authorized to appoint as commissioners of the state of Ohio persons residing in any other state or in any territory of the United States or in any foreign state on such evidence of qualification as he may require. Such commissioner shall continue in office for a term of three years and have authority to take affidavits and depositions to be used in any of the courts of this state and to take acknowledgment and proof of the execution of any deed or other conveyance, lease, contract, letter of attorney or other written instrument to be recorded or used in this state."
>
> "Section 8515. The acknowledgment of an instrument for the conveyance or incumbrance of lands, tenements or hereditaments situate within this state may be made without this state before a commissioner appointed by the governor of this state for that purpose or a consul-general, vice consul-general, deputy consul-general, consul, vice consul, deputy consul, commercial agent and consular agent of the United States resident in any foreign country."

These sections independent of any other provisions constitutional or statutory bear the manifest construction that the governor has authority to select a woman as such commissioner. The only requirement recited is that the appointee must present evidence of qualification satisfactory to the governor.

The doubt as to the validity of the acts of such commissioners has undoubtedly arisen because the supreme court of Ohio has decided that a woman is not eligible to the office of notary public. In State ex rel The Attorney-General vs. Adams 58 O. S. 612 the court in so holding said that a notary public is an officer and that under the provisions of section 4 of article XV of the constitution no person may be elected or appointed to any office in this state unless he possesses the qualifications of an elector. So it has been suggested that such a commissioner is an officer and must possess such qualifications. With this view I do not agree. The pertinent language of section 4 of article XV of the constitution is as follows:

> "No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector; * * *."

And section 1 of article V states the qualifications of an elector thus:

> "Every white male citizen of the United States of the age of twenty-one years who shall have been a resident of the state one year next preceding the election and of the county, township, or ward, in which he resides such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

If the qualifications recited in this section must be possessed by a commissioner of deeds appointed for a foreign state, it would follow that such person so acting must not only be a white male citizen of the United States of the age of twenty-one years, but must also have been a resident of the state of Ohio for one year and of the county, township or ward therein for such time next preceding an election as may be provided by law. No resident of a foreign state could possibly be eligible to such position. However, these qualifications are prescribed only for those who are to be elected or appointed "to any office in this state."

We need not determine whether or not such commissioner is an "officer" because if he is his duties are to be performed without the state. There is no "office in this state." If the commissioner is to possess all the qualifications of an elector it must be so because the nature of his duties makes him an officer. But under section 8515 G. C. United States consuls "resident in any foreign country" may take acknowledgments. These officials of course do not possess the qualifications of electors in Ohio but their authority, though frequently exercised, has never been challenged in the courts of this state.

The general view taken by recording officers and acquiesced in by the bar for more than a hundred years carries great weight; nor should a construction be adopted which would overturn what has come to be a rule of property and render questionable scores of titles.

It is proper here to call attention to section 8516 G. C. the language of which is:

> "All deeds, mortgages, powers of attorney and other instruments of writing for the conveyance or incumbrance of lands tenements or hereditaments situate within this, state executed and acknowledged or proved in any other state, territory or country in conformity with the laws of such state, territory or country or in conformity with the laws of this state shall be as valid as if executed within this state in conformity with the foregoing provisions of this chapter."

The existence of this section, however, is not decisive of the point which we are considering because it would not be safe to assume that the laws of other states provide for the execution of deeds therein by commissioners appointed by the governor of Ohio. The section does however evidence in a general way the policy of the legislature and has been before the supreme court for consideration in a number of cases. If the reasoning in this opinion is unsound and my conclusion incorrect then the constitutionality of section 8516 G. C. is doubtful. That it has been considered by the supreme court many times without any suggestion as to its unconstitutionality is of course an argument for the view which I have taken on the question considered here.

It is my opinion therefore that the acknowledgment of an instrument for the conveyance or incumbrance of lands, tenements or hereditaments situate within this state may lawfully be made without this state before a woman resident of another state appointed as commissioner by the governor of Ohio under the provisions of section 132 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

593.

COUNTY SURVEYOR—ASSISTANTS IN CONNECTION WITH CONSTRUCTION OF ROADS BY TOWNSHIP TRUSTEES UNDER SECTION 3298-1 ET SEQ. G. C.—HOW PAID—SECTIONS 2787 AND 2788 G. C. GOVERN

The services of assistants to the county surveyor rendered in connection with the construction of roads by township trustees under favor of section 3298-1 *et seq. G. C. are to be paid by the county from the allowance made in accordance with sections* 2787 *and* 2788 *G. C.; and this principle applies even though the county surveyor in making his estimate of the cost of the improvement, included therein the expenses of such engineering services.*

COLUMBUS, OHIO, August 28, 1919.

HON. WATSON H. GREGG, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—The receipt is acknowledged of your letter of recent date submitting for opinion the following:

> "Where the trustees of a township are constructing a road, the question has arisen who shall pay the expenses such as board and engineering expenses during construction, including the help for the county engineer. That is, who shall pay it, the county or the trustees? It seems clear and satisfactory that the county pay the preliminary work such as surveying and making plans but there seems to be a difference of opinion as to who pays the other items enumerated above.
>
> Will be glad to have your opinion about this matter."

In response to a request for additional information, you have advised in your letter of August 22nd that the road work in question is being done by certain township trustees under the provisions of section 3298-1 et seq. And you also advise that by "board" you mean meals for the assistant engineer and chairman.

You will find that your inquiry has been substantially answered in two opinions of this department the first being No. 378 of date June 9, 1919, directed to Hon. Harry

S. Core, prosecuting attorney, Ottawa, Ohio, and the second being No. 546 of date August 5, 1919, directed to the bureau of inspection and supervision of public offices, copies of which opinions are enclosed for your information.

In the first of these opinions the conclusion reached was:

> "The method of providing compensation for assistants and employes in the office of the county surveyor is governed by sections 2787 and 2788 G. C. which sections direct that the county commissioners shall fix an aggregate compensation to be expended for such purpose during the year and further that if an additional allowance is found to be necessary the same may be granted by the court of common pleas upon proper application drawn from the general fund of the county.
>
> The services rendered by assistants or employes of the county surveyor in township road improvements at the direction of the township trustees constitute part of the official duties of the surveyor and compensation for such service is governed by the aforesaid statutes subject to the exception provided in section 3298-15k G. C. which authorizes payment of compensation of an inspector on a township road to be paid out of funds available for the construction of the improvement"

In the second opinion mentioned the following conclusion was arrived at:

> "The services of assistants to the county surveyor rendered in connection with the construction of roads under the county road improvement statutes as amended 107 Ohio laws are to be paid from the allowance made in accordance with sections 2787 and 2788 G C., and are not to be charged to a specific road improvement."

In view of the various statutes enumerated in the first of these opinions, it becomes plain that the principles discussed in the second opinion are applicable to improvements conducted by township trustees under favor of section 3298-1 et seq. with the special statutory exception provided by section 3298-15k, as noted in the first opinion above cited.

Therefore, you are advised that engineering expenses of the character indicated by you incurred in the construction of improvements by township trustees under the provisions of section 3298-1 et seq. are to be paid by the county from the allowance made in accordance with sections 2787 and 2788 G. C.

In a verbal statement to this department you have indicated that the engineer in making his estimate for the improvement in question included in the estimated cost of such improvement the engineering expenses named by you. That fact, however, is not in point, because, as has already been pointed out, such items may not properly be charged to a specific improvement, and the action of the engineer in that respect is without legal effect.

Respectfully,
JOHN G. PRICE,
Attorney-General.

594.

COLD STORAGE ACT—DUTY OF THOSE OPERATING SUCH WAREHOUSES WHERE FOOD HAS PREVIOUSLY BEEN IN COLD STORAGE—HOW TIME CALCULATED UNDER STATUTES WHERE FOOD STORED IN DIFFERENT WAREHOUSES—LIABILITY OF LICENSED OPERATOR OR MANAGER OF COLD STORAGE PLANT FOR ABOVE VIOLATION OF LAW—SECRETARY OF AGRICULTURE HAS AUTHORITY TO SECURE COLD STORAGE HISTORY OF FOOD.

1. *Persons, firms or corporations operating cold storage warehouses in this state are charged with the duty of not permitting food to be deposited therein for the purpose of sale if it has previously been in cold storage either within or without the state, or both, beyond the time specified in section* 1155-13 *G. C.; or, if such time has not elapsed at the time of deposit, of not permitting food to remain in cold storage for such purpose beyond the time specified. And in making up the maximum period of time prescribed and allowed by statute, the several periods of time the food has been stored in all the warehouses must be counted.*

2. *The licensed operator or manager of a cold storage warehouse acts at his peril in receiving into the warehouse food which has been in cold storage for the purpose of sale beyond the time specified in section* 1155-13 *G. C., or by keeping it in cold storage for such purpose after the expiration of the specified time.*

3. *The secretary of agriculture has authority under sections* 1155-9 *and* 1155-17 *G. C. to require the licensed operator of a cold storage warehouse to secure the cold storage history of food deposited in his warehouse and embody the same in reports to be made under the former section.*

COLUMBUS, OHIO, August 28, 1919.

HON. THOMAS C. GAULT, *Chief of Bureau of Dairy and Foods, Columbus, Ohio.*

DEAR SIR:—Your letter of August 18, 1919, relative to the duties imposed upon cold storage warehousemen in this state, was duly received, and reads as follows:

> "Please advise me if a manager for a cold storage warehouse in this state shall be required to ascertain at time of deposit in such warehouse if goods so deposited may have been in cold storage prior to the time that it was presented to his warehouse for deposit.
>
> If he is required to obtain this information, shall such information be required to be a part of the record?"

(1) It is provided in section 14 of the act governing the inspection of cold storage goods and the regulation and supervision of cold storage warehouses (section 1151-1 et seq. G. C.; 107 O. L. 594) that:

> "Food may be transferred from one cold storage warehouse to another, provided, that the total length of time such food shall remain in cold storage, for the purpose of sale, shall not exceed the time specified in section thirteen of this act."

The effect of section 14 is to prohibit the storing of food in cold storage warehouses in this state for the purpose of sale, beyond the period of time specified in section 13 of the act, and, in computing the statutory period, the time such food has been in cold storage in other warehouses must be counted.

By section 15 of the act it is provided with respect to food which shall have been placed or stored in any cold storage warehouse outside of Ohio, that:

"No such food shall be sold, or offered or exposed for sale, in this state, if the total length of time that such food has remained in cold storage shall exceed the time specified in section thirteen of this act."

The effect of section 15 is to prohibit the sale, or the offering or exposing for sale, in this state, of food, if the total length of time it has remained in cold storage, either within or without the state, or both, has exceeded the time specified in section 13.

Persons, firms or corporations operating storage warehouses in this state are charged with the duty, under the act referred to, of not permitting food to be deposited therein for the purpose of sale if it has previously been in cold storage either within or without the state, or both, beyond the time specified in section 13; or, if such time has not elapsed at the time of deposit, of not permitting food to remain in storage for such purpose beyond the specified time, to be computed by adding together the respective periods of time it has been stored in the several warehouses. In other words, such persons, firms or corporations act at their peril in receiving or keeping food in cold storage for the prohibited purpose after the time specified in section 13 has expired, no matter in how many warehouses it may have been stored, or where such warehouses may be located.

It is easily within the power of the licensed operator or manager of a warehouse to secure this information from those desiring to place or store food in his warehouse, and his ignorance or want of knowledge of the cold storage history of such food would be the result of his own negligence or indifference. No hardship is imposed upon the operator or manager in this respect, because the source of such knowledge would in all cases be close at hand, and the means of reaching it peculiarly within his power. Refusal on the part of the owner of food to furnish such information could be met by the operator or manager's refusal to accept the food for storage.

(2) Persons, firms or corporations operating a cold storage warehouse are charged by section 9 of the act with the duty of keeping certain records, as follows:

"It shall be the duty of every person, firm, or corporation that shall be licensed to operate a cold storage warehouse to keep an accurate record of the receipts and withdrawals of food therefrom. The agents of the secretary of agriculture shall have free access to such records at all times. It shall be the duty of each person, firm, or corporation licensed to operate a cold storage warehouse to file in the office of the secretary of agriculture on or before the sixth day of January, April, July and October, of each year, a report setting forth in itemized form the kind and quantities of food products held in cold storage in such warehouse. The report shall be made on printed forms prepared and supplied by the secretary of agriculture. The secretary of agriculture may cause such other reports to be filed and at such times as it may deem advisable."

The foregoing section, so far as records are concerned, requires that the licensed operator of a cold storage warehouse "shall keep an accurate record of receipts and withdrawals of food therefrom." It will be observed from this section that the duty imposed upon the operator is not to keep a record of the warehouse history of food prior to its deposit in his warehouse, but to keep a record of receipts and withdrawals therefrom. But, as stated in paragraph 1 of this opinion, the operator or manager of a warehouse acts at his peril in receiving into his warehouse food which has been in cold storage for the purpose of sale beyond the time specified in section 13, or by allowing it to remain in his warehouse for such purpose after the expiration of the time specified.

(3) It will also be observed that the secretary of agriculture has authority under section 9 quoted above to require, in addition to the quarterly reports setting forth

the kind and quantity of food products held in cold storage, that the licensed operator of a cold storage warehouse shall file "such other reports * * * at such times" as he may deem advisable.

It is my opinion that the secretary of agriculture has authority under this section, and section 17 imposing upon him the duty of making rules and regulations for the enforcement of the act, to require the licensed operator to secure the cold storage history of food deposited in his warehouse from those making the deposit, and to require that such history be embodied in reports to be made to him under section 9.

Respectfully,
JOHN G. PRICE,
Attorney-General.

595.

APPROVAL OF CONTRACTS FOR FISH HATCHERIES AT LAKE ST. MARY'S, CELINA AND NEWTOWN, OHIO.

COLUMBUS, OHIO, August 28, 1919.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for approval as per section 2319 G. C. (107 O. L. 455) two contracts as follows:

> (1) Contract between N. E. Shaw, secretary of board of agriculture, and Frank Tejan for furnishing of labor and materials necessary to construct a reinforced steel concrete fish screen in the west bank of Lake St. Marys, Celina, Ohio.
>
> (2) Contract between N. E. Shaw, secretary of board of agriculture, and J. W. Weeks for furnishing labor and materials necessary to construct a fish hatchery at Newtown Ohio."

You have also submitted the bonds covering said contracts.

Having before me the certificate of the auditor of state that there are funds in the appropriation heretofore made for the purposes set forth in each of said contracts sufficient to cover the amounts payable thereunder and being satisfied that said contracts and bonds are in all respects according to law, I am this day certifying my approval thereon.

I have this day filed said contracts and bonds with the auditor of state.

Respectfully
JOHN G. PRICE
Attorney-General.

596.

HUGHES HEALTH BILL—HOUSE BILL No. 211—DOES NOT REPEAL BY IMPLICATION SECTIONS 7692 AND 7692-1 G. C. WHICH EMPOWER BOARDS OF EDUCATION TO PROVIDE FOR MEDICAL INSPECTION OF SCHOOLS—DISTRICT BOARDS OF HEALTH ALSO HAVE CONCURRENT JURISDICTION.

1. *House bill No. 211, known as Hughes health bill, effective August 10, 1919, did not repeal by implication sections 7692 and 7692-1 G. C., which empower boards of education to provide for medical inspection of schools.*

2. *Under section* 11 *of the Hughes bill, district boards of health are required to provide for the medical inspection of schools, but such inspection is not exclusive, boards of education also having the right to make inspection to the extent provided in sections* 7692 *and* 7692-1 *G. C.*

COLUMBUS, OHIO, August 30, 1919.

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

GENTLEMEN:—Your letter of recent date reads as follows:

"We are respectfully requesting the following information relative to house bill No. 211, known as the Hughes health bill, passed by the last general assembly:

1. Does such act remove from school authorities the right to provide for medical inspection of schools?

2. Will such inspection be conducted by the municipal health boards and district health boards?"

The authority of boards of education to provide for medical inspection of schools is contained in the following sections of the General Code:

Sec. 7692 (103 O. L. 897):

"Each and every board of education in this state may appoint at least one school physician; provided two or more school districts may unite and employ one such physician whose duties shall be such as are prescribed in this act. Said school physician shall hold a license to practice medicine in Ohio. School physicians may be discharged at any time by the appointing power whether the same be a board of education or of health or health officer, as herein provided. School physicians shall serve one year and until their successors are appointed and shall receive such compensation as the appointing board may determine. Such boards may also employ trained nurses to aid in such inspection in such ways as may be prescribed by the board. Such board may delegate the duties and powers herein provided for to the board of health or officer performing the functions of a board of health within the school district if such board or officer is willing to assume the same. Boards of education shall co-operate with boards of health in the preventing of epidemics."

Sec. 7692-1 (103 O. L. 897):

"School physicians may make examinations and diagnosis of all children referred to them at the beginning of every school year and at other times if deemed desirable. They may make such further examination of teachers, janitors and school buildings as in their opinion the protection of health of the pupils and teachers may require. Whenever a school child, teacher or janitor is found to be ill or suffering from positive open pulmonary tuberculosis or other contagious disease the school physician shall promptly send such child, teacher, or janitor home with a note, in the case of the child, to its parents or guardian briefly setting forth the discovered facts and advising that the family physician be consulted. School physicians shall keep accurate card index records of all examinations and said records that they may be uniform throughout the state shall be according to the form prescribed by the state school commissioner, and the reports shall be made according to the method of said form; provided however that if the parent

or guardian of any school child or any teacher or janitor after notice from the board of education shall within two weeks thereafter furnish the written certificate of any reputable physician that the child or teacher or janitor has been examined in such cases the services of the medical inspector herein provided for shall be dispensed with and such certificate shall be furnished by such parent or guardian from time to time as required by the board of education. Such individual records shall not be open to the public and shall be solely for the use of the boards of education and health or other health officer. If any teacher or janitor is found to have positive open pulmonary tuberculosis or other communicable disease, his or her employment shall be discontinued upon expiration of the contract therefor, or, at the option of the board, suspended upon such terms as to salary as the board may deem just until the school physician shall have certified to a recovery from such disease."

Although H. B. No. 211, known as the Hughes bill (effective August 10, 1919), specifically repealed some eighteen sections of the General Code, sections 7692 and 7692-1 G. C. were not specifically repealed by it. Said sections are therefore unaffected by the act in question, unless they must be taken to have been repealed by implication. It is to a consideration of this question that we now proceed.

Repeals by implication are of course not favored. "A statute," says Black on interpretation of laws, at p. 112, "will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect), unless there is an *irreconcilable repugnancy* between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on that subject."

On the question of irreconcilable repugnancy, it is important to consider section 11 of the Hughes bill, reading thus:

"Section 11. In addition to the duties now required of boards of health it shall be the duty of each district board of health to study and record the prevalence of disease within its district; to provide for the prompt diagnosis and control of communicable diseases; to provide for the medical and dental supervision of school children; to provide for the free treatment of cases of venereal diseases; to provide for the inspection of schools, public institutions, jails, workhouses, children's homes, infirmaries and other charitable, benevolent, correctional and penal institutions; to provide for the inspection of dairies, stores, restaurants, hotels and other places where food is manufactured, handled, stored, sold or offered for sale, and for the medical inspection of persons employed therein; to provide for the inspection and abatement of nuisances dangerous to public health or comfort; and to take all steps necessary to protect the public health and to prevent disease.

Provided that in the medical supervision of school children as herein provided, no medical or surgical treatment shall be administered to any minor school child except upon the written request of the parent or guardian of such child; and provided further, that any information regarding any diseased condition or defect found as a result of any medical school examination shall be communicated only to the parent or guardian of such child and if in writing shall be in a sealed envelope addressed to such parent or guardian."

It is apparent from this section that full authority is given to each district board of health to provide for inspection of schools and for the medical and dental supervision of school children. Yet there is nothing to show that the exercise of such powers would either necessarily or probably conflict with the action taken by the board of

education under sections 7692 and 7692-1 G. C. Furthermore, the last named sections, it will be noticed, provide only for examination and diagnosis of school children, while under section 11 of the Hughes bill medical and surgical treatment of a minor school child may be afforded at the request of a parent or guardian.

If it should seem odd that the legislature should provide for medical inspection of schools by two different, uncoordinated agencies, it should be remembered that under the terms of section 7692 G. C. the appointment by a board of education of a school physician or trained nurse is not compulsory, merely optional; that under provisions of the next to last sentence of that section, "such board may delegate the duties and powers herein provided for to the board of health or officer performing the functions of a board of health within the school district if such board or officer is willing to assume the same." It is entirely possible that some district boards of health may not be able to give to the work of medical inspection in the schools the degree of attention that the boards of education desire, in which event the authority contained in sections 7692, et seq. G. C. could be exercised to good advantage.

It is also noteworthy that while the Hughes bill specifically provides (see section 15) for the exercise by the district board of health of all the powers and duties now conferred and imposed by law upon the board of health of a municipality, it is not specifically provided that "health" powers of boards of education should be transferred to district boards of health.

I am therefore of the opinion that the Hughes bill did not, when it became effective, repeal by implication the sections of the General Code first hereinabove cited, and that it did not remove from boards of education the right to provide for medical inspection of schools.

Your second question is: "Will such inspection be conducted by the municipal health boards and district health boards?" This question is to be answered in the affirmative, for the reason that under section 11 of the Hughes bill it is the duty of each district board of health "to provide for the medical and dental supervision of school children" and also "to provide for the inspection of schools." The term "district board of health" in this section refers to all the administrative districts created or recognized by the act, to-wit, municipal health districts, separate municipal health districts and general health districts. But, for reasons above stated, the inspection of schools made by the district health districts will not be exclusive, the boards of education also having the right to make inspection to the extent provided in sections 7692 and 7692-1 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

597.

SECURITIES—UNINCORPORATED ASSOCIATION—NO OFFICER OR AGENT SHOULD BE LICENSED TO DEAL IN SUCH SECURITIES WHERE SUCH ORGANIZATION IS CALCULATED TO IMPRESS PUBLIC WITH BELIEF IT IS A CORPORATION—SUPPLEMENT TO OPINION No. 575, DATED AUGUST 19, 1919.

No officer or agent of an unincorporated association of persons organized in this or any other state to carry on business in such manner as is calculated to impress the general public with the belief that it is a corporation, and whose acts are such as appertain to or

are to be done after the manner of corporations, nor any other person acting for it or in its behalf, should be licensed to deal in its securities in this state.

COLUMBUS, OHIO, August 30, 1919.

HON. P. A. BERRY, *Commissioner of Securities, Columbus, Ohio.*

DEAR SIR:—Supplementing my former opinion No. 575, in which the conclusion was reached that an unincorporated association of persons organized to carry on business in such manner as is calculated to impress the general public with the belief that it is a corporation, and whose acts are such as appertain to or are to be done after the manner of corporations, cannot transact business in this state, and in response to your verbal inquiry, I beg to advise you that that opinion applies to all such associations whether organized in this or other states, and that one of the effects of the opinion is to deny the right of the officers and agents of such associations, and others acting in their behalf, to be licensed as dealers in their securities in this state. In other words, no officer or agent of such an association, nor any other person acting for or in its behalf, should be licensed by your department to deal in its securities in this state.

Respectfully,
JOHN G. PRICE,
Attorney-General.

598.

COUNTY SURVEYOR—DEPUTY COUNTY SURVEYOR INELIGIBLE TO BID ON ROAD IMPROVEMENT TO BE DONE BY COUNTY COMMISSIONERS OF COUNTY IN WHICH DEPUTY EMPLOYED.

A deputy county surveyor is ineligible as a bidder on road improvement work to be done under the supervision of the commissioners of the county in which the deputy is employed as such.

COLUMBUS, OHIO, August 30, 1919.

HON. CARROLL A. STUBBS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—Your letter of recent date is received, reading as follows:

> "The Mercer county commissioners at a road sale yesterday received a bid from one of the deputy county surveyors on one of the roads. This bid was $4,000.00 cheaper or less than any other bids received on this road. The deputy in question has expressed his intention to resign from his office should he be awarded this contract.
>
> I have examined the statutes and opinions of the attorney-general but have been unable to find anything covering this particular case and am therefore making the following inquiries:
>
> 1. If the contract should be awarded this deputy and he resign upon being awarded the same, would such award be illegal?
>
> 2. If the contract should be awarded this deputy and he not resign upon being awarded the same, would such award be illegal?"

Your inquiry involves a reference to the statutes providing for the method of selection and for the duties to be performed by deputy county surveyors.

Section 2788 G. C. provides, among other things, that the county surveyor shall

appoint such assistants, deputies, draughtsmen, inspectors, clerks or employes as he deems necessary for the proper performance of the duties of his office. As no statute has been found directing or commanding the county surveyor to assign his assistants or deputies to particular classes of work—such, for instance, as assigning one to bridge construction, another to ditch work, and so on—it follows that the county surveyor may in his discretion call upon his assistants and deputies to take charge of, or assist in, any of the various classes of engineering duties which it may fall to his office to perform. And what are those duties? By the terms of section 2792 G. C.

> "The county surveyor shall perform all duties for the county now or hereafter authorized or declared by law to be done by a 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, constructed under the authority of any board within and for the county. When required by the county commissioners, he shall inspect all bridges and culverts, and on or before the first day of June of each year report their condition to the commissioners. Such report shall be made oftener if the commissioners so require."

By the terms of section 2793,

> "The county surveyor shall be responsible for the inspection of all public improvements made under 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 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, turn pikes, or ditches constructed under the authority of the board of county commissioners and shall perform such other duties as such board from time to time requires."

In addition, the county surveyor by the provisions of section 7184 is given general charge of the construction, reconstruction, improvement, maintenance and repair of all bridges and highways within his county under the jurisdiction of the county commissioners.

When we turn to the statutes providing for road construction by county commissioners (section 6906 et seq.), we find that the county surveyor plays an important part. It is his duty to make surveys, plans, profiles. cross-sections, estimates and specifications, and on his own motion may submit such surveys, etc., in alternate form (sections 6911 and 6912); and it is his duty to make assessments, subject to review by the county commissioners (Sec. 6922).

The foregoing references, without others which might be made, are sufficient to show the broad scope of the powers and duties of the county surveyor; and as before pointed out, the surveyor is at liberty to assign any of his deputies to take part in the performance of any such engineering duties. In this connection it may be stated as a matter of common knowledge, that the work of the county surveyor involves a large amount of detail; so that in great measure, in order to properly perform the duties of his office, he must depend on the disinterested service of his assistants and the constant exercise of skill and good judgment on their part.

Under these conditions, what would be the practical effect upon the public interest, of permitting a deputy or assistant to become a bidder for public work to be done according to plans and specifications for which his principal is responsible?

In the first place, the door would be opened to the deputy to influence the preparation of plans and specifications in such manner as to give himself an advantage over other bidders. Again, items in the surveys and cross-sections might be improperly dealt with, and other details, the correctness of which prospective bidders are accustomed to depend upon in making their calculations, might be suppressed, so as to mislead bidders other than the deputy. Estimates of cost, which are an important factor in the letting of county road work,—inasmuch as assessments are based on them (section 6922) and the work may not be awarded at a price in excess of the estimate (section 6946)—might be made in such way as to discourage competition or to give bidders a wrong impression. Instances need not be multiplied to illustrate the almost self-evident proposition that a contractor bidding on plans of his own making, has an advantage over others. Furthermore, it should not be overlooked that the mere fact, made known to a prospective bidder, that an assistant or employe in the office of the county surveyor intended to bid on certain work and might be awarded it, would tend to discourage such prospective bidder from entering into competition. And finally, it should be kept in mind that the commissioners, if they so request, are entitled to the views of the county surveyor as to what is the lowest and best bid; and assuredly it is not in the public interest that a situation be allowed to arise wherein the surveyor is put in the attitude of comparing the bid of one of his deputies with the bids of other persons.

The foregoing observations are not to be taken as implying want of good faith on the part of the deputy in the particular instance stated by you. But good faith in a given instance is no answer where a matter of general public policy is concerned. No doubt in many instances, and perhaps in the very instance which you state, there might be direct financial gain to the public by awarding the work to the deputy surveyor; but as for outweighing any such consideration, we have the other consideration that an employe of the public must not be permitted to put himself in a position where his private financial interest may influence his duty to the public, or the exercise of his judgment in performing that duty.

You are therefore advised that under the facts stated by you, the deputy surveyor is, upon grounds of public policy, disqualified as a bidder.

Respectfully,
JOHN G. PRICE,
Attorney-General.

599.

BOND ISSUE UNDER FLOOD EMERGENCY ACT OF 1913—UNEXPENDED BALANCE MAY NOT BE USED IN PAYMENT OF REPAIRS AND RECONSTRUCTION BY FLOODS RECENTLY OCCURRING.

Unexpended balances in funds arising from the issue of bonds under the flood emergency act of 1913 (103 *O. L.* 141), *may not be used in payment of repairs and reconstruction made necessary by floods recently occurring.*

COLUMBUS, OHIO, August 30, 1919.

HON. CHARLES C. CHAPMAN, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—The receipt is acknowledged of your letter of recent date reading as follows:

> "Our county commissioners, shortly after the flood of 1913 in our county passed a resolution under the emergency act for the issuance of bonds for

the building and repairing of certain specified county bridges. There still remains in this emergency fund something like $35,000. Our county commissioners desire to apply this money to the emergency fund of 1919.

Our view of this is that it is governed by section 5654 G. C., which says in substance:

'Where any surplus remains that has been raised by special tax, that it must be returned to the county sinking fund.'

We are requested to ask your opinion in regard to this special fund, whether or not there would be some way by which this could be used to repair and build county bridges and roads which were washed away by the recent flood."

In addition to what is stated in your letter information has come to this department to the effect that the use proposed to be made of the moneys in question is for the repair of bridges injured by floods resulting from a recent heavy rainstorm.

The flood emergency act of 1913 is found in 103 O. L. 141; and as indicated by its title as well as by its colloquial name, it is an emergency act pure and simple. It has relation to public property and public ways destroyed or injured by the floods of 1913; and as to the repair and reconstruction made necessary by such floods authorizes the raising of funds and levying of taxes without the observance of certain statutory formalities which would otherwise be applicable. It is unnecessary to discuss the act in detail; but your attention is called to these provisions of section 6 of the act:

"In no case shall funds produced by the levy authorized and required to be made by this section be used otherwise than for the purposes specified herein. In case money levied or borrowed under any of the provisions of this act is more than sufficient for the purposes for which it is levied or borrowed, the unexpended balance thereof shall be credited to the sinking fund provided for herein, and shall in no case be subject to transfer to any other fund; and when in such case, the final redemption of such bonds is provided for, the levy shall thereupon terminate."

Quite plainly a violation of these provisions would take place if the unexpended balances of bond issues made under the provisions of said emergency act were used for the purpose indicated in your letter.

As a matter of information, your attention is called to sections 5638 to 5644 G. C., especially to sections 5643 and 5644, and to opinions of this department rendered in connection with said sections during the years 1914 to 1917 and reported in Opinions of Attorney-General for the several years indicated.

Respectfully,
JOHN G. PRICE,
Attorney-General

600

BONDS MAY NOT BE ISSUED BY TOWNSHIP TRUSTEES FOR PURCHASE OF ROAD MACHINERY

Bonds may not be issued by township trustees for the purpose of purchasing road machinery.

COLUMBUS, OHIO, August 30, 1919

HON. JOHN E. BLAKE, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—Your letter of recent date is received, reading as follows:

> "Will you kindly give me an opinion on the following state of facts:
> The township trustees contract for a road machine to do certain grading on the public roads when there are no funds in the township treasury or to its credit to pay for the same. Can the township trustees issue the bonds of the township to obtain money to pay for such machine?"

No doubt the statute under which the township trustees have assumed, or are assuming, to act is section 3373 G. C., which provides among other things:

> "* * * Township trustees are hereby authorized to purchase or lease such machinery as may be deemed necessary for use in maintaining or repairing roads and culverts within the township. * * * All payments on account of machinery, tools, material, labor and team shall be made from the township road fund as provided by law. All purchases of materials, machinery and tools, shall, where the amount exceeds one hundred dollars, be made from the lowest responsible bidder after advertisement in the manner hereinbefore provided. * * *"

In order to make their purchase as provided by law, the trustees must give heed to the provisions of section 5660, to the effect that

> "* * * the trustees of a township * * * shall not enter into any contract agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose."

According to your letter, the mandate of this section has not been fulfilled; and inasmuch as by the provisions of the next following section (5661, G. C.), contracts (with certain enumerated exceptions) are void if entered into contrary to the provisions of said section 5660, it is quite plain that no basis is furnished for a bond issue for the payment of the alleged obligation which you describe. It may be added that no provision of statute has been found authorizing the issue of bonds by a township for the purpose of purchasing road machinery.

Respectfully,
JOHN G. PRICE,
Attorney-General.

601.

SCHOOLS—COUNTY BOARD OF EDUCATION—SUSPENSION OF SCHOOL BY COUNTY OR LOCAL BOARD—WHEN RE-ESTABLISHED—AVERAGE DAILY ATTENDANCE GOVERNS.

1. *Whenever the average daily attendance of any school in the school district for the preceding year has been below ten, the county board of education shall direct the suspension of such school and the board of education of the village or rural school affected shall suspend such school; but wherever such suspension is had on the direction of the county board of education, then upon the direction of such county board, after such daily attendance shall be established as being ten or more, and in other cases upon the finding by the board of education ordering such suspension that such school ought to be re-established, such school shall be re-established.*

2. *Where a public school has been closed because the average daily attendance for the preceding year has been below ten, and it later appears upon investigation that such school if re-established would have an average daily attendance of ten or more and it is the finding of the board of education that such school ought to be re-established, then such school shall be re-established.*

COLUMBUS, OHIO, August 30, 1919.

HON. J. C. OGLEVEE, *Prosecuting Attorney, Carrollton, Ohio.*

DEAR SIR:—Acknowledgment is herewith made of your request for an opinion upon the following statement of facts:

> "I have been asked by the county board of education of this county to submit to you three or four questions in regard to the new school law with reference to closing schools. It is known as House bill No. 348, amending General Code sections 4688 et seq.
>
> 1. By section 13 of this act the county board is required to close all schools whenever the average daily attendance for the preceding year falls below ten. The act is effective September 21, 1919. Are they required to close a school that had an average attendance below ten last year, or does it not rather contemplate that the average daily attendance shall be taken this year, and that no school shall be closed unless the daily attendance this year falls below ten?
>
> 2. If a school last year had a daily attendance of less than ten, and after school opens this year it should appear that more than twelve pupils are attending other schools from the district that had less than ten last year, and has consequently been closed, has the county board authority to re-open the former school, or must the school remain closed throughout the year?
>
> 3. There is one district in this county where the average daily attendance was below ten last year because the teacher was not satisfactory, and parents refused to send their children; but the enumeration this year shows 24 persons of school age, and the daily attendance will exceed twelve. Shall the board close this school, or allow it to continue?"

You refer to House bill No. 348, which becomes law on and with September 22, 1919, and it is presumed that the "Section 13" referred to by you in your letter is section 7730 G. C., which reads as follows:

"The board of education of any rural or village school district may suspend temporarily or permanently any or all schools in such village or rural school district because of disadvantageous location or any other cause. Whenever the average daily attendance of any school in the school district for the preceding year has been below ten the county board of education shall direct the suspension and thereupon the board of education of the village or rural school district shall suspend such school. Whenever any school is suspended the board of education of the district shall provide for the transfer of the pupils residing within the territory of the suspended school to other schools. Upon such suspension the board of education of such village or rural district shall provide for the conveyance of all pupils of legal school age who reside in the territory of the suspended district and who live more than two miles from the school to which they have been assigned, to a public school in the rural or village district or to a public school in another district. Notice of such suspension shall be posted in five conspicuous places within such village or rural school district by the board of education within ten days after the resolution providing for such suspension is adopted. Wherever such suspension is had on the direction of the county board of education, then upon the direction of such county board, and in other cases upon the finding by the board of education ordering such suspension that such school ought to be re-established, such school shall be re-established. If at any time it appears that the average daily attendance of enrolled pupils residing within the territory of the suspended school as it was prior to such suspension is twelve or more then, upon a petition asking for re-establishment signed by a majority of the voters of the said territory, the board of education may re-establish such school."

In your first question you ask whether the county board is required to close all schools whenever the average daily attendance for the preceding year falls below ten, or whether it does not contemplate that the average daily attendance shall be taken this year and that no school shall be closed unless the daily attendance this year falls below ten. Your attention is invited to the language in the second sentence of section 7730, which says:

"Whenever the average daily attendance of any school in the school district for the *preceding year has been below ten* the county board of education shall direct the suspension and thereupon the board of education of the village or rural school district shall suspend such school."

From this language it is noted that the county board of education does not suspend the school, but shall direct the local board of education in control of such school to do the suspending, and that such act of suspension shall be based upon the fact that the average daily attendance for the preceding year has been below ten, the language of the statute.

The seeming purpose of the opening language of section 7730 is that no school shall be permitted to operate where the attendance is less than ten during the preceding year, and thus if a school following the close of the term would have had an average daily attendance for that term of less than ten it would be the clear duty of the county board of education to direct the suspension of such school upon such facts being brought to their official attention. Such act on the part of the county board of education should take place in sufficient time prior to the opening of the next school term—that is, the school year beginning on September 1 of each calendar year—to give the local board of education an oppor-

tunity to employ its teachers. But attention is invited to the language which follows in the section which gives not only the county board of education, but the local board of education as well, full authority to re-establish such school upon ascertaining that *such school ought to be re-established,* for the section says:

> "Wherever such suspension is had on the direction of the county board of education, then upon the direction of such county board, and in other cases *upon the finding* by the board of education ordering such suspension *that such school ought to be re-established,* such school *shall* be re-established."

There might be frequent cases in which a school would show for a certain term an attendance of less than ten, and immediately prior to September 1, or after the enumeration was taken for the new school year, a sufficient number of children would become of school age in such district or a family or families might move in with children of school age in sufficient number that the number less than ten as shown by the figures of the prior school term might be increased to twelve or fifteen or a greater number, and thus it would be a clear injustice to all concerned to govern the school activities of a certain district for the current year by what may have been the history of the preceding year. This seemingly is what the new law has in mind when it says that if the county board of education or the local board of education ordering the suspension finds that such school ought to be re-established, such school shall be re-established. This is followed further by the language that in the event that the respective boards of education fail to re-establish the school, provision is made for a petition signed by a majority of the voters of the territory in question showing that the average daily attendance of enrolled pupils residing within the territory is twelve or more; but even in that event this is merely bringing it to the attention of the board of education, for the closing sentence of the section says that the board of education *may* re-establish such school. (But see Myers vs. Board of Ed., 95 O. S. 367).

It would seem, therefore, that it is the duty of the boards of education concerned in the suspension of the school in question to ascertain the true facts as to what the attendance may be for the coming term and shall make a finding, and the law says that if such finding is that *such school ought to be re-established,* such school shall be re-established.

Attention is invited to the fact that section 7730 was amended in 107 Ohio laws, that is, the last legislature prior to the existing one, and was twice amended by the present General Assembly; first, by the enactment of House bill No. 406 which was effective on and with August 18, 1919; but section 7730 as appearing in House bill No. 406 is repealed by House bill No. 348, which becomes law on and after September 22, 1919. However, an examination of the three sections shows that there is very little difference in the language as regards the suspension of schools and their later re-establishment, if the conditions warrant. Since House bill No. 348 was the last enactment by the legislature upon the subject in question and is effective practically throughout the entire school year from September 22 on, boards of education should have in mind the provisions of House bill No. 348, which will be the governing statute after September 22.

In construing section 7730 G. C. it is therefore the opinion of the Attorney-General that

(1) Whenever the average daily attendance of any school in the school district for the preceding year has been below ten, the county board of education shall direct the suspension of such school and the board of education of the village or rural school affected shall suspend such school; but wherever such suspension is had on the direction of the county board of education, then upon the direction of

such county board, after such daily attendance shall be established as being ten or more, and in other cases upon the finding by the board of education ordering such suspension that such school ought to be re-established, such school shall be re-established.

(2) Where a public school has been closed because the average daily attendance for the preceding year has been below ten, and it later appears upon investigation that such school if re-established would have an average daily attendance of ten or more and it is the finding of the board of education that such school ought to be re-established, then such school shall be re-established.

Respectfully,
JOHN G. PRICE,
Attorney-General.

602.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN TRUMBULL AND PERRY COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, August 30, 1919.

603.

TURTLE OR MOURNING DOVES—UNLAWFUL TO SHOOT OR KILL SAME UNDER STATUTES OF OHIO EFFECTIVE SEPTEMBER 5, 1919—FEDERAL TREATY BETWEEN GREAT BRITAIN AND UNITED STATES DISCUSSED.

1. *Under both the present game law of Ohio and under the new game law which becomes effective September* 5, 1919, *the shooting or killing of turtle or mourning doves in this state is unlawful.*

2. *Said Ohio laws are fully consistent with the "Migratory Bird Treaty" concluded between the United States and Great Britain, and also with the laws of the Congress and proclamations made thereunder.*

3. *The act of Congress of July* 3, 1918, *expressly authorizes the Ohio law, and the proclamations of the United States secretary of agriculture are made subject to the power of state legislatures to pass laws extending further protection to migratory birds, but not lesser protection than that secured by the federal department of agriculture.*

COLUMBUS, OHIO, August 30, 1919.

HON. HAVETH E. MAU, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Acknowledgment is made of the letter of William K. Marshall, assistant prosecuting attorney of Montgomery county, dated August 28.

The question upon which my opinion is desired may be stated thus:

> "Is it lawful to shoot or kill doves within the state of Ohio, and if so, during what period?"

By "doves" is meant what are commonly called turtle or mourning doves. It is assumed herein that such birds are migratory; that is, not remaining permanently the entire year within the borders of this state.

The answer to your question involves the consideration of both state and federal laws. Let us first consider the state law.

(1) Section 1409 of the General Code of Ohio reads, in part:

> "No person shall catch, kill, injure, pursue or have in his possession either dead or alive, or purchase, expose for sale, transport or ship to a point within or without the state *a turtle or mourning dove* * * *, or any wild bird other than a game bird. No part of the plumage, skin or body of such bird shall be sold or had in possession."

The section just quoted is repealed by Senate bill 45, passed by the present legislature, which said bill was signed by the governor, and on the 6th day of June, 1919, was filed in the office of the secretary of state. It becomes effective ninety days after the date last mentioned, to-wit, on the 5th day of September, 1919.

Upon said law becoming effective, section 1390 G .C. will read, in part, as follows:

> *"Definitions* * * * non-game birds; * * * turtle or mourning dove * * *."

Upon said law becoming effective, section 1408, G. C. will read as follows:

> "Sec. 1408.—Non-game birds. No person shall catch, kill, injure, pursue * * * any wild bird *other than a game bird* * * *."

From the foregoing it is apparent that under both the present and the new game laws of Ohio, the shooting or killing of doves is prohibited.

(2) It remains now to consider whether such shooting or killing is lawful under the federal law and regulations proclaimed thereunder, and if so, also to consider what the status of the Ohio law is in the light of that circumstance.

On December 8, 1916, the president of the United States proclaimed a treaty which was made between the United States and Great Britain for the protection of migratory birds in the United States and Canada. Article I of said treaty says:

> "The high contracting powers declare that the migratory birds included in the terms of this convention shall be as follows:
>
> 1. Migratory game birds: * * * (Here follows an enumeration of birds) (e) *Columbidae or pigeon, including doves and wild pigeons.*"

Article II of the treaty says, in part:

> "The high contracting powers agree that, as an effective means of preserving migratory birds, there shall be established the following close seasons during which no hunting shall be done, except for scientific or propagation purposes under permits issued by proper authorities.
>
> 1. The close season on *migratory game birds* shall be between March 10 and September 1, * * *. The season for hunting shall be further restricted to such period *not exceeding three and one-half months as the high contracting powers may severally deem appropriate and define by law or regulation.*"

On July 3, 1918, Congress enacted what is known as the "Migratory Bird

Treaty Act" (July 3, 1918, c. 128, section 1, 40 Stat.; Comp. St., section 8837a). This law, as its title indicates, was designed to "give effect to the convention between the United States and Great Britain for the protection of migratory birds, concluded at Washington August sixteenth, nineteen hundred and sixteen, and for other purposes."

Section 2 of said bird treaty act (Comp. Stat., section 8837b) provides:

> "Unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful to hunt, take, capture, kill * * * any migratory bird included in the terms of the convention between the United States and Great Britain for the protection of migratory birds concluded August sixteenth, nineteen hundred and sixteen, * * *."

Section 3 of the act (Comp. Stat., section 8837c) says:

> "Subject to the provisions and in order to carry out the purposes of the convention, the secretary of agriculture is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the convention to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt such suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the president."

I am informed that the secretary of agriculture of the United States, in pursuance of the authority conferred by the section last above cited, and out of a desire to take advantage of that part of the treaty before mentioned, which reads:

> "The season for hunting shall be further restricted to such period not exceeding three and one-half months as the high contracting powers may severally deem appropriate and define by law or regulation,"

has submitted to the president of the United States for approval, an amendatory regulation which prescribes the open season for hunting mourning and turtle doves in Ohio to be from September 1 to December 15 inclusive.

Attention is also called to section 7 of the act in question (Comp. Stat., section 8837g):

> "Nothing in this act shall be construed to prevent the several states and territories from making or enforcing laws or regulations not inconsistent with the provisions of said convention or of this act, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open seasons for such birds beyond the dates approved by the president in accordance with section three of this act."

Having in mind the purpose of the treaty for the protection of the migratory birds comprehended by its terms, it is the view of this department that it is to be construed as providing first that there shall be a restriction against the hunting of such birds during the period between March 10 and September 1 of each year,

and further that the season for hunting shall be restricted to such period not exceeding three and one-half months as the high contracting powers may severally determine by law.

The legislation enacted by Congress under the provisions of the treaty has authorized the establishment of restrictions limiting the hunting season to the period between September 1 and December 15. By the express provision of the act of Congress found in section 7 thereof, it is further provided that the authority of the states and territories to make and enforce further regulations shall not be held to be denied by the federal legislation, provided that such regulations of the state and territories shall not be in conflict with the provisions of the treaty and the federal legislation, and shall not extend the open season for such birds beyond the dates approved by the president.

In this provision we have what may be said to be a construction that the effect of further protection by state regulations shall not be considered as inconsistent with the protection accorded under the federal act, subject to the proviso that such state regulations shall not extend the open season beyond the dates approved by the president.

In other words, it is considered that the language of the federal act itself recognizes and preserves the right of the states to enact and enforce further regulatory measures for the protection of the birds in question. From which it follows that the provisions of the Ohio law extending further protection by means of the absolute prohibition against the hunting of such birds, are in accord with the general purport and spirit of the federal act and not void for inconsistency therewith.

You are therefore advised that the above mentioned Ohio statute, both in its present form and in its amended form when in effect, is valid and operative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

604.

APPROVAL OF BOND OF CLINTON COWEN, STATE HIGHWAY COMMISSIONER.

COLUMBUS, OHIO, September 2, 1919.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I am transmitting herewith two bonds in the aggregate sum of $20,000, of date of August 30, 1919, with Clinton Cowen as principal and The Aetna Casualty and Surety Company as surety on one of the bonds, and The Fidelity and Casualty Company of New York as surety on the other, covering faithful performance by Mr. Cowen of his duties as state highway commissioner.

The bonds were submitted to me for my approval as to form under the provisions of section 1179 G. C.

I have examined the bonds and find both of them correct in form; and I have accordingly endorsed on each of them my approval as to form. I am sending them to you for attention in connection with the provisions of the above mentioned statute.

Respectfully,
JOHN G. PRICE,
Attorney-General.

605.

COUNTY AUDITOR—WHERE RE-ELECTED, THEN DIES BEFORE COMMENCEMENT OF SECOND TERM—VACANCY—HOW FILLED—TENURE OF OFFICE OF SUCH APPOINTEE.

When a county auditor who has been re-elected to succeed himself, dies before the commencement of his second term, the person appointed to fill the unexpired term is entitled, by virtue of section 10 G. C., to hold the office until his successor is elected and qualified, which election must be had at the first general election for county officers that is held more than thirty days after the occurrence of the vacancy. The tenure of office of such appointee is not limited to the unexpired portion of the decedent's first term.

COLUMBUS, OHIO, September 2, 1919.

HON CHARLES R. SARGENT, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Your letter of August 11, 1919, relating to the situation which has arisen in your county by reason of the death of the county auditor, was duly received.

The facts as I understand them are as follows:

Mr. William S. Howland died on April 5, 1919, while serving his first term as county auditor. He had been re-elected to the office at the general election for county officers held on November 5, 1918, for the term commencing on the third Monday in October, 1919. A vacancy having occurred in the office by reason of Mr. Howland's death, the county commissioners, acting under authority of section 2562 G. C., appointed Mr. W. H. Cook to fill the vacancy.

The questions for decision are as follows:

(1) Does Mr. Cook's right and authority to hold the office expire on October 19, 1919 (the end of Mr. Howland's first term), thereby enabling the county commissioners to make another appointment to the office?

(2) When must the successor in office be elected?

Section 2558 G. C. provides that a county auditor shall be chosen biennially in each county, who shall hold his office for two years, commencing on the third Monday in October next after his election. The time for holding elections for county officers is prescribed by section 1, article XVII of the state constitution which provides that such election shall be held on the first Tuesday after the first Monday in November in the even numbered years, and it is also provided in section 2 of the same article that vacancies in all elective offices other than that of a member of the General Assembly shall be filled for the unexpired term in such manner as may be prescribed by law.

The manner of filling vacancies in the office of county auditor, as contemplated by the constitutional provision just referred to, is provided for by sections 10 and 2562 G. C. Section 2562 authorizes the county commissioners to fill any vacancy in the office of county auditor by the appointment of a suitable person, resident of the county, and section 10 G. C., which in my opinion is the controlling statute in the present case, provides that:

"When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred.

> This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy."

It will be observed that, by virtue of the foregoing statute, the appointee is to hold the office "until his successor is elected and qualified," and that unless otherwise provided by law (and it is not otherwise provided by law so far as the present inquiry is concerned) the successor in office to such appointee must not only be elected, but can only be elected at the first general election for the office that occurs more than thirty days after the vacancy shall have occurred, which in the present case will be in November, 1920—there being no law under which a special election for the office can be held before that time. In other words, section 10 G. C. fixes the tenure of office of the appointee by expressly providing that he shall hold office "until his successor is elected and qualified," and there is no provision either in that section or any other section governing county auditors warranting the county commissioners in shortening the tenure, or declaring the office vacant. See State vs. Metcalfe, 80 O. S., 244, holding that an office cannot be regarded as vacant while filled by one lawfully entitled to hold it.

It is my opinion, as already stated, that the principal governing statute in this case at this time is section 10 G. C.; that under its clear and express terms the tenure of the present appointee, Mr. W. H. Cook, is not limited to the unexpired portion of the term in which Mr. Howland's death occurred, but that he is entitled to hold the office until his successor is elected and qualified; and that his successor can only be elected at the first general election for the office that occurs more than thirty days after the vacancy occurred, which in this case will be the general election in November, 1920.

The foregoing conclusion is supported by State vs. Speidel, 62 O. S. 156, which holds that the death of an officer during his first term does not create a vacancy in, but instead disposes of, the new or second term for which he has been re-elected; that the vacancy is created in the first term, and that a person duly appointed to fill the vacancy will hold the office not only during the unexpired portion of the first term, but also until his successor is elected and qualified, which election it was also held must be had at the first proper election for the office that is held more than thirty days after the occurrence of the vacancy. That case is directly in point, and cannot be distinguished from the present situation so far as any facts of legal significance are concerned.

A conclusion contrary to the one at which I have arrived would not only be in conflict with section 10 G. C. and State vs. Speidel, supra, but also out of harmony with the declared policy of our law on the subject of vacancies in public offices, as expressed in the decision just referred to, viz.:

> "The policy has been to secure continuity of service and avoid unnecessary vacancies. It has never been the policy of the state to create vacancies in office for the mere purpose of giving somebody an opportunity to fill them. Piling vacancy upon vacancy is an anomaly. * * * The policy to discourage the needless creation of vacancies is recognized in a number of decisions of this court."

Adams vs. Hopkins, 10 O. S. 509, has been cited as applicable to the present inquiry, but the situation in that case was materially different from the situation in the case now under consideration, and involved the application of different statutes. The incumbent in that case was not an appointee to fill a vacancy, but had been elected to the office of county treasurer and had served two full terms of

two years each, and was therefore disqualified by the four year limitation prescribed by section 3 of article X of the state constitution from continuing in office. His successor had been duly elected, but died before the commencment of his term of office. Hence, the office not being in the possession of a person entitled to hold it because of the constitutional disqualification imposed upon the incumbent, it was held, and properly so, that the office had become vacant by death, so as to authorize the commissioners to make an appointment to fill the vacancy. No such situation is presented here, because Mr. Cook, the appointee, is not disqualified by any statute or constitutional provision from continuing in the office, but on the contrary, he is especially authorized by section 10 G. C. to hold the office until his successor is elected and qualified, and not only that, but the time of the election of his successor is specifically provided for in that section.

Bearing on the questions as to when such elected successor will take office, and the length of his term, see State vs. Hadley, 59 O. S. 167.

Respectfully,
JOHN G. PRICE,
Attorney-General.

606.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ROSS COUNTY.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, September 5, 1919.

607.

APPROVAL OF TWELVE LEASES OF LANDS AT BUCKEYE LAKE, INDIAN LAKE, AND LAKE ST. MARYS; ALSO VARIOUS CANAL LAND LEASES.

COLUMBUS, OHIO, September 5, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of September 3, 1919, in which you enclose leases, in triplicate, for my approval, as follows:

	Valuation.
To The Ohio Cities Gas Company, abandoned Ohio Canal property in Muskingum county	$6,100 00
To Steve Sjittia, Barberton, Ohio, outer slope of canal bank and state land in the rear thereof at Barberton, Ohio	1.366 66
To S. L. Wilgus, Sandy Beach Midway Island at Indian Lake	1,000 00
To John W. McBroom, Logan, Ohio, abandoned Hocking canal property, fronting 41 feet on Gallagher avenue, Logan, Ohio	900 00
To Mrs. Kate Kiraly, 37 feet outer slope of the towing path embankment and state land in the rear thereof at Barberton, O.	916 66
To Frank Nincehelcer, cottage site, Buckeye Lake	600 00

To George M. Ginn, 300 feet outer slope and water front, Indian Lake	500 00
To R. A. Hauss, Elm Island, Lake St. Marys	600 00
To Mary Milinski, 100 feet outer slope west embankment Lake St. Marys	400 00
To George Petrowitch, Barberton, Ohio, 61 feet outer slope, towing path embankment and state land in the rear thereof at Barberton, Ohio	350 00
To Frank E. Hess, 20 feet of berme embankment of Ohio canal in Massillon, Ohio	272 00
To S. A. Skelton, Portsmouth, Ohio, cottage site, outer slope tow path of Ohio canal near Powder Mill Lock, Scioto county	100 00

I have carefully examined said leases, find them correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

608.

APPROVAL OF BOND ISSUE OF SCIOTO COUNTY IN THE SUM OF $193,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, September 8, 1919.

609.

APPROVAL OF BOND ISSUE OF MONTGOMERY COUNTY IN THE SUM OF $24,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, September 8, 1919.

610.

HUGHES HEALTH ACT—HOUSE BILL NO. 211 (108 O. L. 236)—EFFECTIVE DATE OF LAW—HOW EXPENSES OF GENERAL HEALTH DISTRICTS FOR YEAR 1920 ARE TO BE TAKEN CARE OF—COUNTY AUDITOR WITHHOLD FROM PROPER FUNDS DUE EACH TAX SUBDIVISION ONE-HALF OF AMOUNT OF HEALTH DISTRICT EXPENSE ESTIMATE.

1. *Section 29 of the act known as House Bill No.* 211 (*Hughes Health Law*) *becomes effective January* 1, 1920. *The rest of the act went into effect ninety days after May* 12, 1919.

2. *The money for expenses of general health districts for the year beginning January* 1, 1920, *will be raised by levies made under general laws enacted prior to the enactment of House Bill No.* 211.

3. *At the semi-annual settlements after January* 1, 1920, *the county auditor shall withhold from the proper funds due each tax subdivision (except those raised by levies for other specially designated purposes) one-half of the amount of health district expense estimates apportioned by him against such subdivisions on the basis of population.*

COLUMBUS, OHIO, September 9, 1919.

HON. JOHN L. CABLE, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department, as follows:

> "In Re: *Hughes Health Bill—House Bill* 211 (108 O. L. 236).
> Please advise when the above health bill goes into effect, also how money shall be obtained for the year beginning January 1, 1920, to pay the expenses of the General Health District."

Your inquiry relates to House Bill No. 211, known as the Hughes Health Law, passed during the present session of the General Assembly April 17, 1919, and approved May 9, 1919, and was filed in the office of the Secretary of State May 12, 1919. Your first question may be stated to be:

> "When does this act go into effect?"

Section 29 of House Bill No. 211 provides:

> "That said original sections 1245, 1246, 3391, 3392, 3393, 3394, 4404, 4405, 4408, 4409, 4410, 4413, 4429, 4430, 4436, 4437, 4476 and 12785 of the General Code be and the same are hereby repealed, but *this section* shall not go into effect until January 1, 1920."

It should be noted that there is no provision in the act fixing a time at which any other section of the act shall go into effect and that section 29 relates only to "this section."

Section 12 of article II, Constitution of Ohio, provides in part:

> "Every bill passed by the General Assembly shall, before it becomes a law, be presented to the governor for his approval. If he approves, he shall sign it and thereupon it shall become a law and be filed with the secretary of state."

This section also fixes the time within which an act becomes a law if passed over the veto of the governor, but that part of the section is not material to the question in this case as the act was approved by the Governor May 9, 1919.

However, by the amendment known as the initiative and referendum, adopted in 1912, being sections 1 et seq. article II of the Constitution, the operation of laws passed by the General Assembly is postponed as provided in section 1c, which in part is:

> "No law passed by the General Assembly shall go into effect until

ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided."

The exceptions therein provided may be found in section 1d providing that laws providing for tax levies, appropriations for current expenses of state government and state institutions and emergency laws "shall go into immediate effect."

The effect of these exceptions is not material in the present inquiry as more than ninety days have elapsed since the filing of the law in the office of the Secretary of State.

From this it would appear that the legislature in section 29 of the act has fixed the time when the repealing section goes into effect, leaving the rest of the law to go into effect as otherwise provided by law.

As to the time when section 29 becomes effective little doubt exists.

As held in *State vs. Roney,* 82 O. S. 376, in the first and third syllabi:

"1. The presumption is that the legislature intends a statute to take effect *at the time it declares the statute shall be in effect,* and a court may not by construction substitute a different time merely to correct defective legislation. The province of construction is to ascertain and give effect to the intention of the legislature, but its intention must be derived from the legislation and may not be invented by the court. To supply the intention and then give the statute effect according to such intention would not be construction but legislation.

3. A statute, declared to take effect from and after a date named, takes effect on the day after the day of the date named."

In *Gas & Fuel Co.* vs. *Chillicothe,* 65 O. S. 186, in the opinion (page 208) it is held:

"There is no legal objection to different provisions of the same statute taking effect at different times at the will of the legislature."

In view of the explicit expression of the legislative intention that section 29 should go into effect January 1, 1920, and the constitutional provisions above cited, taken in connection with the decisions of the Supreme Court above quoted, it is clear that section 29 will become effective January 1, 1920, and that the other sections of the act become effective ninety days after May 12, 1919.

Your second question is:

How shall the money be obtained for the year beginning January 1, 1920, to pay the expenses of the general health district?

This is an interesting question and of prime importance in the administration of the health laws as amended. Apparent difficulties may be eliminated by an analysis of the financial sections of the act in determining the preliminary question of whether or not any change as to the method of obtaining the money for the expenses of the health district is effected by the new law.

Section 25 of that law provides:

"The board of health of a general health district shall annually, on or before August first, estimate in itemized form the amounts needed for the current expenses of such district for the fiscal year beginning on the first day of January next ensuing. Such estimate shall be certified to the county auditor and by him submitted to the district advisory council at a meeting

held at his office on the second Monday of September. The district advisory council may reduce any item or items in such estimate but may not increase any item or the aggregate of all items. The aggregate amount as fixed by the district advisory council shall be apportioned by the county auditor among the townships and municipalities composing the health district on the basis of population as shown by the last federal census. * * The county auditor, when making his semi-annual apportionments of funds, shall retain at each such semi-annual apportionment, one-half of the money so apportioned to each township and municipality. Such moneys shall be placed in a separate fund, to be known as the 'district health fund.'"

Section 26 relates only to raising money in cases of "epidemic or threatened epidemic or the unusual prevalence of dangerous communicable diseases."

It may be observed that there is no direct authority to levy contained in section 25 or 26, or in any other section of the act. Nor is there, except as hereinafter indicated, any change in the method of making a levy.

Section 25 evidently presupposes the making of such levies under existing laws. After receiving the itemized statement of the amounts needed for the current expenses of the health district as finally approved by the district advisory council, the auditor is not authorized to levy such an amount but his duties from that point are rather those of apportioning to and collecting from each tax subdivision a share of the total estimate on the basis of population, resulting in an appropriation and segregation of the subdivision's share.

The latter part of section 25 provides that after having so apportioned such estimate the county auditor, when making his semi-annual settlements with the townships and municipalities, "shall retain * * one-half of the money so apportioned to each township and municipality. Such money shall be placed in a separate fund, to be known as the 'district health fund.'"

It might be claimed that this power amounts to authority to make, and does in fact constitute, a levy. The essential elements of a valid levy and a restriction on the application of money collected thereunder are found in *section* 5 *of article XII of the Constitution of Ohio,* which provides:

"No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, *to which only, it shall be applied.*"

Sections 3646, 3647 and 3784 G. C., which authorize levies by municipalities for health purposes, are left intact and unaffected by this act. Likewise no attempt was made to amend or repeal sections 5646 to 5649 inc. G. C., relating to levies for township purposes, which include health purposes.

So it may be said that none of the legal machinery theretofore provided for making such levies or determining the amount thereof is amended or repealed by this act, unless that part of section 25, above quoted, has such effect by the necessary implication that giving the county auditor the arbitrary power to withhold the apportioned amount from each tax subdivision at the semi-annual settlements amounts to and has the effect of indirectly authorizing the levy of a tax by the county auditor, in direct conflict with former statutes as to such levies. Such implied repeal may also occur if the new act revises the whole matter involved, and is evidently intended as a substitute for the former laws. This is the rule announced in *Goff* vs. *Gates,* 87 O. S. 142, the first branch of the syllabus of which is:

"An act of the legislature that fails to repeal in terms an existing statute on the same subject-matter must be held to repeal the former statute

by implication if the later act *is in direct conflict with the former, or if the subsequent act revises the whole subject-matter of the former act and is evidently intended as a substitute for it.*"

Therefore to reach a conclusion that section 25 impliedly repeals such former laws, we must find that it is irreconcilably repugnant to them, or, revising the whole subject, was evidently intended as a substitute for them.

In support of the idea that such repugnancy exists, it might be claimed that this power of apportionment and retention of the amount charged against each subdivision gives the auditor the power to withhold such amounts, regardless of the amount levied and collected for such purpose. If this were correct, it would be in direct conflict with such laws which place the discretion as to the amount and the method of making such levies in other officials. But is this the proper interpretation of section 25? It must be borne in mind that unless this section contains direct authority to levy, and unless the auditor's action thereunder constitutes a valid levy of the amount apportioned, such a power to apportion and withhold money for health purposes from the tax subdivision's funds, regardless of the purpose of the levy under which such funds were collected, would be in violation of Sec. 5 of Art. XII, supra, in this, that taxes would be thus applied to objects other than those for which they were levied.

The proper construction to be placed upon section 25 in this regard, and it may be suggested the only construction which will maintain its constitutionality and carry out the legislative intention, is that after the township and municipal officers have made the levies from which such health expenses are payable, the auditor is authorized to retain half of the apportionment against each township or municipality from the funds payable to such township or municipality up to but not to exceed the total amounts in the funds from which such expenses are payable, such as general or contingent funds.

Precedent for such procedure is found in section 1465-66 et seq. G. C., enacted in 103 O. L. 72. These sections were construed in *Porter, et al.* vs. *Hopkins, et al.*, 91 O. S. 74. This was an action to contest the constitutionality of the workmen's compensation act. Section 1466 gave the power to the auditor to pay and charge to each taxing subdivision its proportionate part of the county's contribution to the workmen's compensation fund.

It was claimed that in such payment by the county auditor the public funds were diverted from the purpose for which they were levied, in violation of Sec. 5 of Art. XII of the Constitution. The auditor proposed to pay such contribution from general and contingent funds and charge the same to the taxing subdivision.

The court held on page 84:

> "The maintenance of contingent and general funds for general purposes is provided for by statutes which are familiar. The municipal and other subdivisions are fully empowered to raise such funds. It would be wholly impracticable to specifically name in the different budgets the amount to be raised for each specific item. There are many incidental charges which are necessarily taken care of out of the funds of the character referred to as the needs arise. The fact that the amount raised does not meet the exact requirements from time to time and that some inconvenience may arise does not affect the validity of the statutory requirements. * * * It was the duty of the taxing officers of the different subdivisions to provide for such general and contingent funds in accordance with the provisions of the law."

The court, in holding that such contribution may be paid from contingent and general funds without violating the constitution in the respect above indicated,

did not mean to hold that taxes could be applied to purposes other than those for which they were levied, but that the use of taxes for contributions for workmen's compensation was within the purposes for which general and contingent fund levies were made.

Consistently with the holding of the court in the workmen's compensation case, the county auditor may and is by this statute legally empowered to withhold from the various townships and municipalities their portion of the expenses for the health district by taking the same from their contingent and general funds where sufficient levies are not made in special health funds.

Of course it should be noted that taxes raised by levies for special purposes, as for example township road or cemetery purposes, could not be diverted to other uses.

It is the opinion of this department that there is no irreconcilable conflict between the sections above considered; that section 25 is not intended as a revision of the whole subject of levies for health purposes and was not intended as a substitute for the former laws above mentioned, and that the money for the expenses of the general health district for the year beginning January 1, 1920, will be raised in the following manner:

(1) By levies made by proper township and municipal officers as provided in sections 5646 to 5649 inc. and 3646, 3647 and 3784 respectively.

(2) In his semi-annual settlements with such townships and municipalities the county auditor shall retain one-half of the amount apportioned by him against each township or municipality. The funds retained shall be taken from township or municipal funds, from which expenses for health purposes are properly payable, excluding, of course, funds raised by special levies as above indicated.

Respectfully,
JOHN G. PRICE,
Attorney-General.

611.

NON-PAR VALUE STOCK ACT—MAY PROVIDE FOR ISSUE OF PREFERRED STOCK—FEES HOW COMPUTED—NO ALLOWANCE TO CORPORATION REORGANIZED UNDER NON-PAR STOCK ACT—AMOUNT OF FEE ON EACH SHARE OF COMMON STOCK WITHOUT PAR VALUE—FOREIGN CORPORATION HAVING NON-PAR VALUE SHARES WHERE AMOUNT OF CAPITAL NOT STATED IN ARTICLES OF INCORPORATION—FEES AND AMOUNT OF FRANCHISE TAX, HOW COMPUTED.

1. *A corporation incorporated or reorganized under the Ohio non-par value stock act is not required to, but may if it so desires, provide for the creation and issue of preferred stock.*

2. *In computing the fee to be paid to the Secretary of State by a corporation reorganized under the non-par value stock law, credit cannot be allowed on account of fees paid to the Secretary of State prior to its reorganization.*

3. *Every corporation reorganized under the non-par value stock act must pay to the Secretary of State a fee of ten cents on each share of common stock authorized to be issued without any nominal or par value, whether such shares be new or additional shares, or shares changed from par value to non-par value shares under the reorganization.*

4. *When the amount of capital with which a foreign corporation having*

non-par value shares will carry on business is not stated in its articles of incorporation, or otherwise fixed and certified to the Secretary of State and Tax Commission, so as to bring the company within section 11 *of the non-par value stock act, proper rules to be followed in placing a value upon the authorized non-par value shares of the corporation when seeking admission to do business in this state under section* 178 *et seq. G. C., and also in computing the amount of the annual franchise tax under section* 5501 *et seq., G. C., would be to adopt the real consideration for which such shares have been issued by the company from time to time, in the case of issued shares, and the real consideration for which such shares are being offered by the company, with respect to the unissued shares. But in the event unissued shares are not being offered at the time of the application, or at the time of filing the annual report, then the value to be placed upon the unissued shares should be the real consideration for which the last non-par value shares were issued. Such information should be certified to the Secretary of State and to the tax commission.*

COLUMBUS, OHIO, September 9, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date requesting an opinion on seventeen questions arising under the new non-par value stock law (Amended Senate Bill No. 47) was duly received. Pursuant to your verbal request, immediate attention has been given to the four following questions, and the others have been taken under advisement:

(1) Must a corporation that desires to issue common stock without par value issue preferred stock also?

A corporation incorporated or reorganized under the recent non-par value stock law is not required to, but it may if it so desires, provide for the creation and issue of preferred stock. The act in this respect is not mandatory, but permissive only.

See section 1 of the act prescribing the contents of articles of incorporation, particularly paragraph (a), which provides that the number of shares to be issued must be set out, "and if any of such shares be preferred stock," the terms and provisions thereof; and paragraph (b), which provides that the amount of capital stock with which the company will carry on business must not be less than the amount of the "preferred capital, if any."

See also section 4 of the act, which provides that the capital stock may be increased by preferred stock "if none theretofore was authorized," in the manner and in accordance with the provisions relating to the amendment of articles of incorporation under the general law. The general law (sections 8698 and 8719 G. C.), it will be remembered, provides for the creation and issue of preferred stock after the incorporation of the company.

See also the provisions of section 5 relating to the classification, if any, of the company's capital stock, and if classified, the terms and provisions of the preferred stock, etc.

(2) When a reorganized corporation files its certificate with the Secretary of State, should it not be allowed a credit for incorporation fee previously paid upon its authorized capital stock?

This question must be answered in the negative. The act clearly and specifically provides what fee shall be paid upon reorganization, and nowhere is there any

provision authorizing a credit on account of fees previously paid to the Secretary of State. The requirement of the act (section 10) is that every reorganized company "shall pay to the Secretary of State the same fees provided in section 1 of this act as therein computed," and the only exception to the rule is expressed in the section itself, viz., that the fee shall not be less than $25.00. It follows, therefore, that every corporation reorganized pursuant to the act, is required to pay to the Secretary of State "a fee of ten cents on each share of common stock authorized in the articles to be issued without any nominal or par value, and in addition thereto a fee of one-tenth of one per cent of the par value of preferred stock authorized in the articles," as provided in section 1 of the act. In other words, a reorganized company is treated exactly as if it was a new incorporation, so far as the fees of the Secretary of State are concerned excepting only as to the minimum fee.

It has been suggested that section 10 only applies when the certificate of reorganization shows that a company has been reorganized with an increased authorized capital stock, but this contention cannot be adopted because that section, and also section 1 in terms clearly provide for two separate and distinct fees, viz., (a) a reorganization fee to be paid when the certificate of reorganization is filed, and (b) an increased capital stock fee to be paid in event the reorganized company increases its authorized capital stock. See also the proviso in section 10 fixing a minimum fee to be paid upon the filing of the certificate of reorganization.

Section 9, referred to in your letter, does not affect the question of fees to be paid to the Secretary of State by corporations taking advantage of the statutory authority to reorganize; its only effect is to declare that reorganization shall not work a dissolution or in any way affect the corporate existence of the company, etc.

> (3) Kindly state whether or not a corporation which reorganizes under the above act is obliged to pay a fee of ten cents per share for changing a share of par stock to a share of non-par stock.

The fees to be paid to the secretary of state upon reorganization are those fixed by section 1 of the act. Section 10 expressly so provides. The secretary of state must be governed by the certificate of reorganization in computing the fees to be charged and collected, and the fact that par value shares have been changed or transformed under authority of the act to non-par value shares does not exempt such shares from the computation. The mandate of the statute is that ten cents must be charged and collected on each share to be issued without par value. In other words, there is no distinction between a so-called "transformed" share and a newly created or additional share, so far as the fee is concerned.

> (4) When the amount of capital with which a foreign corporation having non-par value shares will carry on business is not stated in its articles of incorporation, or otherwise fixed, so as to bring the company within section 11 of the Ohio non-par value stock act, what rule should be adopted in determining the fee to be paid to the secretary of state under section 178 et seq. G. C. governing the admission of foreign corporations to do business in this state, and the amount of the annual franchise tax under section 5501 et seq. G. C.?

Section 11 of the act prescribes the rule to be followed with respect to such foreign corporations, and such only, as state in their articles or otherwise fix the amount of capital with which they will carry on business, as follows:

> "The amount of capital with which a foreign corporation having

shares of capital stock without par value will carry on business, as stated in its articles of incorporation, or otherwise fixed or as thereafter lawfully changed, shall be deemed to be the authorized capital stock of such foreign corporation for the purposes of sections 180, 183, 184, 185, 5501, 5502 and 5503 of the General Code."

In other words, the secretary of state and the tax commission cannot adopt the foregoing rule, unless the amount of capital with which the company will carry on business is stated in its articles of incorporation or is otherwise fixed.

(a) It will be observed that the foregoing section 11 does not provide that there shall be a foreign statute requiring the amount of capital with which the company will carry on business to be stated in the articles, or providing how the amount shall be otherwise fixed.

In my opinion when the amount is not stated in the articles of incorporation, it is permissible for the board of directors of the foreign corporation to fix the amount, and thereby bring the company within section 11 of the act, which amount, if so fixed, should be certified to the secretary of state at the time the company makes application for admission to do business in this state, and to the tax commission when the company files its annual reports with the commission.

(b) In the event, however, that the amount is not stated in the articles, or otherwise fixed as provided in paragraph (a) supra, then recourse must be had to section 178 et seq. G. C. as to the fee to be paid by a foreign company seeking admission to do business in this state, and to section 5501 et seq. G. C. with respect to the annual franchise tax—those being the governing statutes.

Examination of section 178 et seq. G. C. will disclose that the amount of the company's "authorized capital stock" is an indispensable factor in determining the amount of the fee, because under one section (180 G. C.) the fee is an arbitrary one based solely on the authorized capital stock, and under the other sections of the group (184 and 185 G. C.) the fee is based upon the proportion of the company's authorized capital stock represented by property and business in Ohio.

The company's authorized capital stock is also an indispensable factor in determining the amount of the annual franchise tax, as will appear from the provisions of section 5501 G. C. which provides that the tax commission shall determine and certify to the state auditor the proportion of the company's authorized capital stock represented by its property and business in this state, and from section 5503 G. C. which provides that the state auditor shall charge, and that the company shall pay to the state treasurer a certain fee upon the proportion of the company's authorized capital stock represented by property and business in this state.

In determining the amount of the authorized non-par value capital stock of a foreign corporation which does not come within section 11 of the act and paragraph (a) of this opinion, I suggest that the following rules be adopted:

"In case of issued and outstanding non-par value shares, adopt the real consideration for which such shares were issued from time to time.

With respect to unissued non-par value shares, adopt the real consideration for which such shares are being offered by the company; but in the event unissued shares are not being offered by the company, then adopt the real consideration for which the last issued non-par value shares were issued by the company."

This information should be certified to the secretary of state at the time the company makes application to do business in this state, and to the tax commission at the time it files its annual franchise tax reports.

The rules just mentioned should be applied to Delaware corporations, and also

to other foreign corporations organized under the laws of other states, which do not come or bring themselves within section 11 of the act and paragraph (a) of this opinion.

The Delaware law has specifically placed a valuation of $100 per share on non-par value shares as far as Delaware fees only are concerned, but of course that provision has no application to fees and taxes to be paid under the Ohio law.

The case of North American Petroleum Company vs. Hopkins, 181 Bac. 625, has been cited for consideration in this connection, but that case involved the method for determining the value of the "lawfully issued capital" of the company, and also its "capital stock," as those terms are used in the Kansas law, and not the amount of the company's "authorized" capital stock, which is the term used in the Ohio law.

Respectfully,
JOHN G. PRICE,
Attorney-General.

612.

BOARD OF EDUCATION—SENATE BILL NO. 187 (108 O. L. 924)—IN EVENT TWO MILL ADDITIONAL LEVY IS AUTHORIZED BY ELECTORS UNDER SAID STATUTE—BUDGET COMMISSION REQUIRED TO ALLOW SCHOOL DISTRICT AN AMOUNT NOT LESS THAN ALLOWED FOR YEAR 1918—SEE ALSO OPINIONS NOS. 565 AND 570, 1919.

In event of favorable vote by the electorate upon the proposition to levy the additional two mills authorized under Senate Bill No. 187 for school purposes, the budget commission is required to allow to the school district, upon its budget submitted to the commission, an amount not less than that allowed the school district for all purposes, by the budget commission, for the year 1918.

COLUMBUS, OHIO, September 9, 1919.

HON. THOMAS F. HUDSON, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Under date of July 26, you submitted to me a request for a construction of the provision of Senate bill No. 187 (108 O. L. 924), authorizing the levy of an additional two mills of tax by boards of education, in event of favorable vote thereon by the electorate at a special election, and particularly the provision that budget commissions shall not reduce the amount of all other levies made by boards of education below the amount allowed for the preceding year.

This request for construction of said provision of the law was joined in by Hon. R. W. McKinney, auditor of your county, and a similar inquiry from the city attorney of Columbus was at the time under consideration at this office and a ruling announced in Opinion No. 570, directed to the tax commission of Ohio on August 16, 1919, of which you have received a copy.

Mr. McKinney has further advised me, under date of August 25, that some uncertainty prevails in the minds of your budget commissioners as to the application of the law as construed in my former ruling, to the specific facts before your budget commission, relative to the levy for school purposes and accordingly has submitted the following data covering allowances made by the budget commission to the city of Springfield school board for the year 1918 and also the amounts requested in the budget of the school board for the year 1919, and requests an application of the law to the concrete case stated:

"The budget commission allowed said school board in 1918 the following amounts:

Tuition fund	$159,434 37	
Contingent fund	87,000 55	Rate 3.30
Sinking fund within the 10 mill limitation	12,000 00	Rate .16
Sinking fund outside the 10 mill limitation	40,000 00	Rate .54
Total	$298,434 92	Rate 4.00

This year, 1919, the board hands to the budget commission the following request:

Tuition fund	$445,000 00
Contingent fund	195,000 00
Interest and sinking fund within the 10 mill limitation	9,000 00
Interest and sinking fund outside the 10 mill limitation	12,941 00
Total	$661,941 86

The rate required to grant the $9,000.00 for the sinking fund within the 10 mill limitation would be .12 of a mill, and without the 10 mill limitation to grant the $12,941.86, the rate required would be .17 of a mill.

If the Attorney-General's Opinion No. 570 means that the budget commission must grant amounts aggregating the total amount allowed last year, and inasmuch as the sinking fund requests this year are so much less than the grants for that purpose last year, it would mean, in order to grant the aggregate of last year, that considerably more money would have to be allowed for current expense, viz.: Tuition and contingent funds, than was allowed last year, which will very greatly cut into the revenues of both city and county.

Trusting that I may have an early interpretation of our situation in the light of Opinion No. 570, I remain," etc.

The provision of S. B. No. 187 which gives rise to your inquiry is contained in section 3, which is as follows:

"Sec. 3.—If a majority of the electors voting on the proposition so submitted vote in favor thereof, upon the certification and canvass of such result it shall be lawful for such board of education to levy taxes on the duplicate made up in the year 1919 at the aggregate rate so authorized for such purposes in addition to all other taxes for like purposes. Such levy shall be certified to the county auditor, who shall place it on the tax duplicate; it shall not be subject to any limitation on tax rates now in force, and shall not be subject to the control of the budget commission, nor shall such budget commission reduce the amount of all other levies made by any board below the amount allowed such board for the preceding year."

Other pertinent provisions of other statutes are found in the so-called Smith 1 per cent law and are as follows:

"Sec. 5649-1.—In any taxing district, the taxing authority shall, within the limitations now prescribed by law, levy a tax sufficient to provide for sinking fund and interest purposes for all bonds issued by any political subdivision, which tax shall be placed before and in preference to all other items, and for the full amount thereof."

Section 5649-3c G. C. governs the action of the budget commission and directs that the commission shall examine the budgets submitted by the various taxing subdivisions and ascertain the total amount proposed to be raised in each district; and further:

> "* * * If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district, or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and *may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district, within the limits provided by law.* * * *."

The provision of section 5649-1 G. C. and that of S. B. No. 187, to the effect that the budget commission shall not reduce the amount of all levies authorized under the Smith law, for the school district, below the amount allowed for the preceding year, are mandatory, and, to the extent that they conflict with the general language of section 5649-3c G. C., they are a limitation upon the powers of the budget commission conferred by that section.

The purpose of the enactment of S. B. No. 187 obviously was to authorize a two mill levy for school purposes, in addition to that authorized within the then existing limitations, and the provision against reduction of the other levies as contained in section 3, is clearly employed to insure the benefit of the additional rate allowed by the stipulation that the power of the budget commission to reduce levies under section 5649-3c G. C. should not be employed in the direction of curtailing the levies of the school board which were authorized under the Smith law, and the legislature has chosen to adopt the allowance granted to the school district for 1918 as the standard or basis for allowance of what may be termed the regular levy for 1919.

It was pointed out in Opinion No. 570:

> "The budget commission deals with amounts, though it is true that in so doing it is enforcing limitations which according to the Smith law in its present form are expressed in terms of rates only. Having fixed amounts, its action is certified to the county auditor who determines rates. Therefore it is clear that what the budget commission is required to do under the Smith law and conversely what it is prohibited from doing under section 3 of Senate bill No. 187, both relate ultimately to the amount of taxes to be levied and must be expressed in terms of amount. We may therefore say that the language in question means that the budget commission shall not reduce the amount of money to be raised by levies on the grand duplicate of taxable property below a certain figure."

Here the provision of S. B. No. 187 supplies the language which must furnish the answer to your inquiry, to wit, the amount allowed such board for the preceding year.

Applying this specifically to the data submitted in your last communication, it follows that the amount requested by the school board in its budget is subject to reduction by the budget commission, either *in toto,* or in one or more of the items thereof, under authority of section 5649-3c G. C., provided that the total amount to be allowed shall not be less than that allowed for the preceding year, which is stated in your letter as $298,434.92.

While it is true, as you point out, that a substantially less sum is required for interest and sinking fund purposes, yet the practical effect of this is to make available for tuition and contingent fund purposes a larger amount to that extent, and this is beyond the control of the budget commission.

It is no doubt true that if the amount requested by the school board in its budget, either in the aggregate or in any of its items, is less than that allowed for the year 1918, the budget commission would not be authorized to increase the allowance over the amount requested, but such a contention is not being made by any one, as I understand, and therefore need not be considered.

Therefore you are advised that the budget commission is not authorized to reduce the amount of the budget for the school district, in the aggregate, below the amount allowed for all purposes in the year 1918, to wit, $298,434.92.

Respectfully,
JOHN G. PRICE,
Attorney-General.

613.

BOARD OF EDUCATION—INSTRUCTION OF BLIND—HISTORY OF NEW METHOD FOR INSTRUCTING PARTIALLY BLIND—AUTHORITY OF SUPERINTENDENT OF PUBLIC INSTRUCTION TO PRESCRIBE STANDARD REQUIREMENTS FOR SCHOOLS RECEIVING STATE AID.

1. *Under section 7761 G. C. the state superintendent of public instruction has full authority to prescribe standard requirements as to the methods of instruction in those schools which receive state aid for the instruction of the blind, and can direct that boards of education maintaining such schools for persons of defective vision shall provide such equipment as is necessary, including text books printed in large type for the use of pupils who are partially blind.*

2. *Boards of education maintaining classes for the blind, in order to receive the state aid mentioned in section 7757 G. C., must comply with the requirements promulgated by the superintendent of public instruction made under authority of section 7761 G. C.*

COLUMBUS, OHIO, September 9, 1919.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

> "Section 7761 gives the superintendent of public instruction authority to prescribe 'certain standard requirements concerning the conditions under which * * * schools for the blind * * * are conducted,' etc. I desire to issue a statement to the effect that as the success of the method of instructing partially blind children in so-called 'Conservation of Vision'

or 'Sight-Saving Classes' is dependent for its ultimate success upon an adequate supply of text books and supplementary reading material in a large clear type, and as such an adequate supply of books is not at present available, and as the printing of such a supply in any one year would entail too great an expenditure to be considered in the present state of school finances, I shall hereafter require that the cities conducting such classes shall expend each year for such books not less than 15 per cent of the amount received from the state for the instruction of such pupils during the preceding school year until such time as these classes are satisfactorily equipped in this respect.

I beg leave to have your official opinion as to whether such a requirement is within my authority to prescribe in accordance with the provisions of section 7761 and other sections which may bear upon the control and support of these schools."

Section 7761 G. C., as amended in 107 Ohio Laws, 154, reads in part as follows:

"The state superintendent of public instruction shall select some competent person or persons to inspect all such schools for * * * blind * * * established by virtue of this act, and cause inspection to be made at least twice a year or as often as the state superintendent of public instruction may deem necessary concerning the *method of instruction* * *, the condition under which such schools are maintained * * * and such other matters as may be of interest in the education of such children in such schools; * * *. The state superintendent of public instruction *shall* prescribe *certain standard requirements* concerning the conditions under which such school or schools for the blind * * * are conducted, the *methods of instruction* and supervision * * *. When upon inspection it has been found that the standard requirements theretofore prescribed for the instruction * * * of blind persons have not been complied with by a board of education, the state superintendent of public instruction shall recommend to the auditor of state that the payment to such board of education provided for in section 7757 be withheld, and thereupon the auditor of state shall refuse to draw his warrant upon the treasurer of state for the amount to which such board of education of a school district maintaining a school for the blind would otherwise be entitled."

Section 7755 G. C., as amended in 107 Ohio Laws, p. 153, provides for the application by the board of education to the state superintendent of public instruction on the question of establishing a school for the education of the blind, and before such school can be established by the board of education the state superintendent of public instruction shall *grant permission* to do so.

Section 7756 G. C. provides that each and every one of such blind schools established in the public schools shall report annually to the state superintendent of public instruction and must furnish any additional facts oftener than annually if the state superintendent of public instruction makes a request for such facts.

Section 7757 provides that at the close of each school year the board of education which has conducted the school for the blind shall certify to the auditor of state the number of persons given instruction and thereupon the auditor of state shall draw his warrant upon the treasurer of state in favor of such board of education, payable out of the general state fund in an amount equal to two hundred and fifty dollars for each pupil.

Section 7758 provides that the state superintendent of public instruction shall

certify that the inspection provided for in section 7761 "had shown these schools to be operating under satisfactory conditions," and taken in conjunction with section 7761 G. C., supra, it is clear that the state superintendent of public instruction *has the authority to say whether a school for the blind is entitled to such two hundred and fifty dollars from the state for each pupil, following the inspection which his department must make as provided by the statute.*

The clear intent of the act of March 19, 1917, in which the above amended sections appear, was that the payment to be made by the state auditor must first have the approval of the superintendent of public instruction, and unless such latter official recommended the payment, the same could not be made as indicated in section 7761. The latter section places *the methods of instruction,* the methods of supervision, the conditions under which such schools are maintained, and *"such other matters as may be of interest in the education of such children,"* in the hands of the superintendent of public instruction, and it is for that official to say whether the funds received from the state are being wisely expended, because he must certify that they are or are not, *whether the methods of instruction are up-to-date and the best that can be secured,* and if it is his view, after a careful inspection, that an adequate supply of proper equipment for latest methods of instruction, including text books and supplementary reading material, in large clear type for the sight-saving classes, is necessary and that the best interests of the state will be served by having a supply secured at one time for all such schools in order to save expense, he has authority to do so. An expenditure of fifteen per cent of the amount received from the state for proper text books selected by the state superintendent of public instruction is not unreasonable, and such official has authority, under section 7761 G. C., to direct boards of education maintaining schools for the blind, to purchase such equipment as he indicates as being necessary in *"proper methods of instruction"* for the blind, or the near blind.

Section 7760 G .C. (107 Ohio Laws, 154) provides that for the purposes of the act relative to the education of the blind, persons of defective vision shall come within the scope of such law. Your question seemingly is upon the proper methods of instruction of those of defective vision, but who are not totally blind; that is, who may be called semi-sighted, and for the proper education of whom arrangements have been made by the establishment of what is known as "Sight-saving Classes." It is found that sight-saving classes are now maintained by the school authorities of progressive cities for the special training of those whose sight is radically imperfect, but who are not blind. It has been found that standard methods of class room study in the public schools are unsuited to the child with very defective sight. He cannot be taught with his clear-visioned companions, and the methods used with the blind will not do for him; he needs to be trained by *special methods* in a class by himself. The semi-sighted child is necessarily always behind his fellow students, when these have good eyes; he becomes discouraged and often careless and shiftless, an attitude that handicaps his whole industrial life. In order that such children may be properly educated and their sight conserved as much as possible, it has been found that they should have at their disposal and for their use a *special equipment;* that is, books printed in large type but possibly containing the same matter that their other pupils use, printed in the ordinary standard book print type. Seemingly, no effort should be lost to place at the hands of these future citizens, handicapped as they are by defective vision, every possible chance for learning as much as possible while in school and encourage them to stay in school as long as possible before abandoning their education. So whatever may be established as *the latest and best method of instruction* for these pupils, who are not blind and thus have no occasion for using what is known as the raised print that is read by the sense of touch, should certainly be adopted and encouraged in schools of this kind.

No hard and fast line can be drawn between the sighted and semi-sighted on the one hand and the semi-sighted and the blind on the other. For purposes of classification, defective sight has been defined as "vision not more than one-third nor less than one-tenth with the best glasses obtainable."

Children suffering from ocular defects of this sort have, of course, always been enrolled in every large school system. Prior to the period of medical inspection, the reason for the backwardness of any given child did not always appear. All that the teacher and parent knew was that the youngster did not get along well. Even if the defect were discovered, the teacher and parent were helpless. The former had no right to exclude such a child from classes, and often tried hard to fit the child into the usual educational groove—a process which was no more successful than the attempt to fit a square block into a round hole. At the end of the term the discouraged teacher had no recourse but to demote the discouraged pupil. The following year the same weary and futile process was repeated. Of course, this sort of thing could not keep up indefinitely and the problem solved itself (if solution it can be called) by the child leaving the school long before completion of the grammar-school grades.

When systematic medical inspection began to be the rule in schools in the larger cities, more and more of these cases came to light and the problem began to assume definite shape in the minds of educators. It having been determined that these children could not be educated in the ordinary schools, it was thought that provision might be made for them in schools for the blind. It was assumed (erroneously, as experience proved), that the partial-sighted child was to all intents and purposes a blind child, and that the educational methods appropriate for the latter would prove equally effective for the former. The child's vision may be seriously defective, and yet he sees after a fashion. He is bound to rebel at any effort to fit him into any educational system designed for the sightless. It has been found impracticable to teach the raised types of the blind to partial-sighted children; the laborious process of determining the individual letter by the sense of touch is soon abandoned, and these children are found straining their eyes in an effort to see the arrangement of the raised dots. Thus is promoted the very thing which should be avoided, namely, overstrains of the eyes.

The semi-sighted child is discouraged with always being behind his fellow students and develops a consequent carelessness, shiftlessness, and lack of confidence. Later his lack of the fundamentals of education must inevitably handicap his industrial life. Almost always there is the same tale—early abandonment of school because the work could not be done.

The cost of special education varies with location, equipment, etc. It is the highest of any special educational work done in the public schools, but considerably less than the cost of education in institutions for the blind. This cost can be further reduced by placing such children as far as possible in classes with seeing children, which has the additional advantage of accustoming them to a normal school environment in competition with those with whom they will be thrown in later life. The whole aims to minimize eye-strain during school life, to train the semi-sighted child to conserve his own vision, and to give such vocational training as will enable him to become self-supporting.

Your question is whether the superintendent of public instruction can require boards of education to make use of part of their subsidy from the state, which they receive upon the approval of the state superintendent of public instruction, to pay for the installation of certain equipment which in his opinion is necessary as one of *the proper methods of teaching* provided for under his supervision by section 7761 G. C.

Section 7761 G. C. clearly provides that the superintendent of public instruction shall prescribe certain standard requirements concerning *the methods of instruc-*

tion in schools for the blind and those of defective vision, and he has as much authority to require that printed books with large type for the use of those of semi-vision be placed in the schools as proper equipment as he has to require that books with raised print for the use of the fingers shall be placed therein. From the argument heretofore given it would seem that the child with partial vision should not be compelled to use the standard text books used by other pupils whose vision is clear; again, he should not be required to use the touch system on raised print when he is not totally blind. Recent investigation has established that these children will be better served from an educational standpoint in every way if boards of education will place at their disposal and for their use the books of instruction printed in a size of type which the child with limited vision can see, and would not have to further strain their eyes in attempting to read standard book print in text books, or, on the other hand, be forced to use the touch system, against which they might rebel because they did not care to be called totally blind.

Investigation shows that the state of Ohio leads in the maintenance of these sight-saving classes for children of limited vision, and that the great states of Massachusetts and New York are following the lead of this state, which has been the pioneer in having this special equipment of books of large type printing for the use of those of semi-vision, whose sight it is desired to conserve. No stone should be left unturned to give to those who have partial sight and those who are deaf and those who are crippled the best possible education in order that they may become independent in after life, and not wards of the state.

The very purpose of the sections heretofore quoted seems to be that the superintendent of public instruction should have charge of *the methods of instruction* in all schools for the blind which receive the state subsidy of two hundred and fifty dollars for each pupil, heretofore mentioned. It would seem that no one could question the value of the equipment of books of large print being installed in schools for the blind, and section 7761 G. C. clearly provides that the superintendent of public instruction *shall prescribe the requirements necessary in these schools in order to receive the state aid,* and that he shall inspect them through proper channels as to whether proper methods of instruction are being used.

It is therefore the opinion of the Attorney-General that

(1) Under section 7761 G. C. the state superintendent of public instruction has full authority to prescribe standard requirements as to the methods of instruction in those schools which receive state aid for the instruction of the blind, and can direct that boards of education maintaining such schools for persons of defective vision shall provide such equipment as is necessary, including text books printed in large type for the use of pupils who are partially blind.

(2) Boards of education maintaining classes for the blind, in order to receive the state aid mentioned in section 7757 G. C., must comply with the requirements promulgated by the superintendent of public instruction made under authority of section 7761 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

614.

COLLATERAL INHERITANCE TAXES—NO STATUTORY AUTHORITY FOR REFUNDER OF EXCESSIVE PAYMENTS.

There is no statutory authority for the refunder of excessive payments of collateral inheritance taxes.

COLUMBUS, OHIO, September 9, 1919.

HON. WALTER W. BECK, *Prosecuting Attorney, Lisbon, Ohio.*

DEAR SIR:—In your letter of August 26th you submit an inquiry addressed to you by the auditor of Columbiana county, in which he states that the administrator of a certain estate paid collateral inheritance taxes in the year 1918 on account of certain successions to the estate of which he was administrator; that these payments are now alleged to have been erroneous and excessive in amount because of the failure of the administrator and the collecting authorities to deduct the five hundred dollar exemption provided by the former collateral inheritance tax law from the share of each successor. The administrator now asks a refunder of the amount so excessively paid, and you request the opinion of this department as to whether or not such a refunder can be made.

The contention that the payment was excessive is, on the facts stated, correct as each succession was entitled to a separate exemption. It does not, however, follow that the administrator has an immediate and available right to secure a refunder. Waiving the question of voluntary payment induced by the negligence of the administrator himself or his mistake of law, as the case may be (or the payment may have been in truth involuntary, as no facts are shown on this point), it is nevertheless true that the collateral inheritance tax law provided no machinery for refunding excessive payments from the public treasury. Quotation of the collateral inheritance tax law will be unnecessary to show this fact. Not only is there no provision for such a refunder, but if there were such a provision it would have to go to the extent of distributing the refunder as between the state and the local subdivision entitled to share in the proceeds of the payment.

Other tax laws do provide for refunders. For example, property taxes erroneously collected may, under proper circumstances, be refunded by order of the county commissioners (sections 2589 and 2590 of the General Code). It is true that these sections standing by themselves might possibly be interpreted broadly enough to authorize the refunder which is now claimed, in that inheritance taxes were in theory collected on duplicates (See section 2641 of the General Code). The inheritance tax duplicate was, however, a special duplicate as distinguished from the tax list and duplicate of taxable property which was frequently designated as the "general duplicate." It is clear that sections 2589 and 2590 referred only to the general duplicate; for they were originally a part of section 1038 of the Revised Statutes, which also provided what is now found in section 2588 of the General Code. The first sentence of that section is as follows:

> "From time to time the county auditor shall correct all errors which he discovers in the tax list and duplicate, either in the name of the person charged with taxes or assessments, the description of lands or other property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment."

Section 2589 then begins as follows:

> "After having delivered *the duplicate* to the county treasurer for col-

lection, if the auditor is satisfied that any tax or assessment *thereon* * * has been erroneously charged, he may give the person so charged a certificate. * * *"

It goes on to provide that:

"If at any time the auditor discovers that erroneous taxes or assessments have been charged and collected in previous years, he shall call the attention of the county commissioners thereto," etc.

The sentence last quoted must be, I think, interpreted in connection with what precedes. The phrase "erroneous taxes or assessments" therein must refer to taxes and assessments of the kind dealt with previously in the related provisions.

It follows, therefore, that section 2588 et seq. of the General Code are not available in the present instance. As previously stated, other statutory provisions have been made for refunders, as in the case of liquor assessments, for example. These facts are mentioned to bring out the point that there is no single statute of universal application authorizing the refunder of erroneously paid taxes, and that the policy of our legislation has been to make special provision in the case of each tax or kind of tax for such refunder. Section 20-1 of the General Code comes closest to being a law of such universal application. Without quoting that section, however, it may be said that it is limited to taxes paid directly into the state treasury and therefore can have no application to taxes paid to county treasurers.

It follows that whatever may be the merit of the administrator's claim as tested by the character of the payment made by him, there is no administrative machinery which will afford him any relief at the present time. It will be necessary for the administrator to secure relief, if at all, by act of the legislature.

Respectfully,
JOHN G. PRICE,
Attorney-General.

615.

APPROVAL OF BOND OF ALEXANDER R. TAYLOR AS STATE HIGHWAY COMMISSIONER.

COLUMBUS, OHIO, September 9, 1919.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—I am transmitting herewith two bonds of Hon. Alexander R. Taylor in the aggregate sum of twenty thousand dollars ($20,000) conditioned that Mr. Taylor will faithfully perform his duties as State Highway Commissioner, each of said bonds being in the sum of ten thousand dollars ($10,000) and signed respectively by The Fidelity & Casualty Company of New York and The Aetna Casualty & Surety Company of Hartford, Connecticut, as sureties. You will note that on each of these bonds I have endorsed my approval as to the form thereof.

Respectfully,
JOHN G. PRICE,
Attorney-General.

616.

TAXES AND TAXATION—CONSTITUTIONAL AMENDMENT PROVIDING FOR CLASSIFICATION OF PROPERTY FOR PURPOSE OF TAXATION—QUERY AS TO WHETHER JOURNALS OF BOTH BRANCHES OF GENERAL ASSEMBLY OR ENROLLED AND AUTHENTICATED COPY OF JOINT RESOLUTION IS BEST EVIDENCE OF A PROPOSED AMENDMENT TO CONSTITUTION OF STATE.

1. *The amendment to section 2 of Article XII of the state constitution providing for the classification of property for the purposes of taxation, which was proposed by the senate during the present session of the general assembly under authority of section 1 of Article XVI, must be submitted to the electors for their approval or rejection as it appears of record on the legislative journals.*

2. *The reconvening of the general assembly to take further action with respect to the submission of such proposed amendment to the electors, is unnecessary.*

COLUMBUS, OHIO, September 9, 1919.

HON. CLARENCE J. BROWN, *Lieutenant Governor and President of the Senate;*
HON. CARL R. KIMBALL, *Speaker of the House of Representatives, Columbus, Ohio.*

GENTLEMEN:—This department is in receipt of a recent communication propounding certain questions relating to a proposed amendment to section 2 of Article XII of the state constitution, reading and signed as follows:

"HOUSE OF REPRESENTATIVES

General Assembly of Ohio

COLUMBUS, OHIO, September 5, 1919.

HON. JOHN G. PRICE, *Attorney-General, Columbus, Ohio.*

DEAR SIR:—The undersigned members and officers of the General Assembly constituting a committee authorized by Joint Resolution of the General Assembly to convene the General Assembly during the present recess when occasion may require, respectfully request your written opinion upon the following questions:

Senate Joint Resolution No. 31 entitled 'A Joint Resolution proposing to amend Article 12, Sec. 2 of the Constitution of the State of Ohio, etc.,' was introduced in the Senate and passed by that body; it was amended and passed in the House of Representatives and was then referred to a joint committee of conference. On Friday, April 11, 1919, the joint committee of conference reported back the resolution 'In the form as passed by the Senate' with certain amendments. This report was agreed to by the constitutional majority in both houses on that day.

On the journals of the respective houses in connection with the record of the yeas and nays appear entries of amended Senate Joint Resolution No. 31 in full. These entries agree with each other so far as the phraseology of the proposed amended Sec. 2 of Article 12 of the Constitution is concerned; and both of them are in accord with the resolution as passed by the Senate with the amendments recommended by the committee of conference.

Pursuant to the custom of the houses amended Senate Joint Resolution No. 31 was enrolled after its passage and signed by the presiding officers of

the respective houses in the presence thereof while such houses were in session and capable of transacting business. In the enrolled copy, which is on file in the office of the Secretary of State, there is an omission of the words 'public worship, institutions used exclusively for;' found in line 14 of the original resolution and occurring in the repeated portion of Article 12, Section 2 of the Constitution.

Does this omission in the enrolled copy of the Joint Resolution invalidate the proceedings of the General Assembly? Which text, as between that of the enrolled resolution and that of the journals of the House and Senate is to be employed by the Secretary of State in making the publication referred to in Article 16, Sec. 1 of the Constitution and in formulating the ballots for the submission of the proposed amendment to the electors?

In order to procure the proper submission of the proposed amendment in the form in which it actually passed the two houses, will it be necessary to reconvene the General Assembly at this time?

Your early attention to these questions is urgently requested and will be greatly appreciated.

Very respectfully,
CLARENCE J. BROWN,
CARL R. KIMBALL,
RUPERT BENHAM,
F. E. WHITTEMORE,
E. J. HOPPLE."

It appears from the statement of facts contained in the above letter that the joint resolution therein referred to was initiated or proposed by the Senate, and after being duly agreed to was entered on the journals of both branches of the General Assembly; that both journals are in accord as to the terms or contents of the proposed amendment; and that what purports to be, but is not, a true and correct copy of the proposed amendment, was prepared and authenticated by the presiding officers of both houses and filed with the Secretary of State.

The enrolled and authenticated copy, as just indicated, is not identical in contents with, but in one respect is materially different from, the resolution as it was correctly entered and now appears of record on the journals of the two houses, in that the words "public worship, institutions used exclusively for" which appear on the journals, are omitted from the enrolled copy.

Many interesting questions have been, and others might be raised upon the statement of facts referred to, but the facts, when reduced to their last analysis, present but a single controlling question, viz., What is the best evidence of the proposed amendment, the journals, or the enrolled and authenticated copy of the joint resolution?

If the statement of facts involved the contents of a bill, or of a joint resolution other than one whereby the Senate or House had proposed an amendment to the Constitution under Section 1 of Article XVI of the Constitution, the question would be foreclosed by Ritzman vs. Campbell, 93 O. S., 246, which holds that a duly enrolled and authenticated bill, and not the journals, is conclusive upon the courts as to its contents. The expressed underlying reason of the decision on that point was, that the attestation of the presiding officers of the General Assembly is a solemn declaration of a co-ordinate branch of the state government that the bill as enrolled was duly enacted by the legislature.

When there is no positive constitutional or statutory requirement that bills and joint resolutions shall be entered upon the journals no difficulty is encountered in reaching the conclusion arrived at in Ritzman vs. Campbell, supra, that a bill or

resolution duly enrolled and authenticated by the presiding officers of both houses, as required by section 17 of Article II, is the exclusive evidence of its contents. See section 69 G. C. showing the legislative policy to be not to allow bills or resolutions, but only amendments thereto, to be entered on the journals.

But that is not the situation we are now considering, for with respect to cases such as the one presented in the statement of facts, there is a constitutional requirement, mandatory in form and effect, that a proposed amendment to the Constitution, when agreed to by three-fifths of the members elected to both houses, "shall be entered on the journals." And assuming, but not deciding, that section 17 of Article II applies to such proposal when made in the form of a joint resolution, it by no means follows that an enrolled and authenticated copy thereof is the best or exclusive evidence, or conclusive upon the courts, as to what the proposed amendment really was or is. On the contrary, the only possible effect of an enrollment would be to provide secondary evidence of the contents of the proposed amendment, for use in the event the journals should be lost or destroyed. In such cases the enrolled and authenticated copy might through necessity be looked to and, although secondary in character, be considered prima facie evidence of its contents.

It is my opinion that the doctrine of Ritzman vs. Campbell, supra, can only be applied to the contents of bills and joint resolutions which are not required by the Constitution to be entered on the journals, and not to resolutions which the Constitution expressly and mandatorily requires shall be entered thereon.

Section 9 of Article II of the Constitution which requires that "on the passage of every bill, in either house, the vote shall be taken by yeas and nays, and entered upon the journals," was referred to in Ritzman vs. Campbell, supra, and has not been overlooked. With respect to the yeas and nays, it was held that "the legislative journals must provide the appropriate as well as the conclusive evidence" as to the number of votes cast for and against a particular bill. Was it so decided because the Constitution required such entries to be made upon the journal? If so, why not apply the same doctrine to other entries which the Constitution requires shall be made upon the journals?

Coming now to a special consideration of Section 1 of Article XVI, that section, in my opinion, is the sole and exclusive governing provision of the Constitution so far as the question now under consideration is concerned. It should be remembered that the State Constitution was established by the people. It is so declared in the instrument itself.

To secure the blessing of freedom and to promote their common welfare, which were the declared purposes for establishing the Constitution, the people, among other things, provided certain methods for amending the Constitution as occasions might arise, each of which is distinct from and of equal dignity with the others, viz.,

(a) *The people may propose amendments to the General Assembly.* "The people reserve to themselves the power to propose to the General Assembly * * * amendments to the Constitution, and to adopt or reject the same," etc. (See Article II);

(b) *The people may propose amendments independent of the General Assembly.* "They also reserve the power * * * independent of the General Assembly to propose amendments to the Constitution and to adopt or reject the same," etc. (See Article II);

(c) *Either branch of the General Assembly may propose amendments.* This was the method adopted in the present case. See section 1, Article XVI, hereinafter quoted; and

(d) *A constitutional convention may be called.* See sections 2 and 3, Article XVI.

As just indicated, the proposed amendment now under investigation was initiated or proposed by the Senate under and by virtue of the authority vested in it

by the people under section 1, Article XVI of the Constitution, which reads as follows:

> "Either branch of the General Assembly may propose amendments to this Constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be submitted to the electors, for their approval or rejection, on a separate ballot without party designation of any kind, at either a special or a general election as the General Assembly may prescribe. Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the Constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately."

It will be observed that after an amendment has been proposed under the foregoing section by either branch of the General Assembly, and agreed to by three-fifths of the members elected to each house,

> "such proposed amendment shall be entered on the journals, with the yeas and nays, and shall be submitted to the electors, for their approval or rejection,"

at either a special or general election as the General Assembly may prescribe. In other words, the proposed amendment, and the only one, that must or can be submitted to the electors is the one *entered on the journals,* and not as it may appear in an enrolled copy of a joint resolution which purports to, but does not, correctly set forth its contents.

The clear, special, mandatory requirement of section 1 of Article XVI should not and cannot be explained away, nor disregarded by invoking rules, whether constitutional or otherwise, which are intended only as general rules to be applied in cases where the Constitution has not prescribed a special rule on the subject. As before stated, and which cannot be too often repeated, section 1, Article XVI has prescribed a special mandatory rule with respect to constitutional amendments proposed by either branch of the General Assembly, by requiring that the proposed amendment shall be entered on the journals of both houses, and has thereby provided the primary and best evidence of its contents. Is not such record a solemn declaration that the proposed amendment as so recorded is the one that was agreed to by the members elected to both houses, and the one that must be submitted to the electors for adoption or rejection?

It may be suggested or contended that there is no provision for giving notice to the Secretary of State as to the contents of the proposed amendment as entered upon the journals, unless it be through an enrolled copy of the joint resolution, but that fact, even if true, cannot be allowed to render ineffective or inoperative the requirement of Article XVI that the proposed amendment as entered upon the journals shall be submitted to the electors. But since under section 9 of Article II and section 68 G. C. each house is required to keep a journal of its proceedings, and under section 1 of Article XVI the proposed amendment must be entered on the journals, and these recorded journals are required by section 68 G. C. to be deposited with the Secretary of State, and further by reason of the presumption that public officers will properly discharge the duties of their respective offices, it is not apprehended that the Secretary of State, with the means of knowledge so peculiarly within his power, will find it difficult to submit the proposed amendment in the form in which it appears on the journals. When it is considered, and it is

a matter of common knowledge, that the officers of the General Assembly and the executive officers of the state, including the Secretary of State, and also many other interested persons, have ascertained and publicly announced through the press and otherwise that a material discrepancy exists between the journals on the one hand and the enrolled copy on the other, all apprehension as to the ability of the Secretary of State to submit the real proposed amendment disappears.

It may be pertinently said that the Constitution does not require that either the Senate or the House, when proposing an amendment to the Constitution under section 1 of Article XVI, shall make the proposal in any particular form. The form would appear to be immaterial. The important facts to be ascertained are whether either branch of the General Assembly has proposed an amendment to the Constitution which has been agreed to by three-fifths of the members elected to each house, and if so, what the proposed amendment really is. And, as before stated, the journals are the best evidence of their existence.

The existence of the foregoing facts being found on the journals, the question arises as to the form in which the proposed amendment should be submitted to the electors—whether as it appears on the journals, or as set out in an enrolled copy of the joint resolution by which the proposal was made? Surely the answer must be, in the form "entered on the journals," and not as it appears in an enrolled copy of the joint resolution which, perchance, as was true in this case, might not be the amendment that was actually proposed and agreed to by three-fifths of the members elected to both houses. This must be true, because there would be no authority to submit to the electors an amendment which had not been proposed and agreed to, and entered on the journals, as required by section 1, of Article XVI, excepting only amendments proposed under Article II or by a constitutional convention.

While it must be conceded, as held in Ritzman vs. Campbell, supra, that a duly enrolled and authenticated copy of a bill, or of a joint resolution, which is not required by law to be entered at length upon the journals of both houses, is conclusive upon the courts as to its contents, yet, with respect to a joint resolution proposing an amendment to the Constitution under section 1, Article XVI, which, to use the exact words of the Constitution, "shall be entered on the journals, * * and shall be submitted to the electors," the conclusion cannot be escaped that the journals, except when lost or destroyed, are the best and exclusive evidence of the proposed amendment and conclusive as to its contents.

In the foregoing opinion effect has been given, within their respective legitimate spheres, to the several constitutional provisions relating to the journals and the authentication of joint resolutions, and to the decision in Ritzman vs. Campbell, supra, as well as to the intention of the people as solemnly expressed in section 1 of Article XVI.

In reaching the foregoing conclusion, it was not found necessary to specially emphasize the settled rule of statutory and constitutional construction, that where general provisions are found in one part of a statute or constitution which are inconsistent with specific and particular provisions in another part, the latter will govern as being the clearer and more definite expressions of the will of the people, nor the rules that the last expression in point of time is the law, and that where two or more provisions are adopted at the same time the last in order of arrangement should prevail. See, generally, 8 Cyc., 720; 36 Cyc., 1130; Gas Co. vs. Tiffin, 59 O. S. 420, 441; Doll vs. Barr, 58 O. S. 113, 120.

You are therefore advised that the proposed amendment as entered on the journals of both houses is the one that must be submitted to the electors for adoption or rejection, and that it will not be necessary to reconvene the General Assembly to take any further action with respect to such submission.

Respectfully,

JOHN G. PRICE,

Attorney-General.

617.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN HURON AND SCIOTO COUNTIES.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, September 9, 1919.

618.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN CRAWFORD COUNTY.

HON. CLINTON COWEN, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, September 9, 1919.

619.

ROADS AND HIGHWAYS—PROCEEDINGS FOR VACATION OF STREET IN AN UNINCORPORATED VILLAGE—SECTION 6860 G. C. ET SEQ. APPLICABLE—EXCEPTION INTERCOUNTY OR MAIN MARKET ROAD.

Proceedings for the vacation of a street, road or highway in an unincorporated village may be had in accordance with sections 6860 G. C. et seq., unless such street, road or highway be part of an intercounty or main market road.

COLUMBUS, OHIO, September 10, 1919.

HON. HAVETH E. MAU, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Receipt is acknowledged of letter from your office signed by Mr. William K. Marshall, assistant prosecuting attorney, reading as follows:

> "The following is a copy of a letter which I have received from the commissioners of this county:
>
> 'August 14, 1919.
>
> MR. WM. K. MARSHALL, *Assistant Prosecuting Atty., Montgomery County, Ohio.*
>
> DEAR SIR:—We have a petition filed with this board for the vacation of Constance Ave. in Carrmonte, which, is a street on the plat and not a located township or county road.
>
> Have the Board of County Commissioners authority to vacate a street that is not dedicated to the public?
>
> The board does not infer from the law that they have the authority to vacate such street under present laws.

We would suggest that you present the question to the Attorney-General for an opinion.

Very truly yours,
MONTGOMERY COUNTY COMMISSIONERS.'

This matter is pending before the Commissioners on an application to vacate the street in question, and the view has been had and an advertisement made. The present County Commissioners retire from office next month, and if this matter is not decided by that time, it will necessitate another view and advertisement. I would therefore appreciate it if you could give this matter prompt attention.

I might state for your information, that I understand, that this plat was placed of record before the law required plats to be approved by the County Commissioners; that the land is within three miles of the corporate limits of the city of Dayton, and that the plat was submitted to the plat commission of that city and approved by it."

In response to requests for additional information, the following data has been furnished in subsequent correspondence and in a personal interview with Mr. Marshall:

"The plat of which this street is a part is dated April 28, 1903, is properly witnessed and acknowledged, and the plat was recorded on May 4, 1903. In the acknowledgment the owner 'dedicates to public use forever the streets and alleys as laid out and designated therein.'

The plat of record bears the certification of the surveyor who made it, and indicates a placing of corner stones. It also shows markings of distances, width of streets, size of lots, etc.

My information is that the portion of this street sought to be vacated has never been made or used by the public as a street. The plat is not within the limits of a municipal corporation but is within three miles of the corporate limits of the city of Dayton, and it would come under section 4346 which was passed, however, subsequent to the recording of this plat.

The petition to vacate the portion of this street was filed under sections 6860 and 6862; the latter of which was amended in 107 Ohio Laws, page 71. Those who are opposed to the vacation insist that the county commissioners have no authority to vacate the portion of this street, but that the same must be done either under section 3600 or 3595."

The pertinent statutes in force at the time of the making and recording of the plat in question, in April and May of 1903, were section 2597 et seq., designated in Bates' Fourth Edition as sections 1536-62 et seq., part of which series is here quoted:

"Sec. 1536-62. When any person wishes to lay out a hamlet or village, or subdivision or addition to any municipal corporation, he shall cause it to be surveyed, and a plat or map of it made by a competent surveyor; in which plat or map shall be particularly described and set forth the streets, alleys, commons, or public grounds, and all in-lots and out-lots and fractional lots within or adjacent to such hamlet or village, the description to include the courses, boundaries and extent."

"Sec. 1536-63. All the in-lots intended for sale shall be numbered in progressive numbers, or by the squares in which they are situated, and their precise length and width shall be stated on such plat or map; and all

out-lots which do not exceed ten acres in size, shall in like manner be surveyed and numbered, and their precise length and width stated on the plat or map, together with any streets, alleys, or roads which divide or border on the same."

"Sec. 1536-64. The proprietor of the hamlet or village, at the time of surveying and laying it out, shall plant and fix, at the corner of the public ground, or a public lot, if any there be, and if there be none, then at the corner of one of the in-lots, and at the corner of each out-lot, a good and sufficient stone, of such size and dimensions, and in such manner, as the surveyor shall direct, for a corner from which to make future surveys; and the point or points where the same may be found shall be designated on the plat or map."

"Sec. 1536-65. After the plat or map is completed, it shall be certified by the surveyor, and acknowledged by the owner or owners before some officer authorized to take the acknowledgment of deeds, who shall certify his official act on the plat or map; and if any owner is a nonresident of the state, his agent, authorized by writing, may make such acknowledgment; and such plat or map, and if the execution is by agent, his written authority, shall thereupon be recorded in the office of the county recorder."

"Sec. 1536-69. The plats or maps, other than those mentioned in section two thousand six hundred and one, shall be deemed in law a sufficient conveyance to vest the fee simple of all such parcels of land as are therein expressed, named, or intended for public use, in the county in which the hamlet or village is situated, for the uses and purposes therein named, expressed or intended, and for no other use or purpose whatever."

The expression in the last quoted section "other than those mentioned in section 2601" has reference to section 1536-66 as the statute numbering was given in Bates' Fourth Edition; and said section 1536-66 related solely to plats of lands within municipal corporations and provided, among other things, that the recording of a plat should have the effect of vesting in the municipal corporation title in trust to the streets, alleys, etc., for the uses and purposes set forth on the plat.

A mere reading of section 1536-62 indicates plainly that the words "hamlet or village" as used in said section, refer to subdivisions of lands outside of municipal corporations; for in contrast to the words "hamlet or village" the section itself contains the words "subdivision or addition to any municipal corporation." This meaning becomes even clearer when sections 1536-66 and 1536-69 are taken into consideration; for as above stated, section 1536-66 provided for the vesting of title to streets, alleys, etc., in the municipal corporation wherein was situated the land shown on the plat, leaving the meaning above stated as the only one which may be given the words "hamlet or village" as used in section 1536-62, when said section is read with section 1536-69, providing for the vesting in the county in which the hamlet or village is situated, of title in trust to all parcels of land shown on the plat as being intended for public use.

The earlier form of the sections above mentioned is found in Swan & Critchfield's Statutes (1860), Vol. 2, p. 1482, in a chapter entitled "Town Plats," and in that form the word "town" was used where the words "hamlet or village" later appeared, while the words "city or town corporate" were employed in lieu of the words "municipal corporation" as later adopted. The word "town" as used in the earlier form was construed in Walworth vs. Village of Collinwood, 8 O. C. C. 477; 4 O. C. D. 503, to refer to a subdivision outside of a municipal corporation.

The sections above referred to are still in force, with minor changes, and are now known as sections 3580 et seq. G. C., and while both in 1903 and at the present time they appeared as part of the municipal code, it is evident from the above

observations that they make provision for the platting of lands without, as well as for those within, municipal corporations.

The data submitted in connection with your inquiry indicates that the statutory provisions applicable at the time, were fully complied with in the matter of the execution and recording of the plat now in question. Under such circumstances, the further fact that the street sought to be vacated may never have been used as such since its dedication in 1903, becomes immaterial to the consideration of your inquiry. In Village of Fulton vs. Mehrenfeld, 8 O. S. 440, the court say at page 446:

> "The importance of the distinction between dedications under the statute and at common law is obvious. Under the law then in force, upon the acknowledgment and record of the plat, the fee of the streets and public grounds therein specified, *eo instanti*, became and was vested in the public for the uses declared, without any act indicating an acceptance on the part of the public; while a dedication at common law only becomes operative upon its acceptance by the public."

In the case of Walworth vs. Collinwood, supra, the facts as stated by the court were:

> "In this case a plat was made by Coe, Gilbert & Shipherd, of certain lands divided into forty or fifty lots in the township of East Cleveland, now within the limits of the village of Collinwood. It was recorded on the 26th of February, 1872. It contained certain streets, and among them Beech street, running to Lake Erie. Beech street was unimproved, and for a short time inclosed, until a little short of twenty-one years. The incorporation of the village of Collinwood took place in 1883. In 1892 the village undertook, in pursuance of an ordinance, to improve the street. On the 13th day of September, 1892, John Walworth, the owner of a lot that adjoined that street, brought a suit for an injunction. He had become the owner of the lot by a title which in its terms conveyed the lot by number, bounding it by the middle of the street, and naming Beech street as a street."

In the course of its opinion, refusing the injunction asked for, the court say at page 479:

> "The act of 1853, sec. 29 (2 S. & C., p. 1296), now section 4668, provides that unless a county road shall be improved within seven years, it shall revert. Although the fee of this land vested in the county, it was not such a county road as is provided for in section 29, made such by virtue of proper proceedings under the act of which that was a part (2 S. & C. p. 1289), so that neither of these provisions apply to this case. There may be a fair ground for legislative distinction in this, that both the state and county roads were established *in invitum* by judicial proceedings, while in such a case as this the owner expressly, himself, and of his own free will, grants the land in fee to the county for the purposes named.
>
> Now, what is the statute of limitations? We know of no other limitation than that provided in the general statute of twenty-one years, and that statute of limitations does not apply. The twenty-one years had not run. * * *"

It is to be noted that the provisions of said former section 4668 R. S., as to

vacation of a county road, are still in force (see last sentence of section 6869 G. C.); but such provisions are inapplicable in the present instance, not only for the reasons given by the court in the case just cited, but also for the further reason that by subsequent legislative enactment, as will hereinafter appear, the street now in question is to be classified as a township road.

In the recent case of Beard vs. Beatty, 21 O. C. C. (n. s.) 522; 3 Ohio App. 354, the Court of Appeals of Butler county held in effect that not even the twenty-one year statute would operate to bar the rights of the public in a regularly dedicated street outside of a municipality. The following paragraphs are quoted from the opinion in that case:

> "This is an action brought by plaintiffs as trustees of Lemon township, Butler county, Ohio, alleging that as such trustees they have charge of all public highways within their township that are not county roads; and that as such all highways in unincorporated villages and hamlets are public highways under their control. They seek to enjoin the defendant from obstructing an alley adjoining her premises on the south and west, claiming that she has maintained an obstruction thereon in the way of a stable, barn and other buildings.
>
> * * * * * * * * * *
>
> The evidence shows, without question, that this alley was regularly dedicated and became a public alley and the title thereto was vested in fee in the county under the terms of section 8 of the act of March 3, 1831 (29 O. L., 350); afterward found in section 2604, Revised Statutes, and 1536-69 Bates' Revised Statutes; and now in section 3589, General Code.
>
> Defendant, however, claims to have acquired title by prescription, by virtue of the terms of section 11220, General Code, and has submitted evidence tending to show that this alley was enclosed along with the lots in such a manner as to exclude the public for more than twenty-one years, and to come directly within the terms of the statute above mentioned.* *
>
> In our opinion, the evidence does not bring the claim of the defendant within the terms of section 11220, G. C., but this section, however, applies only to streets or alleys within a municipality. We know of no case in Ohio where the statute of limitations has been enforced against the state or any of its subdivisions other than a municipality."

These authorities, together with the fact that at the time of the making and recording of the plat in question, there was not in effect any statute requiring an acceptance by any public authority of plats of lands outside of municipalities, seem clearly to warrant the conclusion that the right of the public to the use of the street now under discussion is at this time wholly unimpaired.

We are thus brought directly to your inquiry. Section 6860 provides:

> "The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except the intercounty and main market roads."

Related sections 6861 to 6869 provide for filing of application to vacate; fixing by the county commissioners of a time for view and hearing; notice of hearing; order of vacation, etc.

Section 7464, relating to classification of the public highways of the state, after reciting in substance that state roads include those constructed or taken over by the state, and that county roads include those improved by the county and not

taken over by the state, as well as those improved by township trustees up to a given standard, contains this provision:

> "Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined.* * * *"

It thus appears that the street now in question is to be considered a township road. From this it follows that the provisions of sections 6860 et seq. as to vacation are applicable. Said section 6860 was enacted as a part of the so-called Cass Highway act, and by the terms of the same act the provisions of section 6972 for vacation of roads by township trustees were repealed. Such repeal gives added force to the words of section 6860 "this power extends to all roads within the county, except the intercounty and main market roads." Of course, it might be urged that the word "road" as ordinarily used in our Ohio statutes, relates to public ways in rural sections, while the word street is used with reference to public ways in municipal corporations and in unincorporated villages or towns. However, no hard and fast rule obtains in Ohio in this connection; and the context must be considered in arriving at the meaning of either word when used in the statutes. It will be noted that section 7464 in defining township roads, makes use of the words "all public highways;" and of course this latter expression is broad enough to include both street and road as those terms are ordinarily understood.

The data submitted indicates that it is being claimed that the proceeding for vacation should be had under the provisions of section 3600 or 3595. However, an examination of those sections shows that section 3600 relates to a change in plats of lands outside of municipal corporations, and not to the vacation of a street; while section 3595 is part of a series making provision for the altering or vacating of a plat upon application to the common pleas court. For these reasons it is not perceived how either of the two sections is in point in the present instance.

You are therefore advised that proceedings for the vacation of the street in question may be had in accordance with sections 6860 et seq. G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

620.

MUNICIPAL CORPORATION—ORDINANCE PROVIDING FOR INCREASE OF SALARIES IN WATERWORKS DEPARTMENT OF CITY—WHEN SUCH ORDINANCE IS LEGALLY AN EMERGENCY MEASURE—EFFECTIVE IMMEDIATELY.

An ordinance providing for increase of salaries in the waterworks department may be legally enacted as an emergency measure to go into immediate effect, when an emergency demanding such action is found to exist.

Such an emergency ordinance goes into immediate effect, and is not postponed pending the lapse of ten days from its first publication.

COLUMBUS, OHIO, September 10, 1919.

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

GENTLEMEN:—Acknowledgment is made of your communication requesting my opinion as follows:

"We are today in receipt of the following communication from the city auditor of Lima, Ohio:

'Lima, Ohio, August 6, 1919.
File Waterworks Salaries.

Mr. Moses Blau, Municipal Supervisor, Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

Dear Sir:—

RE: Salary ordinance containing emergency clause.

Kindly note attached copy of ordinance No. 744, covering increases of from twenty to forty per cent passed August 4, 1919, containing emergency clause, making same effective immediately upon its approval by the mayor.

Kindly advise in this respect.

Yours very truly,
(Signed) David L. Rupert,
City Auditor.'

and we are enclosing you copy of ordinance No. 744.

We are fully conversant with the Opinions of the Attorney-General which may be found on pages 1557 and 1629 of the Annual Reports for 1912, but since the date of these opinions, section 4227-2 has been modified. We, therefore, respectfully request your written opinion on the following matter:

Question: May ordinances increasing salaries and compensation legally be declared emergency ordinances by council to go into immediate effect?"

With your communication you also furnish a copy of ordinance No. 744 referred to in the letter of the city auditor of Lima, which purports to amend certain sections of the ordinances of said city relating to salaries, and which amendment I am advised provides for increases in salaries in the waterworks department. Said amendment having been passed August 4, 1919, as an emergency measure, the last section thereof declaring the emergency to consist in the necessity for the ordinance to become effective at once

"in order to enable the waterworks department to provide employes to conduct and operate the waterworks system and thereby preserve the health and safety of said city and its inhabitants."

Proceeding then to a consideration of the specific question, i. e.,

"May ordinances increasing salaries and compensation legally be declared emergency ordinances by council to go into immediate effect?"

I advise that the provisions of section 4227-3, in my opinion, determine the question in the affirmative.

While it is provided in section 4227-2 that,

"Any ordinance, or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided. No ordinance or other measure shall go into effect until thirty days after it shall have been filed with the mayor of such municipal corporation, except as hereinafter provided,"

yet it is expressly provided in section 4227-3 that certain ordinances shall go into immediate effect, as follows:

> "Ordinances or other measures providing for appropriations for the current expenses of any municipal corporation, or for street improvements petitioned for by the owners of a majority of the feet front of the property benefited and to be especially assessed for the cost thereof as provided by statute, *and emergency ordinances or measures necessary for the immediate preservation of the public peace, health or safety in such municipal corporation, shall go into immediate effect.*"

It is then further provided that such emergency ordinances must receive a two-thirds vote of all members of council, and the reasons for the necessity that the ordinance go into immediate effect shall be set forth in one section thereof.

These provisions are found in the sections of the law which provide for the application of what is known as the initiative and referendum to the legislative acts of the municipal corporation, and while, subject to the exceptions provided in the act all ordinances are subject to the referendum, yet by the specific enumeration contained in section 4227-3, the conclusion must follow that the classes of ordinances there enumerated are withdrawn and excepted entirely from the referendum, and as stated, shall go into "immediate effect."

While you do not especially inquire as to the effect upon emergency ordinances of the provision of section 4227 that "no ordinance shall take effect until the expiration of ten days after the first publication of such notice," yet, in a communication addressed to me by the city auditor, I observe that a question is in fact made as to the specific time when the emergency ordinance becomes effective, and I am therefore considering that question, which in fact may properly be regarded as involved in your question as to such ordinance going into "immediate effect."

The provision of section 4227 provides for the authentication and publication of ordinances, and then provides for deferring the effectiveness of the ordinance until ten days after the first publication thereof.

I am of the opinion that this latter provision for deferring the effectiveness of the ordinance until the expiration of ten days from the first publication is in conflict with the provisions of section 4227-3 supra, to the effect that the ordinances there enumerated "shall go into immediate effect," and the latter provision being subsequently enacted, and being of special application to enumerated ordinances, I hold that it supersedes the ten day provision of section 4227.

It might be noted that it is provided in section 4227-2 as follows:

> "Nothing in this act shall prevent a municipality after the passage of any ordinance or resolution from proceeding at once, to give any notice, or make any publication, required by such ordinance or resolution,"

which provision no doubt is primarily applicable to ordinances subject to referendum, but may be regarded as evidencing the legislative policy to separate in their application the provisions relative to publication, etc., from the provisions dealing especially with the application of the referendum.

The holdings of my predecessor to which you refer, are in no sense applicable to the present state of the law, inasmuch as the amendment of the sections in question has so changed their provisions that those which were determinative in the conclusions reached by my predecessor are now supplanted by provisions of entirely different purport.

Under the original provisions of the enactment ordinances involving expenditures of money were excluded entirely from the application of the provision for the passage of emergency measures, so that this fact alone was decisive, while in its present form the statute authorizes any measure necessary for the immediate

preservation of the public peace, health and safety to be enacted as an emergency measure.

In answer to the question,

"Do ordinances involving emergency measures require publication?"

my predecessor in Opinion No. 38, found at page 1557 of the Annual Reports of the Attorney-General for the year 1912, said:

> "I am inclined to the opinion that such word 'immediately' is used in contradistinction to the provision that ordinances shall remain inoperative for sixty days after passage, and that, therefore, they should be published in the same manner as has been done prior to the passage of the initiative and referendum act. * * * The object of publication is to advise the electors of the municipality of ordinances and resolutions passed by council, and should an emergency ordinance of a general nature or providing for improvement, wherever it is of that nature, be passed, the publication thereof would, in many instances, be the only knowledge that the electors could have that such ordinance had been passed.
>
> Therefore, I am of the opinion that any ordinance of a general nature or providing for improvement, passed as an emergency ordinance, would require publication."

While I do not interpret the observations of my predecessor as referring primarily to the time when emergency ordinances shall go into effect, but more particularly determining that they shall be published in accordance with the general provision, it is my opinion that the exigencies involved in an emergency are such as to indicate the legislative purpose in the provision for emergency legislation, and having employed the express stipulation that emergency measures shall go into immediate effect, the enactment must be construed with a view to effectuating its evident purpose, and to give the provision for publication before the act becomes effective application to emergency measures, would be in contravention of the very spirit and purpose of the latter provision.

The basic policy involved in the provision for ten day publication before an ordinance becomes effective is repugnant to that involved in the provision for legislation becoming effective immediately to meet an emergency. It is to be presumed that the provision for emergency legislation will only be employed where the basic facts sustain and demand its application, and in that event the fact of the existence of an emergency calling for immediate remedy at once suggests repugnancy to the policy of postponement of its effectiveness pending publication, and therefore the policy to appropriately provide for such an emergency has been aptly expressed in the language that the same shall go into "immediate effect," and therefore I hold that such legislation is not held in abeyance pending the lapse of ten days from the first publication thereof, but becomes effective immediately upon its passage.

Respectfully,
JOHN G. PRICE,
Attorney-General.

621.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN CRAWFORD AND MONTGOMERY COUNTIES.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, September 11, 1919.

622.

APPROVAL OF BOND ISSUE OF FAIRPORT VILLAGE SCHOOL DISTRICT, LAKE COUNTY, IN THE SUM OF $250,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, September 12, 1919.

623.

COUNTY COMMISSIONERS—SALARY HOW COMPUTED UNDER PROVISIONS OF SENATE BILL NO. 100 (108 O. L. 926), ENACTED JUNE 19, 1919—SEE OPINION NO. 791, NOVEMBER 17, 1919, COMPUTING SALARIES FOR COMMISSIONERS IN COUNTIES WHERE TAX DUPLICATE IS LESS THAN FIVE MILLION DOLLARS.

1. *Under the provisions of Senate Bill No.* 100 *passed June* 19, 1919, *commissioners in counties having an aggregate tax duplicate of* $5,000,000 *or less are entitled to an annual compensation of* $750; *those in counties where the maximum of* $3,500 *could be drawn by officers serving for the full official year ending on the third Monday of September,* 1911, *to an annual compensation of* $4,025; *and those in other counties to an annual compensation of* $750, *plus* $3 *for every full one hundred thousand dollars of the excess of the aggregate tax duplicate in December,* 1909, *in such respective counties over* $5,000,000; *but not to exceed* 115 *per cent. of the amount which could be drawn annually in such respective counties by county commissioners serving for the full official year ending on the third Monday of September,* 1911.

2. *In addition to the above compensation, each county commissioner is entitled to* $5 *per day for each day he is actually engaged on improvements under said act, but not more than* $25 *for services on one improvement, nor for services on two separate improvements on the same day; but the aggregate of such compensation for time during which he is engaged in improvements shall not exceed* $500 *in any one year.*

COLUMBUS, OHIO, September 12, 1919.

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

GENTLEMEN:—You have requested my opinion as to the proper construction of section 3001 as amended by Senate Bill No. 100 (108 O. L. 926), passed June 19, 1919, and fixing the compensation of county commissioners. Its language is:

> "Sec. 3001. The annual compensation of each county commissioner shall be determined as follows:
>
> In each county in which on the twentieth day of December, 1909, the aggregate of the tax duplicate for real estate and personal property is five million dollars or less, such compensation shall be seven hundred and fifty dollars, and in addition thereto, in each county in which such aggregate is more than five million dollars, three dollars on each full one hundred thousand dollars of the amount of such duplicate in excess of five million dollars. That the compensation of each county commissioner for the year 1912, and each year thereafter, shall not in the aggregate exceed 115 per cent.

of the compensation paid to each county commissioner for the official year ending on the third Monday of September, 1911.

Such compensation shall be in equal monthly installments from the county treasury upon the warrant of the county auditor."

Section 3001 had theretofore provided in part:

"Sec. 3001. The annual compensation of each county commissioner shall be determined as follows:

In each county in which on the twentieth day of December, 1911, the aggregate of the tax duplicate for real estate and personal property is five million dollars or less, such compensation shall be nine hundred dollars, and in addition thereto, in each county in which such aggregate is more than five million dollars, three dollars on each full one hundred thousand dollars of the amount of such duplicate in excess of five million dollars. That the compensation of each county commissioner for the year 1912, and each year thereafter, shall not in the aggregate exceed 115 per cent. of the compensation paid to each county commissioner for the year 1911. * * * Such compensation shall be in full payment of all services rendered as such commissioner and shall not in any case exceed four thousand dollars per annum. Such compensation shall be in equal monthly installments from the county treasury upon the warrant of the county auditor."

Prior to the enactment of the section in that form in June, 1911, a statute passed in 1904 (97 O. L. 254) had been in force. It read:

"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.

Section 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."

The enactment of the Smith law resulted in a large increase in the duplicates in the various counties in December, 1911, which the legislature anticipated in June of that year when it passed amended section 3001. The latter made December 20, 1911, the date to be taken for the computation on the duplicate; increased the compensation in counties having a duplicate of five million dollars or less from $750 to $900; added the provision that the compensation of each county commissioner

for the year 1912 and each year thereafter should not in the aggregate exceed 115 per cent. of the compensation paid for the year 1911; and raised the maximum provided from $3,500 to $4,000 per year.

Senate Bill No. 100 now makes the duplicate for December, 1909, instead of for December, 1911, the basis of calculation, repeals the limitation of $4,000 and declares that the official year ending on the third Monday in September, 1911, shall be the basis of calculation.

With this preliminary statement of the history of the legislation in question, I shall give you my conclusions as to the meaning of section 3001 as it now stands.

Those to whom its provisions are applicable may be divided into three classes, the first of which includes commissioners in counties where the tax duplicate for 1909 did not exceed $5,000,000. As to these, the law is clear. Their compensation is fixed at $750.

In the second class are commissioners of counties whose tax duplicates exceeded $5,000,000 in 1909, but in which the maximum allowance of $3,500 or $4,000 had not been reached. Their compensation is to be determined in the following manner: To $750 add $3 for each full $100,000 that the amount of the duplicate in the county in question in December, 1909, exceeds $5,000,000; then take the amount paid to the commissioners of such county for the official year ending on the third Monday of September, 1911, multiply it by 1.15 and compare the results obtained by the two calculations. The lesser sum is the amount of the officers' compensation.

While as I have stated, the law was amended in June, 1911, the new provisions could not affect the salaries of commissioners then in office, but as to them remained in abeyance until the beginning of the next term, in September, 1912. Ohio Constitution, Art. II, Sec. 20; State ex rel. vs. Raine, Auditor, 49 O. S. 580; State ex rel. vs. Lewis, 15 N. P. (n. s.) 582.

The serious question arises in the interpretation of the expression "the compensation paid to each county commissioner for the year 1911." Does it mean the salary of the officer prior to the act of June, 1911, the amount provided by that act, or an amount obtained by taking one rate of compensation up to June, 1911, and the other from June to September?

The same query is met in the application of the new act to the compensation of commissioners in counties where the maximum of $3,500 was drawn in 1911. As I have already stated, the maximum for the year ending September, 1911, was increased in June of that year from $3,500 to $4,000. We are to take the 115 per cent. of the "compensation paid for this official year." Shall we use $3,500 or $4,000, or make our computation on the former sum from September to June, and on the larger from June to September? The language of section 3001 is not susceptible of a strictly literal construction. The provision that each commissioner shall not receive in a later year more than 115 per cent. of the compensation paid to each commissioner for the official year ending on the third Monday of September, 1911, does not, in my judgment, require the ascertainment of the exact amount in dollars and cents drawn by each commissioner in 1911. For instance, by reason of death or resignation, one such officer may have drawn less than his colleagues. On the other hand, while the change in the maximum salary provided in June, 1911, could not be effective as to those in office at that time, one subsequently appointed to fill a vacancy could draw the increased compensation. State ex rel. vs. Tanner, 27 O. C. A. 385.

Since practically all the commissioners who were in office in 1911 are now retired, and new boards have been elected, it could not in many cases be determined which particular member of a board would be the successor to the officer whose compensation in 1911 had been less than that of his colleagues. Therefore, we must, in my judgment, look further for the meaning of the phrase "compensation paid to each county commissioner."

We have a case [State ex rel. vs. Lewis, 15 N. P. (n. s.) 582] in which the question here was necessarily passed upon, although apparently not discussed by the court. There it appeared that the commissioners of Adams county had been paid $750 for the year 1911 but in 1912 drew $1,131, claiming to be entitled to that amount on a duplicate of $12,700,000 in December, 1911. The court held however, that they should have been paid but 115 per cent. of $750, their salary drawn in 1911. The question as to the effect of the change in the compensation by the legislature in June, 1911, was in that case as it is here. The court could have taken one of three amounts for his multiplier of 1.15 as we must do here. He found the proper sum to be that which a commissioner in office at the time of the amendment referred to, could legally draw. If we are to follow the reasoning of this case we must hold that the officers in counties where the maximum has been reached are to receive 115 per cent. of $3,500 or $4,025; in the counties where it has not, but whose duplicates in December, 1909, exceed $5,000,000, they are to have 115 per cent. of what was drawn in 1911 by a commissioner serving a full term. While the instant question was not discussed in that case, I think it fair to assume that it must have been considered, and should regard that decision as authoritative here and follow it. The case was affirmed by the Court of Appeals of Adams county, and my predecessor gave it his approval in Opinions of Attorney General for 1918. Vol. I, p. 198.

It has been ably urged that $4,000 instead of $3,500 should be used in determining the salaries of commissioners in those counties where the maximum had been reached. The argument is that the compensation stood at $4,000 when the official year closed in September, 1911. But the language is "paid to each county commissioner." The most that any such officer could have received for that year was $3,500.

Ohio Constitution, Art. II, Sec. 20.

True, the aggregate salaries of a commissioner who deceased after June, 1911, and of the appointee to fill the vacancy might exceed $3,500. But the payment to neither could equal that sum. Therefore, the maximum paid to any commissioner for the year 1911 would be $3,500. Again, it is well settled that laws providing for the compensation of public officers must be strictly construed and only such compensation allowed as is clearly expressed.

Debold vs. Trustees, 7 O. S. 237;
Richardson vs. State, 66 O. S. 108;
Thornley vs. State, 81 O. S. 108;
State ex rel. vs. Stone, 92 O. S. 63;
State ex rel. vs. Kleimhoffer, 92 O. S. 163; 29 Cyc. 1226.

Attention is called to section 57 of Senate Bill No. 100 which allows additional compensation for time given to improvements. Its provisions are:

> "In addition to the regular salary provided by law for the county commissioners, each county commissioner shall receive five dollars per day for each day he is actually engaged on improvements under this act, but in no case shall any commissioner receive an aggregate of more than twenty-five dollars for services on one improvement, nor shall they receive pay for two separate improvements on the same day. Such amounts shall be paid by warrants issued by the county auditor upon the county treasurer, upon the filing in his office of an itemized statement by the commissioner of such service; provided, however, that the aggregate compensation paid a county

commissioner under this section for said service shall not exceed in one year five hundred dollars."

I am aware that views different from those expressed above have been entertained by attorneys for whose ability and judgment I have the greatest respect. The questions raised are not free from difficulty. But it is my duty as I comprehend it, to determine what the law is from decisions as well as statutes, and to recognize the authority of a decision unless clearly contrary to reason or other authority.

My conclusions therefore are that:

(1) Under the provisions of Senate Bill No. 100 passed June 19, 1919, commissioners in counties having an aggregate tax duplicate of $5,000,000 or less are entitled to an annual compensation of $750; those in counties where the maximum of $3,500 could be drawn by officers serving for the full official year ending on the third Monday of September, 1911, to an annual compensation of $4,025; and those in other counties to an annual compensation of $452, plus $3 for every full one hundred thousand dollars of the excess of the aggregate tax duplicate in December, 1909, in such respective counties over $5,000,000; but not to exceed 115 per cent. of the amount which could be drawn annually in such respective counties by county commissioners serving for the full official year ending on the third Monday of September, 1911.

(2) In addition to the above compensation, each county commissioner is entitled to $5 per day for each day he is actually engaged on improvements under said act, but not more than $25 for services on one improvement, nor for services on two separate improvements on the same day; but the aggregate of such compensation for time during which he is engaged in improvements shall not exceed $500 in any one year.

Respectfully,
JOHN G. PRICE,
Attorney-General.

624.

NON-PAR STOCK ACT—WHEN AMOUNT OF CAPITAL WITH WHICH SUCH FOREIGN CORPORATION WILL CARRY ON BUSINESS IS NOT STATED IN ITS ARTICLES OF INCORPORATION, OR OTHERWISE FIXED—HOW VALUE IS PLACED UPON AUTHORIZED NON-PAR VALUE SHARES AND ALSO HOW ANNUAL FRANCHISE TAX COMPUTED—REAL CONSIDERATION FOR WHICH SHARES ISSUED—VALUE OF UNISSUED SHARES.

When the amount of capital with which a foreign corporation having non-par value shares will carry on business is not stated in its articles of incorporation, or otherwise fixed and certified to the Secretary of State and Tax Commission, so as to bring the company within section 11 *of the non-par value stock act, proper rules to be followed in placing a value upon the authorized non-par value shares of the corporation when seeking admission to do business in this state under section* 178 *et seq. G. C., and also in computing the amount of the annual franchise tax under section* 5501 *et seq., G. C., would be to adopt the real consideration for which such shares have been issued by the company from time to time, in the case of issued shares, and the real consideration for which such shares are being offered by the*

company, with respect to the unissued shares. But in the event unissued shares are not being offered at the time of the application, or at the time of filing the annual report, then the value to be placed upon the unissued shares should be the real consideration for which the last non-par value shares were issued. Such information should be certified to the Secretary of State and to the Tax Commission.

COLUMBUS, OHIO, September 13, 1919.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date inquiring as to what rule should be adopted in determining the amount of the annual franchise tax of a foreign corporation having non-par value shares of capital stock, was duly received.

The exact question was submitted to this department by the Secretary of State prior to the receipt of your inquiry, and an opinion (No. 611) rendered, copy of which is enclosed herewith.

In that opinion it was held that section 11 of the act prescribes the rule to be followed with respect to foreign corporations, and such only, as state in their articles, or otherwise fix, the amount of capital with which the company will carry on business; and also, that when the amount of such capital is not stated in the articles, it is permissible for the board of directors to fix the amount and thereby bring the company within section 11 of the recent non-par value stock act, which amount, if so fixed, should be certified to the Secretary of State at the time the company makes application for admission to do business in this state, and to the Tax Commission when the company files its annual reports with the Tax Commission.

It was also held in that opinion that in the event the amount of such capital was not stated in the articles, or otherwise fixed by the board of directors and certified to the Secretary of State and Tax Commission of Ohio, then recourse must be had to section 178 et seq., G. C. as to the fee to be paid by a foreign corporation seeking admission to do business in this state, and to section 5501 et seq. G. C. with respect to the annual franchise tax—those being the governing statutes.

After pointing out that the company's authorized capital stock is an indispensable factor in determining the amount of the fees to be paid to the Secretary of State under section 178 et seq. and the amount of the annual franchise tax under section 5501 et seq. G. C., it was advised that the following rules be adopted with respect to those companies which have not stated in their articles, or otherwise fixed by their board of directors, the amount of capital with which they will carry on business, viz.:

> "In case of issued and outstanding non-par value shares, adopt the real consideration for which such shares were issued from time to time.
>
> With respect to unissued non-par value shares, adopt the real consideration for which such shares are being offered by the company; but in the event unissued shares are not being offered by the company, then adopt the real consideration for which the last issued non-par value shares were issued by the company."

The information necessary to apply the foregoing rules should be certified to the Secretary of State at the time the company makes application to do business in this state, and to the Tax Commission of Ohio at the time it files its annual franchise tax reports with that commission.

The foregoing rules should be applied to all foreign corporations which do not come or bring themselves within section 11 of the non-par value act, as above construed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

625.

COUNTY BOARD OF EDUCATION—HAS AUTHORITY UNDER SECTION 4692 G. C. TO TRANSFER ALL OR PART OF SCHOOL DISTRICT TO ADJOINING VILLAGE OR RURAL DISTRICT—WHEN REMONSTRANCE FAILS—COUNTY BOARD MAY MAKE TRANSFER AT ANY TIME—NEW DISTRICTS CREATED UNDER SECTION 4736 G. C.—HOW FUNDS OR INDEBTEDNESS BELONGING TO NEW DISTRICT DIVIDED—DIVISION EQUITABLE.

1. *A county board of education has a legal right under section 4692 G. C. to transfer all of a school district, or a part of it, to an adjoining village or rural school district, and a remonstrance filed later than thirty days after the filing of the map with the county auditor, fails.*

2. *Under section 4692 G. C. the county board of education, in its discretion, can make transfers of territory from one school district to another at any time it decides it is necessary, but new districts are created under section 4736 G. C.*

3. *Under section 4736 G. C. the county board of education can create a new school district from one or more school districts or parts thereof.*

4. *Where a new school district is created by the county board of education, such county board shall direct an equitable division of the funds or indebtedness belonging to the newly created district.*

COLUMBUS, OHIO, September 13, 1919.

HON. PHIL H. WIELAND, *Prosecuting Attorney, Mt. Gilead, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following statement of facts:

"On March 22, 1919, the county board of education of Morrow county, in accordance with section 4692 G. C., transferred in one transfer to the Edison village school district a strip of territory from Gilead township school district, a strip of territory from the Canaan township school district and the whole of Denmark rural school district. Denmark school district previous to the enactment of the present school code was a special district; it has a tax duplicate of approximately $200,000.

"A remonstrance containing more than fifty one per cent. of the qualified electors in the territory proposed to be transferred was filed with the county board of education three days after the expiration of the thirty days, consequently the board declared the transfer effective. Subsequent to the filing of the remonstrance the majority of the qualified electors of said territory have filed a petition with the county board of education requesting that said territory be detached from the Edison village school district and restored to the same status as it was previous to the action of the county board on March 22, 1919.

"Did the county board of education have legal right to attach the Denmark rural school district to the Edison village school district under the provisions of section 4692 G. C.?

"Does the county board of education have the legal right to restore the Denmark rural school district under the provisions of section 4692 G. C.?

"Does the county board of education have the legal right to restore the Denmark rural school district under the provisions of section 4736 G. C.?

"If said territory be detached from the Edison village school district,

will it carry with it its proportion of the bonded or borrowed indebtedness of the Edison village school district?"

It is understood that this transfer of territory was made under section 4692 G. C., which is as follows:

> "The county board of education may transfer a part or all of a school district of the county school district to an adjoining district or districts of the county school district. Such transfer shall not take effect until a map is filed with the auditor of the county in which the transferred territory is situated, showing the boundaries of the territory transferred, and a notice of such proposed transfer has been posted in three conspicuous places in the district or districts proposed to be transferred, or printed in a paper of general circulation in said county, for ten days; nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer. If an entire district be transferred the board of education of such district is thereby abolished or if a member of the board of education lives in a part of a school district transferred the member becomes a nonresident of the school district from which he was transferred and ceases to be a member of such board of education. The legal title of the property of the board of education shall become vested in the board of education of the school district to which such territory is transferred. The county board of education is authorized to make an equitable division of the school funds of the transferred territory either in the treasury or in the course of collection. And also an equitable division of the indebtedness of the transferred territory."

There is no question but what the county board of education had a legal right to attach the Denmark rural school district to a village school district under the above section, for it provides that the county board of education may transfer "all of a school district of a county, school district to an adjoining district," but, "such transfer shall not take effect until a map is filed with the auditor of the county, "and even not then after such filing should a majority of the qualified electors, residing in the territory to be transferred, file within thirty days after the filing of such map a written remonstrance against such proposed transfer, such remonstrance to be filed with the county board of education. It clearly provides also that if an entire district be transferred (which was the case in transferring the Denmark rural school district, which was formerly a special district), the board of education of such district is abolished and the legal title of the property of the Denmark board of education would become vested in the Edison village school district to which transfer had been made, upon the filing of the map mentioned in the section. To have prevented the consummation of such transfer, it would have been necessary to have filed a remonstrance with the county board within thirty days after the filing of the map with the county auditor.

You indicate that such a remonstrance, filed by more than fifty-one per cent. of the qualified electors in the territory to be transferred was filed with the county board of education but after the expiration of the thirty days, in which event the transfer would be effective. You further say that following the filing of the remonstrance, a majority of the qualified electors then filed a petition with the county board of education, requesting that said territory be detached from the Edison village school district and restored to its former status prior to the action of the county board on March 22, 1919.

It is advised that section 4692 provides for the remonstrance, but makes no provision for a petition by the electors. Hence the county board of education is not required to act upon such petition from the fact that it has been filed by the electors, but there is nothing to prevent any board from being guided in their decisions by any petition that comes out in time from the electors, who are directly concerned in the matter at issue.

So, answering your first question, it is advised that the county board of education has a legal right, under section 4692 G. C., to transfer all of a rural school district to an adjoining district, but the provisions of said section 4692 must be clearly and fully carried out, as provided therein, that the rights of all concerned may be fully protected.

Your second query is, whether the county board of education has the legal right to restore the Denmark rural school district, under the provisions of section 4692 G. C., to its former status as a rural school district, with a school board of its own, having previously been a special district prior to the enactment of the present school code.

In answer to this query it is advised that there is nothing in section 4692 which provides for the creation of a new district as the matter of the creation of a school district by the county board of education is fully covered in section 4736 G. C.

Coming to your third question as to whether the county board of education has the legal right to restore the Denmark rural school district under the provisions of section 4736, attention is invited to the language of such section which reads in part as follows:

> "The county board of education shall arrange the school district according to topography and population in order that the schools may be most easily accessible to the pupils * * *; which said arrangement shall be carried into effect as proposed, unless within thirty days after the filing of such notice with the board or boards of education (in the territory to be affected), a majority of the qualified electors of the territory affected by such order of the county board, file a written remonstrance with the county board against the arrangement of school districts so proposed. *The county board of education is hereby authorized to create a school district from one or more school districts or parts thereof.* The county board of education is authorized to appoint a board of education for such newly created school district and direct an equitable division of the funds or indebtedness belonging to the newly created district. Members of the boards of education of the newly created district shall thereafter be elected at the same time and in the same manner as the boards of education of the village and rural districts."

It will be thus seen that under sections 4692 and 4736 G. C. that a county board of education can make transfers of territory, the same to be effective at any time, provided that such transfers of territory do not constitute a redistricting of the county, in which event such redistricting would take effect only as of the date of September 1st following. That is to say, a county board of education which had transferred a rural district to a village district, or an adjoining rural district, could at such later time as it sees fit, make a subsequent transfer affecting the same territory. In the case of the Denmark rural school district, it is noted that since the whole district was transferred to resume a status that would be similar to the one that had been lost, there is no district to which Denmark could be transferred, as provided in section 4692, because the whole of the Denmark rural district was taken at the time of the transfer of March 22, 1919, and the district abolished if such transfer was made under section 4692 G. C. Therefore the provisions of section

4736 G. C. would have to apply, wherein a county board of education is authorized to create a school district from one or more school districts or boards thereof and at any time that it may see fit, following which it is necessary to appoint a new board of education for the newly created district and make an equitable division of the funds or indebtedness belonging to the newly created district.

Coming to your fourth question, as to whether the said territory, if detached from the Edison village school district, to which it was transferred on March 22, 1919, would carry with it its proportion of the bonded or borrowed indebtedness of the Edison village school district, it is advised that when territory is attached to a school district, it thereby becomes an integral part of such district and under the rule of law the tax for the support of the school district as enlarged, must be spread uniformly over all the territory in such enlarged district. And so, as soon as the newly attached territory becomes a part of the new district, then as an integral part of such enlarged district it must begin to assume its proportion of the indebtedness of the district to which it is attached, because such district has itself assumed the indebtedness of the territory which was transferred, and it is entirely proper that the rule should work both ways. Should the territory in question, that is the Denmark rural school district, be detached from the Edison village school district, under section 4736, that is, by creating a new district, we come again to the language of section 4736, which says that "the county board of education is authorized to * * * direct an equitable division of the funds or indebtedness belonging to the newly created district," which means that the newly created district must take its portion of the indebtedness of the district from which it is detached, as well as its proper portion of the funds of such district.

Bearing upon this particular question, attention is invited to Opinion 146, dated March 27, 1917, and addressed to the Superintendent of Public Instruction of this state, such opinion appearing at page 359, Vol. 1, Opinions of the Attorney-General for 1917, wherein the syllabus reads:

> "Where a county board of education, acting under the provisions of section 4692 G. C., abolishes a village school district by transferring the same to another village school district bonded or other indebtedness of such abolished school district become a charge on the school district to which it is transferred and may be paid by a levy of taxes on all the taxable property of the latter district as enlarged by the transfer.
>
> "The equitable division of the school funds and of the indebtedness which the county board of education under section 4692 G. C. is authorized to make on the transfer of the territory from one school district to another is not a matter jurisdictional to the power of the county board of education to make such transfer of territory; and such equitable division of the fund and the indebtedness may be made at a meeting later than the one at which the transfer of the territory is made.
>
> "There is no right of appeal from an order of the county board of education making such division of school funds and of the indebtedness, but such order may be reviewed by original action in the court of common pleas on the petition of the board of education of either school district affected by such order if the county board of education has been guilty of fraud or gross and intentional abuse of discretion in making such order."

Attention is also invited to Opinion 323, issued by the Attorney-General, May 31, 1917, appearing at page 859, Vol. 1, of Opinions of the Attorney-General for 1917, wherein it was held:

> "When an entire school district is transferred to an adjoining school

district, the bonded indebtedness of the district transferred becomes the debt of the whole district as it exists after the transfer is made.

The board of education of the district as it exists after the transfer is made must provide for all indebtedness by making the levy upon all the property in the district as it exists after the transfer is made.

Should the district transferred by the owner and holder of any property at the time the transfer is made, the property so held shall pass to the district as it exists after the transfer is made."

It would seem, then, that if the county board of education desired to take notice of the petition which has been filed with it, by the electors in the district transferred on March 22, 1919, it can operate under section 4736 by creating a new district from the territory which formerly constituted he Denmark special district. Under the statement of facts submitted, the transfer made on March 22, 1919, was a legal transfer properly made, because a remonstrance was not filed within thirty days required by law.

The county board of education has full authority to make such transfers as it sees fit of school territory at any time, provided it stays within the language of the statutes and always gives to the elector the right of petition and remonstrance provided for in the statutes. The county board is not required to take official notice of petitions for transfer of territory under section 4692 G. C., but it must heed a remonstrance, but such remonstrance must be filed within the stipulated time.

It is therefore the opinion of the Attorney-General:

1. That a county board of education has a legal right under section 4692 G. C. to transfer all of a school district, or a part of it, to an adjoining village or rural school district, and a remonstrance filed later than thirty days after the filing of the map with the county auditor, fails.

2. Under section 4692 G. C. the county board of education, in its discretion, can make transfers of territory from one school district to another at any time it decides it is necessary, but new districts are created under section 4736 G. C.

3. Under section 4736 G. C. the county board of education can create a new school district from one or more school districts or parts thereof.

4. Where a new school district is created by the county board of education, such county board shall direct an equitable division of the funds or indebtedness belonging to the newly created district.

Respectfully,
JOHN G. PRICE,
Attorney-General.

626.

FOREIGN CORPORATIONS—WHETHER OR NOT CORPORATION HAS INCREASED THE PROPORTION OF ITS CAPITAL STOCK REPRESENTED BY PROPERTY USED AND BUSINESS DONE IN THIS STATE IS A QUESTION OF FACT.

1. *Whether or not a foreign corporation has increased the proportion of its capital stock represented by property used and business done in this state, so as to put section* 185 *into operation with respect to such company, is a question of fact to be determined by mathematical calculation in each case.*

2. To effect an increase in such proportion it is not indispensable that the company shall have also increased the amount of its authorized capital stock; nor, on the other hand, will an increase in the amount of the company's capital stock necessarily result in all cases in an increase in such proportion. The statutory test in all cases is, has the company increased the proportion of its capital stock represented by property used and business done in Ohio.

COLUMBUS, OHIO, September 13, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date inquiring as to the proper interpretation to be given to section 185 G. C., which relates to the filing of additional statements by foreign corporations with the secretary of state, was duly received, and in reply thereto I beg to advise you as follows:

Section 185 G. C. first came into the statute law of this state on May 16, 1894 (91 O. L. 272), as part of original supplementary section 148c R. S. Section 148c R. S. as originally enacted, was a somewhat lengthy section, but upon the enactment of the General Code its contents were divided and distributed by the General Assembly into several sections, so that now its parts are to be found in sections 183, 184, 185, 186, 187, 188, 189, 190, 191 and 192 G. C.

As origially passed and in force until the enactment of the General Code, it was, among other things, provided that foreign corporations should file with the secretary of state a statement setting forth the amount of the company's authorized capital stock and the par value of each share, the value of property owned and used in and outside of Ohio, and the proportion of the company's capital stock represented by property owned and used and by business transacted in this state. It was then provided that:

> "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 franchise in Ohio, one-tenth of one per cent upon the proportion of the authorized capital stock of the corporation, represented by property owned and used and business transacted in Ohio." * * *

It doubtless occurred to the legislature, as was said by a former attorney-general, that in the natural course of events the foreign corporation might increase and grow, and it was therefore provided in section 185 G. C. that when the proportion of its capital stock represented by property used and business done in this state was increased, an additional statement thereof should be made to the secretary of state, as follows:

> "Every corporation which has filed its statement and paid the privilege tax under this section, and which thereafter shall increase the proportion of its capital stock represented by property used and business done in Ohio, shall within thirty days after such increase, file an additional statement with the secretary of state, and pay a fee of one-tenth of one per cent upon the amount of increase of its capital stock represented by property owned or business done in Ohio."

Neither the Attorney-General nor the courts have anything to do with the wisdom of requiring these additional statements. The subject is one of legisla-

tive policy. See Opinions of Attorney-General for 1915, Vol. II, p. 1454; also Western Union Telegraph Co., vs. Mayer 28 O. S. 521; Toledo Computing Scale Co., vs. Manufacturing Co., 55 O .S. 217; Gum Co. vs. Laylin, 66 O. S. 595; Humphrey vs. State, 70 O. S. 67, and State vs. Fulton, 98 O. S. 350, which support the proposition that foreign corporations can exercise none of their franchises or powers within this state except by comity and legislative consent, and that their admission to the state may be made subject to such reasonable terms and conditions as the General Assembly may see fit to impose.

The provisions of original supplementary section 148c R. S. set forth in the last paragraph of the foregoing quotation were, after the dismemberment of the section by the codifying commission and General Assembly, placed in what is now known as section 185 G. C. The phraseology was slightly changed, but not in such manner as to change its meaning. In its present form the statute reads as follows:

> "A corporation which has filed its statement and paid the fee prescribed by the preceding two sections and which thereafter shall increase the proportion of its capital stock, represented by property used and business done in this state, shall file within thirty days after such increase an additional statement with the secretary of state, and pay a fee of one-tenth of one per cent upon the increase of its authorized capital stock represented by property owned and business transacted in this state."

That statute means that whenever the proportion of the capital stock of a foreign corporation represented by property used and business done in this state becomes larger than it has been, an additional statement shall be filed and a fee shall be paid, based not upon the new proportion, but upon the difference in amount between such new proportion and the proportion upon which the initial compliance fee, or the last supplementary compliance fee, may have been based. See 1915 Opinions of the Attorney-General, Vol. II, pages 1454, 1456, 1768.

Whether or not a foreign corporation has increased the proportion of its capital stock represented by property used and business done in this state, so as to put section 185 G .C. into operation with respect to such company, is a question of fact to be determined by mathematical calculation in each case. To effect an increase in such proportion it is not indispensable that the company also shall have increased the amount of its authorized capital stock; nor, on the other hand, will an increase in the amount of the company's authorized capital stock necessarily result in all cases in an increase in such proportion. The statutory test in all cases is, has the company increased the proportion of its capital stock represented by property used and business done in Ohio. See examples or illustrations in Opinions of the Attorney-General, supra.

Respectfully,
JOHN G. PRICE,
Attorney-General.

627.

APPROPRIATION BILL—H. B. NO. 536, 108 O. L. 733—UNEXPENDED BALANCES OF ALL APPROPRIATIONS MADE BY 82nd GENERAL ASSEMBLY AGAINST WHICH CONTINGENT LIABILITIES HAVE BEEN LAWFULLY INCURRED ARE TO EXTENT OF SUCH LIABILITIES ONLY HEREBY APPROPRIATED FOR PURPOSE OF DISCHARGING SUCH CONTINGENT LIABILITIES—PREVIOUS APPROPRIATIONS FOR TEACHERS TRAINING SCHOOL BUILDING OF BOWLING GREEN NORMAL COLLEGE NOT AVAILABLE FOR ABOVE REASON.

*By reason of the provision of section 10 of H. B. No. 536, 108 O. L., 733, to the effect that "unexpended balances of all appropriations made by the eighty-second General Assembly, against which contingent liabilities have been lawfully incurred, are to the extent of such liabilities only * * * hereby appropriated and made available for the purpose of discharging such contingent liabilties and for no other purpose," the unexpended balance of the appropriation heretofore made for the teachers' training school building of the Bowling Green State Normal College, is not available for a contemplated new contract for the completion of such buildings.*

COLUMBUS, OHIO, September 13, 1919.

HON. F. E. REYNOLDS, *Secretary Board of Trustees, Bowling Green State Normal College, Wapakoneta, Ohio.*

DEAR SIR:—In your letter of recent date you say:

> "At a meeting of the board of trustees of the Bowling Green State Normal College held August 8, 1919, the secretary of the board was instructed to ascertain from your department whether or not the unexpended balance in the appropriation for the training school building at the college is available for the completion of said building, or such a part of it as may be completed with the money yet unexpended, under a new contract now in contemplation by the board. The original contractor, The Steinle Construction Company, upon the certificate of the architect, has been dismissed and the board is taking steps to let a new contract. Our question is, is this balance available for the new contract?
>
> I am also enclosing a copy of a resolution passed by the board of trustees at this same meeting."

It appears that the 81st General Assembly appropriated the sum of $100,000.00 for the erection and completion of a teachers' training school building at the Bowling Green State Normal College, said appropriation being found in 106 O. L., page 739 and page 814.

On the 21st of July, 1916, the board of trustees of the Bowling Green State Normal College entered into a written contract with The Steinle Construction Company for the construction and completion of such building, said contract calling for the payment to the contractor of the sum of $94,545.45.

Said contract contained a provision requiring the contractor to complete the work by July 1, 1917, but on or about the 14th day of December, 1918, said board of trustees extended the time of such completion to September 1, 1919.

In July, 1919, the board of trustees, being in receipt of a certificate from the architect in charge of said building improvement, to the effect that the refusal, neglect and failure of the contractor to supply sufficient workmen and materials

was such as to justify the board in so doing, terminated, under authority of Article V of the contract, the employment of said contractor for the work.

It is understood that the board of trustees now desires to enter into a new contract with some other person or persons in order to complete the building or such part of it as may be completed with available funds. Before doing so, the board wishes to make sure that the unexpended balance of moneys in said appropriation is available to pay the contractor under the new contract.

Re-appropriations of unexpended balances were made by the eighty-second General Assembly, section 9 of H. B. No. 584 (107 O. L., 355), reading thus:

> "Unexpended balances of all appropriations, made by the eighty-first General Assembly, against which contingent liabilities have been lawfully incurred, are to the extent of such liabilities only hereby reappropriated and made available for the purpose of discharging such contingent liabilities and for no other purpose. Any balance remaining in the item
>
> F 9. General plant, installing indexes, $5,000
>
> made to secretary of state in House bill No. 196 approved March 2, 1917, is hereby re-appropriated."

Re-appropriation of unexpended balances were also made by the eighty-third General Assembly, section 10 of H. B. No. 536 (108 O. L., 733) reading as follows:

> "Unexpended balances of all appropriations, made by the eighty-second General Assembly, against which contingent liabilities have been lawfully incurred, are to the extent of such liabilities only, and whether the same have been lapsed prior to the taking effect of this act with respect thereto or not, hereby appropriated and made available *for the purpose of discharging such contingent liabilities and for no other purpose* * * *."

By reason of the provisions just cited, it appears that the legislative appropriation which you have in mind is available for a limited purpose only, to wit: For the purpose of discharging contingent liabilities which had already been lawfully incurred at the time the re-appropriation took effect. At that time, of course, the new contract was not in existence and there were no contingent liabilities thereunder which the re-appropriation of unexpended balances could possibly relate to.

The conclusion is, therefore, reached that the unexpended balance in the appropriation for the building in question is not available to discharge liabilities arising under the proposed new contract of which your letter speaks.

Respectfully yours,

JOHN G. PRICE,

Attorney-General.

628.

WHERE COUNTY COMMISSIONER ELECT DIES BEFORE COMMENCEMENT OF TERM OF OFFICE—HOW VACANCY FILLED.

When a new county commissioner elect dies before the commencement of his term of office, the probate judge, auditor and recorder, or a majority of them, are authorized under section 2397 G. C. to fill the vacancy if the interest of the county so requires.

COLUMBUS, OHIO, September 13, 1919.

HON. EUGENE WRIGHT, *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR:—Your letter of recent date, inquiring whether there will be a vacancy on the board of county commissioners of your county on September 15, 1919, was duly received.

The facts as I understand them are as follows:

> The board of commissioners as now constituted is composed of Messrs. Barnes, Williams and Wright. At the last general election Messrs. Van-Curren, Smith and Engle were elected for the term beginning on the third Monday of September, 1919. Mr. Engle, one of the commissioners elect, recently died.

By the statutory law of this state it is provided that the board of county commissioners shall consist of three persons, who shall be elected bi-ennially. Pursuant to constitutional authority, the time of the election is fixed as the first Tuesday after the first Monday in November in the even numbered years, and the term of office at two years commencing on the third Monday of September next after the election. See section 2395 G. C., sections 1 and 2, Article XVII, Ohio Constitution.

The filling of a vacancy which occurs in the office of commissioner, and the election of a successor, are provided for by section 2397 G. C., which reads as follows:

> "If a vacancy in the office of commissioner occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat. If a vacancy occurs more than thirty days before such election, or within that time, and the interest of the county requires that the vacancy be filled before the election, the probate judge, auditor, and recorder of the county, or a majority of them, shall appoint a commissioner, who shall hold his office until his successor is elected and qualified."

Your board of commissioners as now constituted is composed of persons other than those elected to the office at the last general election, and the death of one of the commissioners elect does not have the effect of creating a vacancy in the office at this time, because under the well settled law of this state there can be no vacancy in an office so long as there is a person in possession legally entitled to hold it and qualified to perform its duties (see State vs. Bryson, 44 O. S. 457; State vs. McCracken, 51 O. S. 123; State vs. Metcalfe, 80 O. S. 244, 263; State vs. Thompson, 9 C. C. 161, 167); but there will, however, be a vacancy on September 15, 1919, which the probate judge, auditor, and recorder, or a majority of them, are authorized to fill if the interest of the county so requires.

If there was but a single county commissioner, instead of a board composed of three members, there would be no vacancy in the office on September 15, 1919, by reason of the death of the commissioner-elect because the person now in office

would, by virtue of section 8 G. C., continue therein until his successor is elected and qualified. But such is not the case now under consideration for we are dealing with a board composed of three members who are elected at the same time and for the same term, and not with an office filled by a single officer, nor with a board whose members are elected at different times and for different terms, etc.; hence, section 8 G. C. cannot be applied. To hold that section 8 G. C. applies to the present situation would require that all three of the present commissioners continue in office and the result on and after September 15 would be a board composed of five, instead of three members as prescribed by section 2395.

So far as I have been able to ascertain from the official reports, the exact question has never been decided by the courts or the Attorney-General. The nearest approach seems to have been in 1917 Opinions of Attorney-General, Vol. 1, p. 462, holding that when a county commissioner elected to succeed himself dies after election and before commencing the term for which he was elected, a vacancy is thereby created in the term during which the death occurred, which should be filled, and that the appointee to fill such vacancy would, by virtue of section 10 G. C., hold the office not only for the remainder of the term during which the death occurred, but also thereafter until the appointee's successor is elected and qualified.

You are therefore advised that a vacancy will exist in the office of county commissioner of your county on September 15, 1919, by reason of the death of Mr. Engle, which the probate judge, auditor and recorder are authorized to fill if the interest of the county so requires.

Respectfully,
JOHN G. PRICE,
Attorney-General.

629.

CORPORATIONS—MUTUAL PROTECTIVE ASSOCIATION—AMENDMENT TO ARTICLES OF INCORPORATION—HOW ADOPTED—COMPANY CANNOT CLASSIFY RISKS.

1. *An amendment to the articles of incorporation of a mutual protective association must be made by its members and not by its incorporators, and the amendment, when properly adopted, must be certified to the secretary of state by the president and secretary of the association.*

2. *A mutual protective association is without authority to classify its risks and members so as to provide that a loss caused by fire, lightning or explosions from gas, shall only be assessed against members holding policies covering such risks, thereby exempting from the assessment members carrying insurance against loss from cyclones, tornadoes, windstorms and hailstorms, and vice versa.*

COLUMBUS, OHIO, September 13, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your communication of August 19, 1919, with which you transmitted a copy of an amendment to the articles of incorporation of the Hobart Insurance Association, with a certificate thereto attached, and requesting my approval of these papers both as to form and substance, was duly received.

These papers, together with the record in your office, disclose that the Hobart Insurance Association is a mutual protective association incorporated without capital stock under authority of sections 9593 et seq. G. C.

There being no special provision governing amendments to the articles of incorporation of such associations, the proposed amendment and certificate must be tested under the general corporation statutes, viz., sections 8719-8723 G. C. See also section 8737 G. C.

Section 8719 G. C., so far as pertinent to the present inquiry, provides that a domestic corporation may amend its articles of incorporation:

> "3. So as to modify, enlarge or diminish the objects or purposes for which it was formed; but not substantially to change the purpose of its original organization.
>
> 4. So as to * * * add to the articles anything omitted from, or which lawfully might have been provided for originally, or to take out of the articles any unnecessary provisions or provisions which might lawfully have been omitted from them originally."

The procedure to be followed in perfecting the amendment is specifically set forth in sections 8720 et seq. G. C.

Section 8720 G. C. provides:

> "Amendments to articles of incorporation may be made at any meeting of the members or stockholders thereof, of which, and of the business to come before it, thirty days' notice has been given by a majority of the directors or trustees, in a newspaper published and of general circulation in the county where the company's principal place of business is located, and by a vote of the owners of at least three-fifths of its capital stock then subscribed, if it has a capital stock, or if not, by a vote of at least three-fifths of its members."

When the amendment has been adopted in the manner above provided a certified copy thereof, signed "by the president and secretary of the corporation," must be recorded in the office of the secretary of state. See section 8721 G. C.

The certificate of amendment proposed to be filed by the Hobart Insurance Association discloses on its face that the articles of incorporation have not been amended in the manner prescribed by section 8720 G. C., in that the alleged amendment was adopted by the votes of the incorporators, instead of by the votes of at least three-fifths of the company's members, as the statute requires. There is no provision in our laws whereby incorporators are authorized to amend articles of incorporation, either before or after organization.

It is also proposed that the certificate of amendment shall be signed by each incorporator, instead of by the president and secretary of the company, as the law requires. See section 8721 G. C.

Another question arises which goes to the merits of the proposed amendment, viz.: Whether a mutual protective association can classify its risks and members so as to assess the amount of a loss arising from one class of risks upon those members only holding policies covering the particular risks involved, thus exempting from assessment the other members whose policies cover other classes of risks. In other words, and for example, under the provisions of the proposed amendment, whenever a loss is caused by fire, lightning or explosion from gas, an assessment to cover the loss can only be made upon the members carrying insurance covering the risks specified, and not upon those members who carry insurance against loss by cyclones, tornadoes, wind storms and hail storms. Such classification, in my opinion, is out of harmony with the statutes under which the company is incorporated, and is unauthorized.

Section 9593 G. C. clearly provides that persons possessing certain qualifica-

tions may associate themselves together as a mutual protective association for the purpose of insuring "each other" against loss by fire, etc., and assess upon and collect from "each other" such sums of money as may be necessary to pay losses to "any member." It is also provided that:

> "The assessment and collection of such sums of money shall be regulated by the constitution and by-laws of the association, which shall require such assessments to be made directly and specifically upon the members and to be paid directly and specifically by them and not out of any fund deposited with the association or other trustee in anticipation of assessments or in any other manner except that any such association may borrow money for the payment of losses and expenses, such loans not to be made for a longer period than the collection of their next assessment; and such association may also accumulate a surplus from its assessments not exceeding two dollars on each one thousand dollars of insurance in force, such surplus to be used in paying losses and expenses that may occur," etc.

The foregoing statutes, in my opinion, require that the amount of each loss, no matter from what cause, shall be directly and specifically assessed upon and paid by all the members, "and not * * * in any other manner," except as therein otherwise expressly authorized, viz., with borrowed money, or from the association's accumulated surplus. See also section 9594 G. C.

Under the laws of some states mutual companies appear to be empowered to divide their risks into classes, and in case of a loss, to assess only those members within the particular class to which the loss belongs, etc., subject, however, to the limitation that if the necessity arises, all the members shall be subject to assessment. Such division or classification, to be sustained, must not in any case be opposed to the policy and provisions of the statute under which the association is incorporated. The decisions on the subject are referred to in 3 Joyce, Insurance, section 1298, and summed up as follows:

> "The conclusion from these decisions is, that the company's right to divide its risks into classes and to base its assessments upon such division must be governed by the law under and by virtue of which it is created and exists, and that it may be empowered to regulate these matters by its charter and by-laws not inconsistent with express statutory provisions, mandatory or prohibitory in their nature, etc."

Respectfully,
JOHN G. PRICE,
Attorney-General.

630.

APPROVAL OF BOND ISSUE OF BEXLEY VILLAGE SCHOOL DISTRICT IN THE SUM OF $9,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, September 15, 1919.

631.

APPROVAL OF BOND ISSUE OF CLARK COUNTY IN THE SUM OF $100,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, September 16, 1919.

632.

APPROVAL OF BOND ISSUE OF SUMMIT COUNTY IN THE SUM OF $17,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, September 19, 1919.

633.

FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN CLERMONT, CARROLL, COLUMBIANA, ERIE, HIGHLAND, MEDINA AND PORTAGE COUNTIES.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, September 20, 1919.

634.

SCHOOLS—TOWNSHIP BOARD OF EDUCATION—NO AUTHORITY TO PROVIDE TRANSPORTATION FOR ELIGIBLE HIGH SCHOOL PUPILS—BOARD MUST PAY TUITION OF ELIGIBLE HIGH SCHOOL PUPILS RESIDING IN DISTRICT WHICH HAS NO HIGH SCHOOL.

1. *Nowhere in the present law is there found authority or provision for a board of education of a township school district, which does not provide a high school, to provide transportation for eligible high school pupils.*

2. *The tuition of eligible high school pupils residing in a district which has no high school, must be paid by the board of education of the district in which said high school pupil resides.*

COLUMBUS, OHIO, September 22, 1919.

HON. V. W. FILIATRAULT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of recent date requesting an opinion on the following statement of facts:

"Would the board of education of a township school district which

does not provide a high school be allowed to provide transportation as well as pay tuition for eligible pupils to another high school?

Sections 7748 and 7749 of the General Code provide for the paying of tuition to outside high schools and for transportation of pupils to high schools maintained by the supplying board. However, I am unable to determine whether or not the transportation could be furnished to outside high schools and consequently have submitted the above question for your ruling."

Sections 7748 and 7749 G. C., cited by you, read as follows:

"*Sec.* 7748.—A board of education providing a third grade high school as defined by law shall be required to pay the tuition of graduates from such school residing in the district at any first grade high school for two years, or at a second grade high school for one year. Should pupils residing in the district prefer not to attend such third grade high school the board of education of such district shall be required to pay the tuition of such pupils at any first grade high school for four years or at any second grade high school for three years and a first grade high school for one year.

Such a board providing a second grade high school as defined by law shall pay the tuition of graduates residing in the district at any first grade high school for one year; except that, a board maintaining a second or third grade high school is not required to pay such tuition when the maximum levy permitted by law for such district has been reached and all the funds so raised are necessary for the support of the schools of such district. No board of education is required to pay the tuition of any pupil for more than four school years; except that it must pay the tuition of all successful applicants, who have complied with the further provisions hereof, residing more than four miles by the most direct route of public travel, from the high school provided by the board, when such applicants attend a nearer high school, or in lieu of paying such tuition the board of education maintaining a high school may pay for the transportation of the pupils living more than four miles from the said high school, maintained by the said board of education to said high school. Where more than one high school is maintained, by agreement of the board and parent or guardian, pupils may attend either and their transportation shall be so paid. A pupil living in a village or city district who has completed the elementary school course and whose legal residence has been transferred to a rural district in this state before he begins or completes a high school course, shall be entitled to all the rights and privileges of a resident pupil of such district."

"*Sec.* 7749.—When the elementary schools of any rural school district in which a high school is maintained, are centralized and transportation of pupils is provided, all pupils resident of the rural school district who have completed the elementary school work shall be entitled to transportation to the high school of such rural district, and the board of education thereof shall be exempt from the payment of the tuition of such pupils in any other high school for such a portion of four years as the course of study in the high school maintained by the board of education includes."

Bearing upon the question submitted by you, attention is invited to Opinion No. 824, issued by the Attorney-General in 1914 and appearing at page 362 of the Annual Reports for that year, on a question very similar to the one herein, and covered by the following syllabus:

"When a pupil resides five miles from any high school and has a high school in its district not closer than five miles, and no high school in any district nearer than five miles, free transportation to such high school may be furnished by the board of education *when the nearest high school is its own high school.* The board of education cannot under any circumstances furnish transportation to such pupil to any high school *except its own.*"

Speaking further in such opinion, the Attorney-General said:

"* * * It seems to be the legislative intent that the provision for furnishing transportation shall be limited to furnishing transportation to the said high school maintained by the said board of education in its own district, and said provision is not so broad that such board is required to furnish transportation to such pupils or to entitle such pupil to transportation to a high school other than its own high school. As before stated, such board of education is limited to furnishing transportation to such pupils to its own high school in lieu of paying the tuition of such pupils to a nearer high school than the one provided by such board.

* * * * I am of the opinion that such pupil is not entitled to transportation to the nearest high school, under favor of said section, (7748) unless in line with the foregoing, such nearest high school happens to be its own high school, for the reason that such board cannot, under any circumstances, furnish transportation for said pupils to any high school except its own."

It is advised that section 7748 G. C. has not been changed by the legislature upon the point in question since the promulgation of the above opinion, and nowhere in the present law is there found authority or provision for a board of education of a township school district, which does not provide a high school, to provide transportation for eligible high school pupils. The tuition of such pupils must, however, be paid by the board of education of the district in which such pupils reside.

Respectfully,
JOHN G. PRICE,
Attorney-General.

635.

BOARD OF EDUCATION—TEACHER EMPLOYED FOR FIXED TERM AT DEFINITE SALARY—TIME LOST ON ACCOUNT OF CONTAGIOUS DISEASE—ENTITLED TO SALARY—UNDER SECTION 7690 G. C. BOARD CAN GRANT REASONABLE LEAVES OF ABSENCE TO TEACHERS WHO ARE ILL WITH DISEASE NOT CONTAGIOUS.

1. *Where a board of education employes a teacher for a fixed term at a definite salary, and such teacher is compelled to be out of school with a contagious disease, and subsequently resumes teaching work for the board, the teacher is entitled to be paid for the time necessarily lost on account of such sickness.*

2. *Under section 7690 G. C. the board of education has full control of the management of the schools of the district and can grant reasonable leaves of ab-*

sence to teachers who are ill with a disease that is not contagious, if it sees fit to do so, but such leaves of absence must be reasonable in length of time.

COLUMBUS, OHIO, September 22, 1919.

HON. HAVETH E. MAU, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Acknowledgment is made of your request of recent date, signed by Wm. K. Marshall, assistant prosecuting attorney, for an opinion upon the following statement of facts:

> "In the department reports for 1918, Volume, I, Opinion No. 6, page 216, issue of May 23, I found an opinion given by your predecessor holding that 'where a teacher is out of school temporarily by reason of contagious disease, such teacher should receive pay for the time so absented.'
>
> While the caption would indicate that this opinion was confined to cases of teachers who were absent because of illness from contagious disease, a reading of the opinion and the reasoning therein contained would lead one to infer that a teacher who had a contract with a board of education for a definite period at a definite salary was entitled to compensation for time lost on account of any temporary illlness. And this construction has been placed upon it by the department of public instruction of this state, which has been advising, as I understand, that teachers who are absent temporarily on account of any illness are entitled to recover compensation for the time lost.
>
> In view of the latter part of section 7690, it would be my idea that this opinion should be strictly confined to cases where teachers are absent because of illness from contagious disease, and I know this opinion has been heretofore given by one of your predecessors. In any event, there should be no question as to the scope of the opinion first referred to, and I ask that you let me know whether your department would hold a teacher who was temporarily absent on account of illness, caused by any other than a contagious disease, would be entitled to compensation for the time lost; if not, the matter should be brought to the attention of the department of public instruction."

In the above communication you cite an opinion of the preceding Attorney-General, holding that where a teacher is out of school temporarily, by reason of contagious disease, such teacher should receive pay for such time absent. Such opinion appears at page 659-669, Vol. 1, Opinions of the Attorney-General for 1918. The opinion in question is a very exhaustive one of ten pages, on the question as to whether teachers should be paid when absent from their duties on account of illness, and your statement that the reason therein contained would lead one to infer that a teacher who had a contract with a board of education for a definite period at a definite salary, was entitled to compensation for the time lost on account of any temporary illness, is largely true, but attention is invited to the opinion of the Attorney-General in the closing paragraphs, which read as follows:

> "Coming then to a specific answer to the question, and confining my opinion to this case or cases closely allied, it is my view that this entire contract should receive a liberal construction and that this teacher, who was out of school temporarily, by reason of contagious disease, should receive pay for the time so absent.
>
> Inasmuch as it is my opinion that the teacher is entitled to pay for

the time lost by reason of sickness, there is no necessity of my answering your second question as to whether or not the substitute teacher is entitled to receive the pay which would have gone to the regular teacher. Assuming that the board has a contingent fund out of which to provide for emergencies, the compensation for such emergency employe should be taken from that fund, in case there is not sufficient money in the tuition fund to pay same."

The syllabus of the opinion which you cite, and which was rendered on May 8, 1918, reads as follows:

"Where a board of education employs a teacher for a fixed term at a definite salary and there is nothing in the contract or in the rules of the board on the question of absence on account of sickness, and such teacher is compelled to be out of school with a contagious disease, and subsequently resumes teaching work for the board, the teacher is entitled to be paid for the time so necessarily lost on account of such sickness."

A careful examination of the conclusions of the Attorney-General in the opinion just cited, shows that the illness of the teacher, in order to entitle that person to pay, must have been an illness that was contagious and that the teacher must subsequently resume teaching work for the board.

Your attention is invited to Opinion No. 338, dated May 24, 1919, wherein the following language on the part of this department occurs:

"Prior opinions of this department have held that the contagion known as influenza was an epidemic and that teachers must be paid for all time lost when the schools in which they are employed are closed on account of the influenza epidemic.

It has been held further by this department that where a teacher was absent from duty because of being ill with a contagious disease, such teacher is entitled to pay even though the schools were in session. So teachers who are deprived from teaching because schools are closed on account of epidemic and those who are ill *with contagious disease*, when schools are in session, must be given full pay, and it is for the board to provide substitutes in the latter case, as it deems fit.

Under section 7690 G. C., the board has full control of the management of the schools and * * * it can grant reasonable leaves of absence to teachers who are ill with a disease that is not contagious, if it sees fit to do so, but the schools must be kept going, if possible, by other teachers acting in place of those who are ill. * * * Boards of education should be as reasonable in dealing with their employes who are ill for short periods as other public officials and private employers are with salaried help. * * *

* * * If the teachers who were ill had a contagious disease, they must be paid. If such illness was not contagious, the board can grant such leave as it sees fit, at full pay, such grant being reasonable in time.

* * * The opinion of the Attorney-General is, therefore, that * * * salaries of teachers ill with contagious disease can not be withheld by a board of education and the board must provide substitutes."

The above opinion, No. 338, issued by the present Attorney-General, is the

latest construction upon the question at issue and clearly provides that teachers when ill with a contagious disease, must be paid by their board of education for the time lost from their duties, and further, that the board of education, under the general powers given it under section 7690 G. C., can grant such leaves of absence as it sees fit, at full pay, such grant being reasonable in time. The latter view is based upon prior opinions of this department, holding that boards of education have authority to grant reasonable leaves of absence for short periods, when in their judgment it should be done, among which prior opinions is one issued on April 12, 1912, and found in Vol. I, page 226, Annual Report of the Attorney-General for 1912, part of the syllabus of which reads:

> "The action of the board in allowing said regular teacher full pay during said absence is in effect an increase in pay and not illegal. Such action, however, should be scrutinized.
>
> The payment by the absent teacher, of compensation to the aforesaid substitute, is a private arrangement not objectionable."

Practical experience shows that there are a number of contagious diseases which appear in the school room, where the person afflicted does not know for some days as to whether such illness is contagious. Among these diseases might be mentioned scarlet fever, diphtheria, measles and whooping cough, all of which are held to be contagious by medical authorities and all of which are said to be more contagious in the early stages than at a later date. A teacher might feel ill at the beginning of a certain school week on Monday, but rather than stop teaching and have her pay deducted, she will appear for duty on Tuesday or Wednesday, and a medical examination on Thursday or Friday might show that she had any one of the above mentioned diseases, with the result that during such malignant period the pupils had been exposed to the contagious disease and at the end of the week not only the teacher but a number of pupils would be afflicted with the same contagion. On this reasoning it would seem that it is better for a teacher, who may be contracting a contagious disease, to consult a physician at once and be taken from the school room and its activities, rather than to have her continue teaching with the resultant contagion to others, because of a hard and fast rule of the employing board of education that absence for a single day would result in a deduction of pay. Hence boards of education should take these things into consideration, and as they are guardians, in a sense, of the pupils under their control, they have ample authority to grant reasonable leaves of absence to teachers who are ill, if in their judgment it should be done, for a slight illness may later be diagnosed as a contagious one, which would cause an epidemic affecting the whole school population.

Boards of education in each locality are in the best position to judge as to the merits of temporary leaves of absence and they have full authority to do so under the general powers of section 7690 G. C.

Reaffirming the view indicated in Opinion No. 338, it is therefore the opinion of the Attorney-General:

1. Where a board of education employs a teacher for a fixed term at a definite salary, and such teacher is compelled to be out of school with a contagious disease, and subsequently resumes teaching work for the board, the teacher is entitled to be paid for the time necessarily lost on account of such sickness.

2. Under section 7690 G. C., the board of education has full control of the management of the schools of the district and can grant reasonable leaves of ab-

sence to teachers who are ill with a disease that is not contagious, if it sees fit to do so, but such leaves of absence must be reasonable in length of time.

Respectfully,
JOHN G. PRICE,
Attorney-General.

636.

COUNTY COMMISSIONERS—COUNTY AGRICULTURAL AGENT—SALARY—VOLUNTARY CO-OPERATION OF COUNTY WITH STATE—ALSO WHERE COUNTY CO-OPERATES WHEN DIRECTED BY VOTE OF ELECTORS—MINIMUM SALARY OF AGENT IN EACH CASE.

In case of voluntary action by the county commissioners in co-operation with the state in employment of a county agricultural agent under the provisions of section 9921-2 G. C. the minimum undertaking authorized by the statutes on the part of the county commissioners is the appropriation of not less than one thousand dollars annually for a period of not less than two years.

In case the county commissioners are directed and required to co-operate with the state in the employment of the county agent by a referendum vote of the electors of the county, the minimum obligation contemplated by the statute is an appropriation by the commissioners of such an amount annually as shall be directed by the trustees of the Ohio State University, not exceeding fifteen hundred dollars, which shall continue for a period of five years.

COLUMBUS, OHIO, September 22, 1919.

HON. ROBERT B. MCMULLEN, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication requesting my construction of certain provisions of the statutes authorizing employment of a county agricultural agent, as follows:

> "In 1918 the board of county commissioners made an appropriation in the sum of $1,500 for a county agent under section 9921-1 et seq. General Code.
>
> This year (1919) the board of county commissioners have made an appropriation of only $1,000 for the county agent.
>
> 1. Is the board of commissioners compelled to make the 1919 appropriation in the same sum ($1,500) as the 1918 appropriation?
>
> 2. If so, is the board of commissioners or their successors in office required to make an appropriation in a like sum ($1,500) for a period longer than two years?
>
> I may say here that I have advised the board that the 1918 appropriation is binding on them for at least two years and possibly five, but they have asked me to get an opinion from you."

Section 9921-2 G. C. governs in the matter involved in your inquiry, and provides:

> "From moneys appropriated by the state for the employment of agricultural agents, not to exceed three thousand dollars in any one year shall be expended for any county that shall raise at least one thousand dollars

for the support of an agricultural agent for one year, and shall give satisfactory assurance to the trustees of the Ohio State University that a like sum shall be raised for a second year, or shall establish and maintain a county experiment farm as provided in the statutes. To secure this aid from the state, the board of county commissioners of any county shall agree to the employment of an agricultural agent approved by the dean of the college of agriculture of the Ohio State University."

In a previous opinion directed to Hon. R. A. Kerr, Prosecuting Attorney, Troy, Ohio, dated June 21, 1919, and being Opinion No. 502 of this department, it was observed that the provisions of the statutes governing the employment of county agricultural agents were in some respects inconsistent with other sections of the statutes governing appropriation and expenditure of money by the county commissioners, and these statutes being special in their application and of later enactment, to the extent of the inconsistency, supersede the more general provisions of other statutes.

The very obvious import of the provisions of section 9921-2, supra, is that the co-operative action of the county and state in the matter of employment of the county agent shall not be inaugurated or undertaken for a shorter period than at least two years, and in my opinion it is the clear intent of the statute that the commissioners by entering into the arrangement with the state for contribution to the fund for the agricultural work specified, obligate themselves to provide at least $1,000 annually for a period of at least two years, which after the affirmative action of the commissioners becomes an obligation imposed by the law and may not be disregarded.

You inquire as to the obligation to appropriate the same amount in the year 1919 as was appropriated in the year 1918, to-wit $1,500. It is noted that the statute provides that the county must raise at least $1,000 for one year "and shall give satisfactory assurance to the trustees of the Ohio State University that a *like sum* shall be raised for a second year," etc.

I am of the opinion that the term "like sum" which fixes the extent of performance to which the commissioners become obligated, has reference to the preceding expression "at least $1,000," and that an appropriation of $1,000 is a compliance with the purport and mandate of the statute.

You also make a query as to the five year term of co-operation in the employment of the county agent in reference to the case presented. This provision is found in section 9921-5 which authorizes a referendum by the electors of the county for the purpose of directing and requiring the commissioners to co-operate with the state in the employment of the county agent, in case the commissioners fail to act voluntarily in the matter, and in this connection it is provided:

"After having established this county agent work in any county, the county commissioners of such county shall continue to make such annual appropriations for said work as the trustees of the Ohio State University may direct, not exceeding fifteen hundred dollars annually, for a period of five years."

This provision is so obviously more drastic and so essentially different from that provided in the statute above considered in connection with the voluntary action of the commissioners that I have no trouble in reaching the conclusion that it relates only to cases where the agricultural extension work has been inaugurated in pursuance of a referendum vote, in which case the provision for a five year period as well as the provision delegating to the trustees of Ohio State University the authority to determine the amount "not exceeding fifteen hundred dollars annually"

which shall be appropriated by the county commissioners are a substitute for the provisions of section 9921-2 G. C. which govern in case of voluntary action by the commissioners.

You are therefore advised that in the case of a voluntary action on the part of the county commissioners, the statute contemplates an obligation to appropriate not less than $1,000 annually for a term of not less than two years.

Respectfully,
JOHN G. PRICE,
Attorney-General.

637.

FOREIGN CORPORATION—PROPORTION OF AUTHORIZED CAPITAL STOCK REPRESENTED BY PROPERTY USED AND BUSINESS DONE IN THIS STATE BECOMES LARGER IN AMOUNT WHEN COMPARED WITH PROPORTION STATED IN LAST STATEMENT FILED —HOW FEE DETERMINED.

Whenever the proportion of the authorized capital stock of a foreign corporation represented by property used and business done in this state becomes larger in amount than it has been, when compared with the proportion stated in the last statement filed with the Secretary of State, the company must file an additional statement and pay a fee upon the amount of the increase in proportion, as required by section 185 G. C.; and in determining whether the proportion has been increased, the only statements to be considered are the last one filed with the Secretary of State and the new one which it is proposed to file.

COLUMBUS, OHIO, September 22, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date with respect to the rule to be followed by your office in computing the fee to be paid by a foreign corporation under section 185 G. C., was duly received, and reads as follows:

> "Kindly give me the rule that should be followed by this office in computing the fee for a foreign corporation under section 185 of the General Code of Ohio.
>
> For example: If an organization has filed several applications for increase under the above section what proportion should be used for giving said company credit for fee heretofore paid? Should the original proportion be used or should the proportion of the last increase filed be used, or should the sum of the original proportion, together with all proportions of increases filed be used in giving said organization credit for the fee heretofore paid?"

Section 185 G. C., referred to in your letter provides that:

> "A corporation which has filed its statement and paid the fee prescribed by the preceding two sections and which thereafter shall increase the proportion of its capital stock, represented by property used and business done in this state, shall file within thirty days after such increase an additional statement with the Secretary of State, and pay a fee of one-

tenth of one per cent upon the increase of its authorized capital stock represented by property owned and business transacted in this state."

The statement referred to in the first clause of the statute is the initial statement required by section 183 G. C., to be filed with the Secretary of State by foreign corporations before doing business in this state, setting forth, among other things, the proportion of the capital stock of the corporation represented by property owned and used and by business transacted in Ohio; and the fee referred to is the fee of one-tenth of one per cent upon the proportion of the company's authorized capital stock represented by property owned and used and by business transacted in this state, to be not less than $10 in any case.

In 1915 Opinions of Attorney-General, Vol. II, page 1768, it was correctly said with reference to the foregoing section, that:

> "As the section explicitly provides, the fee is to be computed not upon the amount of the authorized capital stock, represented by property owned and business transacted in this state as increased, *but upon the increase itself.* This means that whenever the 'proportion' of the authorized capital stock of a company represented by its property and business in this state * * * becomes larger than it has been, an additional statement shall be filed and a fee shall be paid, based not upon the new 'proportion,' *but upon the difference in amount between such new 'proportion' and the 'proportion' upon which the initial compliance fee, or the last supplementary compliance fee may have been based.*"

The first proportion, and therefore the starting point in determining whether or not there has been an increase in the proportion of the company's capital stock represented by property used and business done in this state within the meaning of section 185 G. C., is the proportion contained in the statement filed by the company with the Secretary of State under section 183 G. C. at the time it seeks admission to do business in this state. Thereafter, and as often as the company shall have increased the proportion of its capital stock represented by property used and business done in this state, just so often must an additional statement be filed and a fee paid on the amount of the increase.

In determining whether or not an additional statement is required to be filed and a fee paid under section 185 G. C. the following rule should be adopted:

Determine the present proportion of the company's capital stock represented by property used and business done in Ohio from the additional statement which the company is proposing to file, and if the proportion therein stated is greater in amount than the proportion stated in the last statement filed with the Secretary of State (whether such last statement be the initial or an additional statement), then the new additional statement should be filed and a fee paid upon the increase in such proportion. If there has been no increase over the amount of the last proportion, then the filing of an additional statement is not required.

In other words, the only statements that need be considered by you in computing the fees to be paid under section 185 G. C. is the last statement which was filed in your office by the foreign corporation, and the new statement which the company is proposing to file.

Respectfully,
JOHN G. PRICE,
Attorney-General.

638.

INHERITANCE TAX LAW—LIFE INSURANCE POLICY—BENEFICIARY'S INTEREST NOT TAXABLE SUCCESSION—INSURANCE POLICY PAYABLE TO ESTATE OF INSURED TAXABLE—WHEN PROCEEDS OF POLICY PAYABLE TO ONE BENEFICIARY DURING HIS LIFE AND THEREAFTER TO ANOTHER, DEATH OF FIRST BENEFICIARY DOES NOT GIVE RISE TO TAXABLE SUCCESSION AS AGAINST SECOND BENEFICIARY—WHEN SAME IS TAXABLE SUCCESSION.

1. *The beneficiary's interest in a life insurance policy payable to such beneficiary is not a taxable succession under the inheritance tax law.*

2. *If an insurance policy is payable to the estate of the insured the successions thereto are taxable under the inheritance tax law; but the insurance company may pay the proceeds of the policy to the executor or administrator without notifying the Tax Commission and retaining a sufficient amount thereof to pay the inheritance tax.*

3. *When the proceeds of the policy are according to its terms payable to one beneficiary during his life and thereafter to another, the death of the first beneficiary does not give rise to a taxable succession as against the second beneficiary.*

If, however, the proceeds of the policy are according to its terms payable to the estate of the insured or to the estate of the beneficiary after the death of the latter, then the successions occurring through the estate of such second decedent constitute "property within this state" which is taxable under the inheritance tax law, if such second decedent was a resident of this state, or if it is necessary for the personal representatives entitled to enforce the claim to resort to the courts of this state for the purpose of enforcing it. Such necessity would seem to arise only in the event that the insurance company was organized under the laws of Ohio and did business in no other state. No other fact, such as the residence of the successor, would be sufficient to subject the succession to taxation under the laws of Ohio.

COLUMBUS, OHIO, September 22, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—You have requested the opinion of this department upon the following questions relative to the interpretation of the inheritance tax law:

"1. Life insurance policies are frequently written 'payable on receipt of due proof at the death of the insured to Mary Doe if living at the death of the insured, otherwise to the executors, administrators or assigns of the insured.' The law levies a tax on succession by deed, grant sale, assignment or gift (See Sec. 5332-3). In your opinion does the succession to a beneficiary under a policy of life insurance fall within the terms of this section? If so, in connection with insurance payable to a beneficiary or to the estate of the insured under a policy containing the above quoted beneficiary provision, is the company required to retain the tax, or to notify the tax commission or the county auditor of the payment?

2. Under the provisions of the policy contracts, sums payable at the

death of the policy holder are frequently left with the company to be paid in installments to the beneficiary. In the event of the death of the beneficiary any balance of such sums remaining unpaid may be payable, under the terms of the contract, either to the estate of the insured, or to the estate of the beneficiary, or to a third person. Will you please advise us whether, in your opinion, such sums passing on the death of the beneficiary are under the provisions of sections 5331 and 5332 to be deemed 'intangible property'; and if so, are they to be deemed 'property within this state?'

First—If passing on the death of a non-resident of Ohio to a non-resident of Ohio.

Second—If passing on the death of a non-resident of Ohio to a resident of Ohio.

Third—If passing on the death of a resident of Ohio to a non-resident of Ohio."

In the opinion of this department the accrual of a right of action in behalf of the beneficiary of a life insurance policy against the company on account of the death of the assured, is not a taxable succession under the inheritance tax law. Section 5332 G. C. as amended in that act, mentions the successions taxable thereunder. Summarizing its provisions it appears that the following are the taxable successions:

(1) By will or intestacy.

(2) By gift in contemplation of death or intended to take effect in possession or enjoyment at death.

(3) By the exercise of a power of appointment or failure to exercise it.

(4) By the accrual of the right of survivorship in case of jointly held property.

(5) By the extinction of a prior interest or charge determinable by death or at a period ascertainable by reference to death.

Obviously life insurance does not come under any of these headings unless it be that of gift, etc. The following is a full quotation of this part of section 5332 G. C.:

"3. When the succession is to property from a resident or to property within this state from a non-resident by deed, grant, sale, assignment or gift, made without a valuable consideration substantially equivalent in money or money's worth to the full value of such property:

(a) In contemplation of the death of the grantor, vendor, assignor, or donor, or

(b) Intended to take effect in possession or enjoyment at or after such death."

The succession must take place as to property which passes from a person to the successor by a stipulated mode. This is not the case with a life insurance policy payable to a beneficiary. The assured does not give, grant, assign or sell any part of his property to the beneficiary. He makes a contract with the insurance company whereby in the event of his death, the insurance company agrees to pay to the beneficiary. The assured never had the right of action which the beneficiary has upon the happening of his death, and therefore that

right of action does not pass from the decedent to the beneficiary, either at death or at any other time. In fact, the only thing which passes to the beneficiary is a thing which has no existence until the death occurs.

It is true that the beneficiary may have a vested interest in the policy to the extent that in the absence of any clause in the policy reserving the right so to do, the assured may not change the beneficiary without the consent of the latter when there is an insurable interest on the part of the beneficiary in the life of the insured. So also in such case the beneficiary has the right to keep up the premiums on the policy, though the assured has defaulted but this is because of the insurable interest on the part of the beneficiary in the life of the assured.

Tyler v. Treasurer L. R. A. 1917D, 633, and Note.
Matter of Parsons, 117 App. Div. (N. Y.) 321.
Matter of Elting 140 N. Y. S. 238.

It is otherwise if the policy is payable to the estate at the time of the death. Then it becomes a part of the estate and is something which the testator disposes of or in case of intestacy something which passes by the intestate laws of the state.

It follows that the policy quoted in your first question would afford ground for the imposition of the inheritance tax only in the event that its proceeds should become a part of the estate of the assured. In that event you further inquire whether it would be the duty of the insurance company to retain the tax or to notify the tax commission or the county auditor of the payment. In the opinion of this department it would not be the duty of the insurance company to do so if the company is subject to the laws of Ohio.

Section 5348-2 of the new inheritance tax law provides:

> "No * * corporation * * or other institution * * having in possession or in control or custody * * assets or property belonging to or standing in the joint names of a decedent * * shall deliver or transfer the same to any person whatsoever whether in a representative capacity or not, * * without retaining a sufficient portion or amount thereof to pay any taxes * *, and unless notice * * be served upon the tax commission * *."

As previously pointed out, the insurance company has no assets or property belonging to the decedent. It merely owes a debt to the decedent's estate. This section is not broad enough in my opinion to apply to all debtors of the decedent's estate and to prevent them from paying to the administrator amounts due from them to the estate. In other words the phrase "assets or property" does not in the opinion of this department include debts. At the instant of death the right of action on the policy in favor of the estate is an asset of the estate—not of the insurance company; as to the latter it is a liability. The payment of a chose in action by the debtor is not the transfer of assets belonging to the creditor. For this reason the last part of your first question is answered in the negative.

Coming now to your second question it is to be observed that what has been said in answer to your first question makes it clear that the payment of the installments to the beneficiary by the company does not constitute a succession to property taxable under the act, as far as the relation between the beneficiary and the deceased assured is concerned.

However, a new question arises, namely, as to whether the payment over after the death of the first beneficiary to the estate of the decedent, or to a third

person constitutes a taxable succession. It can come under none of the headings of section 5332 G. C. unless it be the last heading thereof, viz.:

> "When any property shall pass subject to any charge, estate or interest determinable by the death of any person or at any period ascertainable only by reference to death, the increase accruing to any person, institution or corporation, on the extinction and determination of such charge estate or interest shall be deemed a succession taxable under the provisions of this subdivision of this chapter, in the same manner as if the person, institution or corporation beneficiary entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived."

In the opinion of this department this part of the statute does not apply. It will be observed that in order for it to have application property must pass subject to a charge or estate. In the case of an insurance contract of the kind described in your second question there are merely successive beneficiaries, the rights of each one of whom are fixed by the same instrument, viz.: the original policy or some election referable thereto. The death of one such successive beneficiary does not cause any property to pass to the next in succession. True, by that event the rights of the deceased beneficiary terminate and new rights arise in his successor as beneficiary. But by this process no rights which formerly devolved upon the first of them devolve upon the second. The situation is rather that separate and distinct rights arise than that a single right devolves by succession upon a new person. Thus, if at the time of the death of the first beneficiary a payment then due had not been made the personal representatives or legatees of the first beneficiary would be entitled to that payment, and not the second beneficiary.

For these reasons, then it is the opinion of this department, as heretofore stated, that no tax is imposed by the new inheritance tax law upon the accrual of rights in secondary beneficiaries under policy contracts like those referred to in your second question.

Of course if the policy contract is such that the estate of the insured or the estate of the beneficiary becomes entitled to the remaining installments or payments the law would apply and such rights of action would constitute property of the estate of the insured or that of the original beneficiary, as the case might be. In such event, the remaining points suggested in your second question would arise. Clearly, if the person whose estate is entitled to the remaining payments, be that person the insured or the original beneficiary, was a resident of Ohio as described in the third case put by you, the right of action would be "property within this state" because its succession would be directly subject to and governed by the law of this state with respect to the administration of the estates of deceased persons. This would be true whether the ultimate successor to the property through the estate in question were a resident of this state or not. In short, the situation would be the same as in the case of any other chose in action belonging to the estate in question.

The other two cases stated in your second question are those wherein the person whose estate receives the benefit of the deferred payments is a non-resident of Ohio. The first of them supposes also that the ultimate successor is a non-resident of this state. Under these circumstances, the only ground for holding that the claim constitutes "property within this state" would be that the contract was either made in this state or was with a company organized under the laws of this state. It is true that paragraph 3 of section 5331 uses very broad language, as follows:

> " 'Within this state', * * * when predicated of intangible property, (means) that the succession thereto is, for any purpose, subject to, or governed by the law of this state."

Such a theory would not be without the support of judicial authority. Thus, it has been held that ordinary debts due from residents to non-resident decedents are "property within the state" for purposes of inheritance taxation.

> People ex rel. Graff vs. Probate Court, 128 Minn. 371;
> Blackstone vs. Miller, 188 U. S. 189;
> Matter of Daly, 100 App. Div., 373;
> Affirmed 182 N. Y. 524.

However, in the face of these authorities the Court of Appeals of New York has held that the mere fact that the insurance company is a New York corporation is not sufficient to subject the matured claim under the insurance policy issued by it to the inheritance tax law of New York when the decedent was a non-resident of that state.

> Matter of Gordon 186 N. Y. 471;
> Matter of Rhoades 190 N. Y. 525.

Without quoting from the Gordon case it is sufficient to observe that the other cases mentioned were distinguished upon the ground that in all of them the creditor was under the actual necessity of coming to the taxing state for the purpose of enforcing his claim; whereas in the case of the insurance company then before the court the personal representatives of the policy holder could obtain judgment against it in the foreign state and there get satisfaction, inasmuch as the company had both subjected itself to the laws of that state for jurisdictional purposes and placed on deposit there sufficient assets to guarantee the payment of all claims against it due to citizens of that state.

It is the opinion of this department that the answer to the question now under discussion depends upon whether or not the company issuing the policy is doing business elsewhere than in Ohio, and particularly in the state where the personal representatives of the decedent reside. If so, the claim is not "property within this state" on the principle laid down in the case last cited; if not, the claim is "property within this state" for the purpose of the inheritance tax law upon the principles of the other decisions cited; that is to say, the succession to that property is subject to the law of this state for the purpose of enforcement of the claim, and this is sufficient to bring it within the scope of the inheritance tax law.

If the company is not an Ohio company and the decedent was not a resident of Ohio, it is the opinion of this department that no other fact could constitute a policy contract in the hands of the personal representatives of a decedent "property within the state." The contract might have been originally entered into in this state or otherwise referable to the laws of this state for its construction, but that would not give the courts of this state jurisdiction over its enforcement for any purpose nor jurisdiction over the administration of the estate. Nor would the fact that the ultimate successor might reside in this state be significant. In the first place, the claim itself in the single instance in which a tax could apply at all (viz.: where the proceeds of the policy become payable to the estate) would vest for remedial purposes in the executors or administrators of the decedent. In other words, the next of kin or residuary legatee could not directly enforce the claim. Therefore, the fact that

he might reside in Ohio would of itself confer no jurisdiction upon the Ohio courts, much less necessitate recourse to those courts for the enforcement of the claim in his behalf. In the second place, it is true almost as a universal rule that the residence of the successor is an immaterial fact for the purposes of the inheritance tax law. It is the residence of the decedent which is in all cases material for that purpose, and not that of the successor.

For these reasons then, save in the hypothetical case stated, an insurance policy passing on the death of a non-resident of Ohio through his estate to a non-resident of Ohio or to a resident of Ohio would not be "property within this state."

Respectfully,

JOHN G. PRICE,
Attorney-General.

639.

MUNICIPAL CORPORATION — NON-CHARTER CITY — RESOLUTION OF COUNCIL ALLOWING ITS CLERK "THE SUM OF TWENTY-FIVE CENTS FOR EACH NOTICE WRITTEN AND SERVED WITHIN CORPORATION LIMITS"—RECEIVE TWENTY-FIVE CENTS FOR WRITING AND SERVING NOTICE—COUNCIL MAY PROVIDE PER DIEM RATE IN SERVING NOTICE OUTSIDE CORPORATE LIMITS—MAY NOT PROVIDE AUTOMOBILE EXPENSES IN ADDITION TO SUCH PER DIEM COMPENSATION.

1. *Under a valid resolution of a non-charter city council allowing to its clerk "the sum of twenty-five cents for each notice WRITTEN AND SERVED within the corporation limits," such clerk may not legally receive that amount for writing the notice and a like amount for serving the notice.*

2. *In fixing the compensation of its clerk under section* 4210 *G. C., such council may legally provide for a per diem rate in serving such notices outside the corporate limits.*

3. *Such council may not legally provide for the payment of such clerk's automobile expenses in addition to such per diem compensation, as section* 4210 *G. C., contains no provision for allowing expenses.*

COLUMBUS, OHIO, September 22, 1919.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department, as follows:

> "1. Can an assistant clerk of council under authority herein (section 3818 G. C.) legally draw fees for writing notices and additional fees for serving notices?
>
> "2. Is the $3.00 per day for serving notices outside the corporation legal?
>
> "3. Is the automobile expense in addition legal?"

Sections 4210, 4213 and 3818 G. C. are pertinent.

Section 4210 in part provides that the members of the council

"shall elect * * * a clerk, and such other employes of council as may be necessary, and fix their duties * * * and compensation. The officers and employes of council shall serve two years."

Section 4213 prohibits the increasing or diminishing of the *salary* of a clerk or employe of the city council during the term for which he is elected or appointed. It may be observed that it is the salary of such clerk which may not be increased or diminished. The term "salary," as used in this connection, has been construed as meaning a certain definite fixed amount and not to include fees for services, the extent and time of perfomance of which are uncertain. The term "compensation" which may include a salary, is thus construed to be a broader term than salary. It must also be noted that for this inhibition to apply to a clerk, he must have a term or definite period of employment.

So far as the inhibitions of section 4213 may apply to the facts stated in your inquiry, without specific facts being stated, it may be said that if in the resolution electing the assistant clerk of council a salary for such assistants was fixed and his duties were also fixed in that resolution, so as to include those services performed under section 3818 G. C., then such assistant clerk's salary could not be increased or diminished during his term and if such facts exist, the answer to your first question must be in the negative.

On the other hand, if the council, acting under section 4210, which authorizes the election of an assistant clerk and the fixing of his duties and compensation, fixed a salary, but did not fix the duties of the assistant clerk under section 3818, a different conclusion will result.

Section 3818 in part provides:

"A notice of the passage of such resolution (improvement resolution) shall be served by the clerk of council or an assistant upon the owner of each piece of property to be assessed in the manner provided by law for the service of summons in civil actions."

From other facts stated in your letter, it is inferred that your questions relate to non-charter cities, to which this opinion is accordingly confined.

Under the terms of the section last quoted, the service of such notice is made the duty of the clerk or his assistant and council is powerless to charge any other office or employe with this duty. It may, however, appoint or designate a certain clerk or assistant clerk, as the person to serve them.

Section 4210 empowers council to fix the duties of the clerk and assistant clerk, but this section, construed with other sections imposing certain statutory duties upon the clerk, must be understood as if it read that "the members of council shall fix their duties *in addition to those duties imposed by law.*"

In any event, whether the service be considered as a duty imposed by statute or by council under this section, it must be remembered that council alone has full authority to fix the compensation for the performance of both kinds of duties.

In the absence of further facts as to the contents of the resolution of the city council, fixing the duties and compensation of the assistant clerk, it is impossible to answer your question categorically. But in addition to the conditional answer above given, it may be added that if at the time council fixed the duties and compensation of the assistant clerk, it fixed a general salary and at the same time included in the duties of the assistant clerk the duty of serving the notices referred to in your question, then it would follow that the salary of the assistant clerk could not be increased or diminished during his term. This also is on the assumption that as to the form and manner of the resolution council proceeded according to law. The form of your question

indicates that your bureau desires information also as to the amount which would be payable to the assistant under the resolution, if it is held to be a valid exercise of the municipal power. The resolution provides for the payment of the sum of 25c for each notice *"written and served,"* and you inquire if the clerk may draw fees for writing the notice and an additional fee for serving the same.

This question must be answered by consideration of the terms of the resolution. The resolution provides not 25c for writing a notice and 25c for serving the same. This is not ambiguous and before the amount mentioned is payable, the notice must be *written and served.* To hold that the assistant clerk is entitled to a fee of 25c for writing and an additional fee of the same amount for serving the notice would be to construe the ordinance to read that he shall be entitled to 50c for each notice *written and served.* This construction would do violence to plainly expressed meaning of the resolution and cannot be adopted.

Therefore, this department is of the opinion that the assistant clerk is not entitled to additional fees for serving notices.

Your second inquiry questions the power of the city council to fix a per diem compensation for the clerk or his assistant under section 4210 G. C., supra. This section does not restrict the council in fixing such compensation to fixing it in any particular manner; in the exercise of its discretion it could fix a regular salary or a schedule of fees on what might be termed a "piece-work plan." The term compensation, as construed by the courts, includes the idea of a definite salary as well as fees for particular services. In view of the discretion vested in the council in this matter, no reason is apparent why it could not legally make a per diem compensation.

Your third question involves the legality of that part of the resolution of the council which sought to allow the assistant clerk his automobile expenses in serving such notices outside of the city of Marion.

It is the settled policy of this state, evidenced by numerous decisions of the supreme court, that compensation for public service can only be paid pursuant to laws authorizing such payment. (See opinion No. 85, dated March 1, 1919, directed to your bureau.) See also State vs. Maharry, 97 O. S., 272, where, after holding public money to be a public trust fund, the supreme court held:

> "Said trust fund can be disbursed only by clear authority of law."

The proper rule of construction, where the authority to expend public funds is in doubt, is plainly stated in the third syllabus of the case of State vs. Pierce, 96 O. S., 45, as follows:

> "3. In case of doubt as to the right of any administrative board to expend public monies under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power."

True, the city council is not an administrative board, but in the matter involved in this opinion is exercising a delegated power, and it is suggested would be held to the same rule.

The allowance and payment of expenses to public employes stand on no different footing. In Richardson vs. State, 66 O. S., 111, the court say:

> "To make such expenses an additional burden on the public funds would require a plain and unequivocal provision of the statute. An intention to do so will not be inferred."

Again on page 113, speaking of the personal expenses of a county commissioner, it was observed:

> "It is a fair inference that if it had been intended to reimburse the commissioner for expenditures of his character, the legislature would have expressed that intention in plain terms. It is well settled that the compensation of public officers cannot be enlarged, by implication, beyond the terms of the statute."

Section 4210 authorizes the council to fix compensation for the clerk and assistant clerk of council. The word "compensation" is understood to mean that which the state pays the employe in consideration of a given service and does not ordinarily include expenses. The courts of this state have repeatedly held that clear authority must exist before officials' expenses may be paid by the state. It follows that the council is without authority to allow or fix, as a charge upon the public funds, anything in addition to that authorized by law, and that payment to the assistant clerk of his automobile expenses, in serving such notices, is illegal.

Respectfully,

JOHN G. PRICE,
Attorney-General.

640.

INHERITANCE TAX—PROBATE COURT WITHOUT AUTHORITY TO COMPEL RECORDATION OF CERTIFIED COPIES OF FOREIGN WILLS AND OF APPOINTMENT OF EXECUTORS OR ADMINISTRATORS AS A CONDITION PRECEDENT TO EXERCISE OF JURISDICTION OF NON-RESIDENTS UNDER SAID LAW.

Probate courts are without authority to compel the recordation in their offices of certified copies of foreign wills and of the appointment of executors or administrators, as a condition precedent to the exercise of jurisdiction to determine the inheritance tax, in case of the estates of non-resident decedents.

COLUMBUS, OHIO, September 22, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge the receipt of your letter of September 4th enclosing a copy of your Form No. 1 which has been prescribed by the Commission for use solely in connecion with the determination as to the liability to inheritance tax of the succession to stock in Ohio corporations or other Ohio property where the same is part of the estate of a non-resident decedent.

You state that your practice is to have such petition prepared by the legal representatives (executor or administrator) of the estate and forwarded to the Commission, by whom the same is filed in the probate court of the county in which the corporation is located or in which the property may lie.

In this connection you make the following inquiry:

> "In the case of a decedent who died testate, must a certified copy of the will and of the appointment of the executor be filed and recorded in

the court whose jurisdiction is invoked at the time of or prior to the exercise of such jurisdiction?

In the case of a decedent who died intestate, must a certified copy of the appointment of the administrator similarly be filed and recorded?"

There is nothing in the inheritance tax law requiring a foreign administrator or executor, as a condition of applying to the probate court of the proper county for the determination of the tax, to have a copy of the evidence of his official authority, including in the case of an executor a certified copy of the will, filed and recorded in such court. A certified copy of the will is, of course, necessary in case of testate successions, and such copy is provided for in the Commission's blank form as evidence to accompany the petition.

Foreign executors and administrators are entitled to "commence and prosecute an action or proceeding in any court in this state" in their capacity as such, "in like manner and under like restrictions, as a non-resident is permitted to sue." (Section 10769 G. C.)

It is true that a foreign will when offered for probate must be recorded; but I am aware of no authority in the probate court to compel a foreign executor to offer a will for probate as a condition of assessing the tax.

It is the opinion of this department that probate courts are without authority to compel the recordation in their offices of certified copies of foreign wills and of the appointment of executors or administrators, as a condition precedent to the exercise of jurisdiction to determine the tax, in the case of the estates of non-resident decedents.

Respectfully,

JOHN G. PRICE,

Attorney-General.

641.

COUNTY CHILDREN'S HOME—WOMAN MAY BE LEGALLY APPOINTED TO BOARD OF TRUSTEES.

1. *A county children's home established under sections* 3077 *G. C., et seq., is an institution established by a political subdivision of the state, involving the interests or care of children, within the meaning of Sec.* 4 *of Art. XV of the Constitution of Ohio.*

2. *By reason of said constitutional provision, a woman or women may be legally appointed to a board of trustees of a county children's home.*

COLUMBUS, OHIO, September 22, 1919.

HON. WATSON H. GREGG, *Prosecuting Attorney, Cambridge, Ohio.*

DEAR SIR:—Your letter of September 8 is at hand, reading thus:

"May a woman or women be legally appointed to a board of trustees of a children's home in Ohio? Please let me have your opinion on this matter right away. See section 3081, pertaining to the appointment of trustees."

It is assumed that your query relates to the board of trustees of a *county* children's home, established under authority of section 3077, et seq., G. C.

Section 3081 G. C., to which you refer, reads as follows:

"When the necessary site and buildings are provided by the county, the commissioners shall appoint a board of four trustees, as follows: One for one year, one for two years, one for three years, and one for four years, from the first Monday of March thereafter. Not more than two of such trustees shall be of the same political party. Annually thereafter on the first Monday of March, the county commissioners shall appoint one such trustee, who shall hold his office for the term of four years and until his successor is appointed and qualified."

While you do not expressly so state, it is probable that your query is occasioned by the provision in said section that:

"Not more than two of such trustees shall be of the *same political party.*"

It is unnecessary, however, to give further consideraion to said language, in view of the provisions of Sec. 4 of Art. XV of the Constitution of Ohio, reading thus:

"No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector; provided that women who are citizens may be appointed as members of boards of, or to positions in, those departments and institutions established by the state or any political subdivision thereof involving the interests or care of women or children or both."

Relative to the question of who are "citizens," attention is called to Sec. 1 of Art. XIV of the Constitution of the United States, which says in part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

That a county children's home is an institution esablished by a political subdivision of the state, and involves the interests or care of children, clearly appears from a reading of sections 3077 et seq. G. C. A detailed discussion of these sections is deemed unnecessary. Attention is called particularly to section 3089 G. C., which says:

"The home shall be an asylum for children under the age of eighteen years, of sound mind and not morally vicious and free from infectious or contagious diseases, who have resided in the county not less than one year, and for such other children under such age from other counties in the state where there is no home, as the trustees of such home and the persons or authority having the custody and control of such children, by contract agree upon, who are, in the opinion of the trustees, suitable children for admission by reason of orphanage, abandonment or neglect by parents, or inability of parents to provide for them. In no event shall a delinquent or incorrigible child, be committed to or be accepted by such home. If an inmate of such home is found to be incorrigible, he or she shall be brought before the juvenile court for further disposition. Parents or guardians of such children shall in all cases where able to do so, pay reasonable board for their children received in such children's home."

That the Supreme Court of Ohio regards the constitutional provision above quoted (Sec. 4, Art. XV, Ohio Constitution) self-executing, appears from the case of State ex rel. McNamara vs. Campbell, 94 O. S. 403 and also from the case of State ex rel. Taylor vs. French, 96 O. S. 172. In the last mentioned case the court at p. 180 says:

> "* * the amendment adds a proviso 'that women who are citizens may be appointed as members of boards of, or to positions in, those departments and institutions established by the state or any political subdivision thereof involving the interests or care of women or children or both.' The proviso expressly concerns the appointment of women to the places named, and *authorizes the appointment of women who are not electors.*"

You are therefore advised that a woman or women may be legally appointed to a board of trustees of a county children's home.

Respectfully,

JOHN G. PRICE,
Attorney-General.

642.

TAXES AND TAXATION—WHERE CORPORATION TAKES SUBSCRIPTION TO ITS STOCK ON BLANK FORM TO WHICH IS ATTACHED NEGOTIABLE PROMISSORY NOTE—WHETHER OR NOT SUCH LEGAL CLAIMS SHOULD BE LISTED AS CREDITS TO BE TAXED—ALSO WHETHER STOCK SUBSCRIPTION IF NOT ACCOMPANIED BY PROMISSORY NOTE, IS TAXABLE CREDIT AGAINST COMPANY.

Where a corporation takes subscriptions to its stock on a blank form to which is attached a negotiable promissory note which the subscriber is also required to sign, and it is apparent from the provisions of both the note and the subscription that the former is not accepted in payment of the latter, the claim for the unpaid subscription constitutes the only taxable asset of the corporation and constitutes "personal property" from which its debts may not be deducted.

If the note should be detached and negotiated, the only effect of such transaction for taxation purposes would be to diminish or wipe out the taxable asset by crediting on the subscription contract the amount received by the corporation through the negotiation of the note.

COLUMBUS, OHIO, September 22, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of two letters from the Commission, one under date of August 16th enclosing copy of a stock subscription blank and copy of a promissory note used by a certain corporation in taking subscriptions to its capital stock, and requesting the advice of this department as to whether the promissory notes taken in this way are "legal claims and demands which should be listed by the company in determining the amount of its credits to be taxed;" and also "whether the stock subscription itself, if not accompanied by the promissory note, should be taxed as a credit against the company;" the other letter of date August 20th calls attention to the opinion of

my predecessor found at page 714 of the Opinions of Attorney General for the year 1918, which the Commission states was overlooked when the opinion was requested. In connection with this information the Commission requests the advice of this department as to whether or not the previous opinion is agreed to.

The previous opinion thus mentioned held in effect that unpaid subscriptions to the capital stock of a private corporation and sums due under executory contracts for the purchase of such stock made with the corporation do not consitute "credits" of the corporation from which its debts may be deducted, but constitute "personal property" of the corporation from which its debts may not be deducted. This opinion was based upon the definitions of the term "personal property" found in section 5325 of the General Code and the term "credits" found in section 5327 thereof. The one definition constitutes "the capital stock" of a corporation "personal property;" the other excludes from the debts which may be deducted by an individual taxpayer in making up his taxable "credits" "an unpaid subscription to the capital stock of a joint stock company." It was concluded that though such unpaid subscriptions are naturally debts of the subscriber and credits of the corporations, they have been otherwise classified for property taxation purposes, just as money secured by mortgage on real estate, bonds and money on deposit subject to payment on demand, all of which broadly considered are "credits," have been otherwise classified for such purposes.

With this conclusion and the reasoning in support of it I agree. The previous opinion, however, does not afford a complete answer to the question now submitted. In this case the corporation has not been content with the legal claim or chose in action arising on the making of an ordinary contract of subscription to its capital stock, but has in addition taken a promissory note of similar tenor, thus adding to the primary claim the element of negotiability.

The following is a quotation of the essential parts of the instruments thus employed:

"STOCK SUBSCRIPTION

"I hereby subscribe for and agree to take.....shares of the capital stock of.....company and agree to pay therefor.....per share, payable as follows: Twenty-five per cent. (25%) with this subscription and twenty-five per cent. (25%) quarterly until paid in full.

The certificate for the above stock shall be issued by * * when payment in full of this subscription is made.

* * *

No agreements or stipulations other than those printed hereon shall be binding upon the company. * * * The damages accruing upon a breach of this contract by the subscriber being difficult of ascertainment, it is agreed that twenty per cent. (20%) of his subscription shall, upon default by the subscriber, be retained by the company as liquidated damages, and that the stock covered by the said subscription may be issued and sold at public or private sale and the proceeds applied to the payment of any balance due upon said subscription or *said note;* any overplus after defraying all expenses of said sale to be returned to the subscriber. * *"

NOTE

For value received, I hereby promise to pay to The.....

company, or order, the following sums of money at the times herein specified, to wit:

$..... .....19....
$..... .....19....
$..... .....19....
$..... .....19....

with interest after maturity at 6% per annum, payable semi-annually.

Payable at the office of The.....company.

In case of failure to pay any installment of this note when due, this entire note shall become immediately due and payable without further action or demand on the part of the holder of the same, and I hereby make, constitute and appoint the president of The..... company, my true and lawful agent and attorney, hereby giving and granting to said agent full power and authority to issue and endorse said stock certificate in my name, for the purpose of effecting said sale, assignment and transfer.

....."

It further appears that when executed the stock subscription and the note are on a single sheet of paper, but separated from each other by perforations so that the note can be detached from the stock subscription.

The first question which arises is as to whether or not at the time of the execution of these instruments the note constitutes payment of the stock subscription. The general rule of law relative to payment which obtains in Ohio and most of the states is to the effect that the giving of a negotiable note is not regarded as payment either of a pre-existing debt or of one contemporaneously created, unless the intention to treat it as a payment affirmatively appears. Here there is nothing to overthrow this presumption; but on the contrary it is very clear from the recitals of both instruments that the subscription contract is to remain undischarged, notwithstanding the giving of the note. It is therefore unnecessary to investigate the question as to whether or not an Ohio corporation may lawfully receive payment in satisfaction of subscriptions to its capital stock by taking promissory notes.

It is clear therefore that in the inception of such a transaction the corporation possesses what might appear to be two distinct claims—one on the subscription contract and the other on the note. Yet there is but one debt or primary obligation subsisting between the parties, namely, that arising by virtue of the subscription. At the outset at least the note is a collateral undertaking apparently intended to secure the performance of the principal obligation.

Now it is believed to be clear that for taxation purposes the corporation would not be required to list the value of the subscription contract as personal property and also to list the value of the note considered as an independent chose in action among its taxable credits; for between the parties the note is not an independent chose in action; it is merely a negotiable promise to pay the original subscription and any defense available to the subscriber on the subscription contract would also be available to him on the note, as between the parties.

It follows from this that when the corporation has both the note and the subscription contract in the case of a given subscription the note is to be ignored for taxation purposes and the asset possessed by the corporation treated as personal property on the principles laid down in the former opinion.

The commission also inquires, however, regarding the course to be pursued when the corporation retains the subscription contract but has parted with the

note. The same answer is to be given to this question, qualified, however, by the statement that if the note has been negotiated by the corporation for a valuable consideration the proceeds of such negotiation should be credited on the subscription contract. This would be the right of the subscriber and it would follow that pro tanto his subscription contract would be discharged and his liability on such contract limited to the difference, if any, between the amount received by the company through the negotiation of the note plus his other payments and the total amount of the subscription. This, difference, to the extent the claim might be collectible, would, as assets of the company, constitute a part of its personal property for the purpose of taxation.

Respectfully,

JOHN G. PRICE,
Attorney-General.

643.

WORKMEN'S COMPENSATION ACT—AMENDMENT OF SECTIOIN 1465-79 G. C. INCREASING MAXIMUM WEEKLY PAYMENTS IN CASE OF TEMPORARY TOTAL DISABILITY—NOT APPLICABLE TO INJURIES RECEIVED PREVIOUS TO DATE SAID AMENDMENT BECAME EFFECTIVE —LIMITATION IN SECTION 1465-72a G. C. NOT APPLICABLE UNTIL LAW BECAME EFFECTIVE.

1. *The amendment of section* 1465-79 *G. C. which raises the maximum weekly payments in case of temporary total disability from* $12.00 *to* $15.00 *does not apply to injuries received previous to the date that said amendment became effective.*

2. *The limitation found in section* 1465-72a *G. C. does not apply to injuries received previous to the date that said section became effective.*

COLUMBUS, OHIO, September 22, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication requesting my opinion upon the following questions:

> "First, the amendment to section 1465-79 raises the maximum weekly rate of compensation from $12.00 to $15.00, but does not specifically state whether it will apply only to injuries actually received on and after August 14, 1919, or whether it will relate and apply to injuries sustained prior to the above mentioned date where disability continued beyond said date. We should also like to have your opinion as to whether such amendment will apply to cases of injury sustained prior to August 14, 1919, which may be re-opened after that date for the allowance of further compensation.
>
> We should also like to have your opinion on section 1465-72a, which contains no provision as to whether it will cover cases of injury sustained more than two years prior to August 14, 1919, or whether it will only apply to cases of injury which arise on and after August 14, 1919, and in which no report is made until more than two years after that date."

Your first inquiry relates to the amendment of section 1465-79 G. C. (108 O. L., 313), which is as follows:

> "In case of temporary disability, the employe shall receive sixty-six and two-thirds per cent. of his average weekly wages so long as such disability is total, not to exceed a maximum of fifteen dollars per week, and not less than a minimum of five dollars per week, unless the employe's wages shall be less than five dollars per week, in which event he shall receive compensation equal to his full wages; but in no case to continue for more than six years from the date of the injury, nor to exceed three thousand, seven hundred and fifty dollars."

Section 26 G. C. is pertinent to this question, and reads as follows:

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

In considering your first question in connection with this section, injuries received previous to the date the amendment of section 1465-79 became effective would be divided into two classes, to-wit:

> (1) Those injuries which were received prior to the date that said amendment went into effect and for which application for compensation had been made prior thereto.
>
> (2) Those injuries which were received prior to said date but for which no application had been made to you for compensation until after the date that said amendment became effective.

Section 26 G. C. just quoted, however, clearly provides that in either case this amendment shall in no manner affect the rights of the parties unless so specifically expressed by the legislature at the time the amendment was passed.

An examination of the act fails to disclose any such provisions and, therefore, in all cases of injury previous to the date that the amendment became effective compensation must be based entirely upon the law in effect on the date of injury, and the amendment will in nowise affect the amount of compensation due them. This is also true regardless of the time that their claim is considered by you, and it is true even though some of the disability is suffered after the said amendment became effective. This is because their rights are based upon the law in force at the time of the injury, which is the time when their right of action or to receive compensation accrues.

Relative to your second inquiry, as to the effect of supplementing section 1465-72 G. C. by adding section 1465-72a, I find that this supplemental section is as follows:

> "In all cases of injury or death, claims for compensation shall be forever barred, unless, within two years after the injury or death, application shall have been made to the Industrial Commission of Ohio or to the employer in the event such employer has elected to pay compensation direct."

We must again consider section 26 G. C. as quoted above in connection with this inquiry, and in addition thereto I find that the courts have passed upon the question of limitations of action. Previous to the time at which this amendment became effective there was no limitation at all placed by statute upon the time when an injured party might make application for disabilities sustained on account of an injury received in the course of and arising out of his employment. This amendment requires the application to be made to you, or to the employer in case the employer is carrying his own risk, within two years after the injury or death. I find that the authorities are unanimous in holding that a limitation is not placed upon an accrued right of a party by limiting the time in which such an action may be commenced.

> "Where defendant in an action to enforce stockholder's statutory liability died, pending suit, in October, 1895, and, without revivor in the name of the executor of deceased, appointed in October, 1895, a judgment was taken against deceased defendant May 20, 1899, an action by a receiver appointed to collect the judgments rendered in such stockholder's action, was filed May 16, 1900, against the heirs of such deceased judgment debtor, is within Sec. 6113, Rev. Stat., as it existed October, 1895, providing a four-year limitation within which suits might be brought against an executor, and not within the amended statute of April 8, 1898, reducing the limitation to two years."
>
> 1st Syllabus—Bevitt, Receiver vs. Diehl, 12 Ohio Dec., 383.

The right of an employe to file a claim was not limited to any period of time previous to the amendment. The new act places a limitation thereon. If this could be made to apply to injuries sustained previous to the date this amendment became effective, it might entirely deprive him of any right for the reason that he may have been injured more than two years previous to the date that the amendment became effective and all rights thus destroyed. The courts have held, however, that an amendment did not limit this existing right if the legislature did not attempt to do so at the time of enacting the legislation, which they did not do in this act.

I also find:

> "The right to bring and maintain such action (to recover for an injury) 'within four years,' having accrued before that date, under existing law, became a vested right, and is not curtailed, abridged, or in any way affected by subsequent legislation, unless it is remedial, and not then unless express provision therefor is contained in the amending act."
>
> 2d Syllabus—Shuman vs. Drayton, 14 O. C. C., 328.

And also.

> "Where rights have fully vested under a section these rights are not affected by a repeal of the section."
>
> State ex rel. vs. Purcell, 31 O. S., 352, at p. 358.

I also note that your letter refers to "August 14th" as the date upon which these amendments and supplements became effective. I find that these were a part of House Bill No. 424, which was filed in the office of the Secretary of State on May 16, 1919.

Article II, Section 1 of the Constitution provides:

"No law passed by the general assembly shall go into effect until ninety days *after* it shall have been filed by the governor in the office of the secretary of state, except as herein provided."

The term "except as herein provided" refers to emergency laws passed by the legislature. House Bill No. 424 was not an emergency act. In computing the time you cannot include the day it was filed with the secretary of state, and it must remain there ninety days before it becomes effective. Therefore, this act did not become a law until August 15, 1919.

Respectfully,

JOHN G. PRICE,
Attorney-General.

644.

APPROVAL OF BOND ISSUE OF THE VILLAGE OF WESTERVILLE IN THE SUM OF $3,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, September 23, 1919.

645.

APPROVAL OF BOND ISSUE OF VILLAGE OF ALEXANDRIA IN THE SUM OF $2,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, September 23, 1919.

646.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN MORROW AND LICKING COUNTIES.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, September 23, 1919.

647.

MUNICIPAL CORPORATION—CLERK OF COUNCIL—SALARY MAY NOT BE INCREASED OR DIMINISHED DURING TERM OF EMPLOYMENT.

The salary of the clerk of the city council may not be increased or diminished during the term of his employment, as such clerk, by reason of the amendment to section 486-8 (106 *O. L.*, 404) *is placed in the unclassified service and the inhibitions of section* 4213 *G. C. still apply to such clerk.*

COLUMBUS, OHIO, September 23, 1919.

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

GENTLEMEN:—Acknowledgment is made of your recent request for the opinion of this department as follows:

> "May the general salary of the clerk of council be increased or diminished during his term?"

Your inquiry not indicating that your question arises in a charter city, it is inferred, and this opinion is based on that inference, that your question relates to increasing or diminishing the general salary of the clerk of council in a non-charter municipality. Sections 4210, 4213 and 486-8 et seq. G. C., (106 O. L., 404) are pertinent.

Section 4210 G. C. provides that within a certain time the members of council shall elect

> "a clerk, and such other employes of council as may be necessary, and *fix their duties*, bonds and *compensation*. The officers and employes of council shall serve two years."

At this point it may be observed that the members of the council are here authorized to fix the duties and compensation of the clerk, and that his term is definitely fixed for two years. Section 4213 contains, among other things, this inhibition:

> "The salary of any * * * clerk or employe * * * shall not be increased or diminished *during the term for which he was elected or appointed.*"

The application of this statute may be said to rest upon three conditions, viz.: 1. Is the person a clerk or employe? 2. Does he or she have a salary? 3. Is he or she elected or appointed for a definite term?

The clerk of the council is an employe and is specifically named as a clerk. Under section 4210, supra, council is authorized not only to fix a salary for the clerk, but is authorized to fix the compensation, which is a broader term than salary. See Gobrecht vs. Cincinnati, 41 O. S., 72, where it is held:

> "Salary is compensation, but, under the section quoted (section 20, article II of the Constitution) compensation is not, in every instance, salary."

In numerous Ohio cases it has been held that where the salary fixing body has in fact fixed no salary for an officer, the same may be fixed during his term

of office, but that is not involved in your question, as the change of a salary presupposes the existence of a salary which can be changed, and in the case under discussion it is assumed that council has fixed a general salary for the clerk of council. So that we see the first two conditions above stated are established and if these two sections were the only law on this subject, no difficulty would be encountered in concluding that under section 4210 a definite term of two years is fixed by the statute itself and it would follow that the salary of the clerk could not be changed during the term for which he was appointed or elected.

However, after the enactment of these sections, section 10 of article 15 of the Constitution of Ohio was adopted. This is known as the civil service amendment and provides:

> "Appointments and promotions in the civil service of the state, the several counties, and cities, *shall be made* according to merit and fitness, to be ascertained as far as practicable, by competitive examination. *Laws shall be passed* providing for the enforcement of this provision."

This amendment is not self-executing and in 1913 (103 O. L., 698) the legislature, pursuant to its mandate, passed sections 486-1 et seq., providing for the civil service required by the amendment.

These sections continued in force until 1915, when they were amended in 106 O. L., 400. Section 486-1 in part now provides:

> "The term 'civil service' includes all positions of trust or employment in the service of the state and the * * * cities thereof. The term 'classified service' signifies the competitive classified civil service of the * * * cities * * *."

Section 486-8 in part provides.

> "The civil service of * * * the several * * * cities * * * shall be divided into the unclassified service and the classified service.
>
> "(a) The unclassified service shall comprise the following positions, *which shall not be included in the classified service, and shall be exempt from all examinations required in this act.* * * *
>
> "5. All officers and employes elected or appointed by either or both branches of the general assembly, and such employes of the city council *as are engaged in legislative duties.*" * * * * * * *
>
> "(b) The classified service shall comprise all persons in the employ of the * * * cities * * * *not specifically included in the unclassified service*, to be designated as the competitive class and the unskilled labor class."

It may be noted that appointments to and employment in the classified service shall, as provided in section 486-2, "be made only according to merit and fitness to be ascertained, as far as practicable, by competitive examination." So that employment in the unclassified service may be said not to be affected by the civil service act.

It is also to be noted that the repealing section of the amendment, like the original act, contains this provision:

> "All other acts or parts of acts, inconsistent with this act, be and the same are hereby repealed."

What effect has sections 486-1 et seq. upon sections 4210 and 4213 with refer-

ence to the term of the city clerk? The answer to this question determines the power of the council to increase or diminish the salary of the clerk of council, because if the last named sections remain unaffected by the civil service law, the clerk still has a term during which his general salary cannot be changed and, on the other hand, if the effect of the civil service law is to impliedly amend section 4210, in this that the clerk holds his office or employment during good behavior under the civil service, he has no definite or fixed term and it would follow that his salary may be increased or diminished without violating section 4213.

In an opinion found in Vol. 1, Attorney-General's Opinions for 1913, page 722, the attorney-general pointed out:

> "The general rule is that a later general law does not repeal an earlier special or local law. But there are many exceptions to the general rule."

On the same page it was pointed out that there were many exceptions to this general rule in this language:

> "In discussing this rule it is stated at page 1087 of volume 36 of Cyc.:
>
> "'* * * Where the clear general intent of the legislature is to establish a uniform system throughout the state, the presumption must be that local acts are intended to be repealed. So also where an act is passed to carry into effect a general amendatory provision of the constitution, all acts inconsistent therewith, although local, are repealed.'"

Before a later law may be said to impliedly repeal or amend an earlier law, there must be an irreconcilable repugnancy or such a revision of the whole subject matter of the former law as to clearly indicate the legislative intention to supersede the former law by the enactment of the latter.

After considering the effect of the adoption of section 10, article 15 (supra.), and the scope of the civil service legislation, no difficulty is encountered in concluding that the enactment of the civil service laws was intended to carry into effect the constitutional mandate as a substitute for former general laws in the matter of employment in the public service.

Section 4210 is therefore impliedly amended unless the civil service act specifically includes the clerk of city council in the unclassified service.

This narrows our inquiry down to the determination of the status of the clerk of city council in the civil service law.

Under the law prior to its amendment in 1915, the attorney-general, in the opinion above quoted, held that the clerk of city council was in the classified service, holding that under the law as it then existed, the clerk was not specifically included in the unclassified service under paragraph 7 of section 486-8. However, after the rendition of that opinion this section was amended to include in the unclassified service "such employes of the city council as are engaged in legislative duties."

The clerk is an employe of the council, but are his duties such as may be held to be legislative duties? The answer to this question is made more difficult by the fact that the clerk has what may be called two kinds of duties, viz., (1) those duties imposed by statute; for example, 3818 G. C., and may be termed statutory duties, and (2) those duties with which the clerk is charged by action of council under section 4210, which authorizes council to select clerks and other employes of council and "fix their duties, * * * and compensation," which may be termed additional duties.

With regard to the latter kind of duties, no definite opinion could be given as to their "legislative" quality without knowing exactly what duties the council had fixed in this regard. As to the former, however, numerous statutes impose certain definite duties upon the clerk, an instance of which may be cited in section 3818, which requires the clerk to serve copies of resolutions for improvements upon land owners, to show that the clerk of the city council is charged with certain duties incident to the exercise of council's legislative function.

The general assembly is conclusively presumed to have known that the city council is the municipal law-making body and, as such, could not delegate its law-making power to its clerk, and the use of the term "legislative duties" must be construed as to mean clerical duties pertaining to and in connection with the legislative function of council. It is also not without significance that this provision in section 486-8, as amended, immediately follows the inclusion and designation of employes of the general assembly in the unclassified service, and considering the effect of these existing statutes imposing statutory duties upon the clerk of the city council, in connection with the enactment of municipal legislation, the general assembly used the term "legislative duties," meaning to include the clerk of the city council in the unclassified service.

It follows from this conclusion that section 4210 is not impliedly amended or repealed by sections 486-1 et seq. and that the clerk of the city council has a definite term. The third condition for the application of section 4213, as above stated—a definite term—is therefore fulfilled and the inhibition of this section applies.

You are therefore advised that the general salary of a clerk of the city council may not be increased or diminished during his employment.

Respectfully,

JOHN G. PRICE,
Attorney-General.

648.

ROADS AND HIGHWAYS--FORFEITURE OF CONTRACTS—PROCEDURE TO BE FOLLOWED BY STATE HIGHWAY DEPARTMENT—SECTION 1209 G. C. DISCUSSED.

1. *The form of section* 1209 *G. C. that was in effect at the date of the State Highway Commissioner's granting state aid and ordering the making of plans for an improvement under sections* 1193 *to* 1223 *G. C., governs in the matter of removing a contractor from, and completing the work under, a contract for such an improvement.*

2. *The form of section* 1209 *G. C. that was in effect at the date of the State Highway Commissioner's entering into a contract for maintenance or repair by virtue of section* 1224 *G. C., governs in the matter of removing a contractor from, and completing the work under, a contract for such maintenance and repair.*

COLUMBUS, OHIO, September 24, 1919.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—A recent communication, signed by your predecessor, Hon. Clinton Cowen, reads as follows:

"We have a number of contracts which were let between the dates

of June 28, 1917, and August 26, 1919, on which we anticipate that it will be necessary for us to take over the work under section 1209 of the General Code of Ohio.

"I respectfully ask for your opinion as to whether the procedure to be followed in completing this work after forfeiture of contract will be in accordance with the provisions of section 1209 in force between the above mentioned dates, or whether the procedure must be in accordance with section 1209 as amended in House Bill No. 162 passed by the legislature on May 9, 1919, and filed in the office of the secretary of state May 28, 1919."

Said section 1209 as in force from June 28, 1917, to and including August 26, 1919, read as follows:

"If, in the opinion of the State Highway Commissioner, the contractor has not commenced his work within a reasonable time, or does not carry the same forward with reasonable progress, or is improperly performing his work, or has abandoned, or fails or refuses to complete a contract entered into under the provisions of this chapter, the State Highway Commissioner shall have full power and authority to enter upon and complete said improvement either by contract, force account or in such manner as he may deem for the best interest of the public, paying the full costs and expense thereof from the balance of the contract price unpaid to said contractor, and in case there is not sufficient balance to pay for said work, the State Highway Commissioner shall require the contractor or the surety on his bond to pay the cost of completing said work. It shall be the duty of the attorney-general or the prosecuting attorney of the county in which said improvement or some part thereof is situated, upon request of the State Highway Commissioner, to collect the same from the contractor, and the surety on his bond. When the State Highway Commissioner elects to complete said improvement by contract, such contract may be let either with or without competitive bidding, as the State Highway Commissioner may deem for the best interest of the public. When the State Highway Commissioner elects to invite competitive bids, he shall proceed in the manner provided by section 1206 of the General Code. Contracts for the completion of improvements may be let either for a lump sum or on a unit price basis. Before entering into a contract for the completion of an improvement, the commissioner shall require a bond with sufficient sureties, conditioned as provided in section 1208 of the General Code. When the contract is for a lump sum, the bond shall be in an amount equal to the contract price, and when the contract is let on a unit price basis the State Highway Commissioner shall fix the amount of the bond. When the State Highway Commissioner elects to complete an improvement by force account, and in so completing said improvement enters into an agreement with an individual, firm or corporation, to furnish material or machinery, employ labor or purchase material on behalf of the state, or supervise the work of construction, or do any or all of said things, the State Highway Commissioner may, if he deems it necessary, require said individual, firm or corporation to enter into bond with sufficient sureties in an amount fixed by the State Highway Commissioner, conditioned for the faithful performance of said agreement."

By provisions of House Bill No. 162, in effect as of August 27, 1919, said sec-

tion in the form quoted was repealed, and in its stead there became effective a new section bearing the same number and providing in substance that in case of removal of a contractor from his work by the State Highway Commissioner, such commissioner shall first offer to the contractor's surety the option of completing the work, and thereupon, if the surety does not avail himself of such option, shall advertise the uncompleted work for letting upon competitive bids at an estimate not to exceed the balance remaining from the original contract price after deducting the amount paid the original contractor. If no bid is received at or under such estimate, the commissioner is to re-estimate and re-advertise the uncompleted work upon competitive bids, and award the work for not more than such re-estimate, to the lowest and best bidder, who must give bond. If the estimated cost of completing a defaulted contract does not exceed five thousand dollars, the commissioner may complete the same by force account, or by a contract let without advertisement.

At the outset, it may be observed that the activities of the State Highway Department fall into three general classes:

(1) Improvements growing out of the granting of state aid on the application of county commissioners or township trustees, the procedure for which improvements is specified in great part by sections 1193 to 1223 G. C.

(2) Maintenance and repair by State Highway Commissioner as specified particularly in section 1224 G. C.

(3) Improvement by State Highway Commissioner as mentioned in section 1191 G. C. where both county commissioners and township trustees fail within the statutory period to avail themselves of their privilege of applying for state aid.

Proceeding to answer your inquiry so far as it bears upon contracts for improvements of the class first noted:

The series of sections 1193 to 1223 provides for the filing of an application for state aid by county commissioners or township trustees; action on such application by State Highway Commissioner; preparation of plans, etc., by State Highway Commissioner in case he grants the application; approval of such plans by county commissioners or township trustees; determination on the part of the commissioners or trustees to make the improvement (section 1200); advertisement by State Highway Commissioner for bids for the doing of the work; award of contract and taking of bond; removal of contractor as provided in section 1209 in case he fails to make proper progress; apportionment of cost to state, county, township and property owners; assessment against abutting or adjoining lands; and levying of tax and sale of bonds to provide funds for the work.

This brief outline is sufficient to show that the series of statutes named prescribes a definite and connected line of procedure from the beginning to the end of the improvement undertaking; and that the action provided for by section 1209 is a link in the chain of procedure. Hence, if the State Highway Commissioner finds that a contractor is not proceeding properly, such commissioner is at liberty to take such action only as is provided by the statute in force when the improvement proceeding became a pending proceeding; for it is provided by section 26 of the General Code as follows:

> "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of

such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

In the case of State ex rel. Scobie vs. Cass, 13 O. C. C. (N. S.) 449; 22 O. C. D. 208 (affirmed without report 84 O. S. 443), the Circuit Court of Cuyahoga county held:

"The addition, when it was incorporated into the General Code, of the words 'and shall be governed by the provisions of this chapter relating to the erection of public buildings in the county' to the act of March 8, 1906, providing for the appointment of a commission for the building of court houses, is not effectual to limit or restrict the powers of the commission as granted by the original act, where the work of such a commission in building a court house had been carried almost to completion before these words were incorporated into the original act; but in such a case the work should be completed under the provisions of the act as it originally stood."

The court say in the course of the opinion at page 456:

"If this conclusion must necessarily follow from the addition of the words to the statute above referred to, and now appearing in section 2338 for the first time, then, of course, there is nothing for this court to do but to allow the prayer of the petition. We, however, do not think the conclusion contended for by the plaintiff, from the change in the statute, necessarily follows. The commission came into existence for the purpose of building the court house. Preliminary to the appointment of four members of the commission by the court of common pleas the commissioners of the county had, under the act, determined to build a court house; had submitted to the electors of the county the question of issuing bonds for that purpose, which had been determined affirmatively by them, and then it was that the building commission was organized, pursuant to the terms of the statute, and the members appointed thereto by the court were to serve until the court house, as contemplated in the act, was completed. The commission thus created, had but one thing to do, to-wit, to build and complete the court house. The money was provided by the issuing of bonds for that purpose. The members of the commission appointed by the court took an oath and gave bond for the faithful and honest discharge of their duty. In case one of them died before the court house was completed, the judge appointed his successor, and the commission was authorized to employ architects, superintendents and employes, and to adopt plans and specifications and estimates, and invite bids and award contracts for the court house, and for furnishing heat, light and ventilating the same, and for sewerage thereof, and were given authority to determine all questions connected with that work until the court house shall have been completed and accepted by the building commission.

"Thus the statute had one purpose—one object. The commission's service was continuous, beginning with its appointment and ending when the court house was completed. It seems clear, thus viewed, that the work of the commission in carrying out the objects and purposes for which it was appointed, and the building of the court house down to its completion constituted within the meaning of section 26 of the General Code 'a proceeding' and that any amendment of the stat-

ute made after that *proceeding* was instituted and carried forward almost to completion, can in no manner affect the powers given that commission in the original act. Suppose, indeed, that the codifying act by some error had repealed the entire act creating the commission and authorizing the erection of the court house, can it be said that if that had been done the commission would have been absolutely without power or authority to proceed at all with the completion of the building, and that it must remain in its unfinished and unusable state? It would seem as though the very purpose and object of section 26 was to provide against just exactly such contingency, such repeals, and to permit the authority originally granted to be exercised down to the completion of the work which this statute itself originally authorized, and which was begun and largely completed before this amendment was made."

Attention is also called to an opinion of this department relating to a previous amendment of said section 1209 (Opinions of Attorney General for 1917, Vol II, p. 1231), wherein it was held:

"The provisions of section 1209 G. C., in reference to completing contracts under force account, do not apply to those contracts entered into prior to June 28, 1917, in so far as the new matter therein set out is concerned."

At p. 1234 of the opinion it was said, after quoting the then new form of section 1209:

"The provisions above quoted vary materially from the provisions of the old law. However, it is readily seen that none of these provisions have anything to do with the contract as it was originally entered into, but they have to do with matters which arise after the entering into of the contract, and at first thought it might seem that these provisions might be made applicable to a contract entered into prior to June 28, 1917, as well as those entered into after said date. It must be remembered that the sureties of the contractor also have the right to rely upon the provisions of the law as they were at the time the contract of suretyship was entered into. The matter above quoted has to do very materially with the rights of the surety under his contract, for the reason that he is compelled to pay the difference between the original contract price and the price at which the State Highway Commissioner is enabled to complete the work under force account.

Hence, it is my opinion that these provisions should not be followed in the matter of completing contracts under force account, in reference to those contracts which were entered into prior to June 28, 1917."

The foregoing observations give rise to the question: When does the improvement proceeding become a pending proceeding? Answer to that question may be found in the opinion of this department last above referred to, the fourth syllabus of which reads.

"The different steps connected with an improvement of a highway constitute a proceeding and under section 26 G. C. the provisions of the law as it existed prior to June 28, 1917, must be followed when the first step in reference to a particular road improvement, was taken prior to

said date. The first step in the matter of a road improvement is the approval by the State Highway Commissioner of the application of the county commissioners, or the approval of any part of the highways for which application is made, and his ordering the county surveyor to make plans, etc., of the part of the highway so approved."

In the course of said opinion the following language is used at p. 1236:

"Hence, if this approval of the State Highway Commissioner was made and his ordering the county surveyor to make plans, specifications, etc., for an improvement occurred before June 28, 1917, then your department would proceed under the provisions of the old law. But if these steps have been taken since the 28th day of June, 1917, the provisions of the new law would control in the matter of your further proceedings."

Therefore, as to contracts of the first class above mentioned, namely, those growing out of the granting of state aid as specified in sections 1193 to 1223 G. C., the following rule may be laid down in answer to your inquiry:

If the action of the State Highway Commissioner in granting the application of the county commissioners or township trustees for state aid and ordering the making of plans, etc., was taken at any time on and after June 28, 1917, up to and including August 26, 1919, then section 1209, as in effect between those dates, is the governing authority in the matter of removing a contractor and completing his work; while if such action of the commissioner were taken before June 28, 1917, then section 1209, as in force prior to that date, is the governing authority, even though the contract itself may have been entered into subsequent to June 28, 1917.

Referring next to contracts for maintenance and repair as specified in section 1224: This last named section contains the following provision (107 O. L. 133):

"* * The State Highway Commissioner may enter into a contract with any individual, firm or corporation which gives sufficient bond for the faithful performance of said contract, or with the county commissioners of any county or township trustees of any township in which such highway is situated for the repair and maintenance of such highway, or any part thereof, according to the plans and specifications provided by the State Highway Commissioner, or for the furnishing of the material or labor for such repair and maintenance, or the State Highway Commissioner may furnish the material or labor or both, and supervise the repair and maintenance. * * *."

Said section 1224 appears in the same chapter of the General Code as does section 1209; hence, we are brought back to the opening lines of said section 1209:

"If in the opinion of the State Highway Commissioner the contractor has not commenced his work within a reasonable time, or does not carry the same forward with reasonable progress, or is improperly performing his work, or has abandoned, or fails or refuses to complete a contract entered into under the provisions of this chapter, the State Highway Commissioner shall have full power and authority, etc."

This would indicate that section 1209 is applicable to contracts entered into under favor of section 1224.

However, it is doubtful whether a contract entered into by virtue of the last named section is a proceeding, or part of a proceeding, as contemplated by section 26 G. C. It is true that if in maintenance work there is used a material different from that originally employed, an assessment against adjoining lands must be made, but that provision is merely incidental to the evident purpose of the section, namely, to cast upon the State Highway Commissioner the positive duty of maintaining certain roads by such means and using such material as he may think proper, rather than to lay down a course of procedure to be resorted to for the purpose of bringing about the work of maintenance and repair.

At all events, whether section 26 is applicable or not, the first step prescribed by section 1224, when maintenance work is let out by contract, is the making of the contract; and bearing that fact in mind our inquiry is whether such a contract, if entered into between June 28, 1917, and August 26, 1919, is governed, in the matter of removal of contractor and completion of his work, by the form of section 1209 as it existed between those dates, or by its later form in effect August 27, 1919.

Section 28 of article II of the Ohio Constitution reads in part:

> "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts."

In addition, it is well settled in Ohio that a valid statute is as much a part of a contract as if the statute were set out therein in full.

> Robbins vs. Hennessey, 86 O. S. 181;
> Compton vs. Railway, 45 O. S. 592;
> Weil vs. State, 46 O. S. 450.

In this last named case, the supreme court quotes with approval the following from Cooley on Constitutional Limitations:

> "Contracts must be expounded according to the law in force at the time they were made; and the parties are as much bound by a provision contained in the law as if that provision had been inserted in and formed part of the contract."

It certainly may not be said as a matter of law that the repeal of former section 1209 and the substitution of its later form as of August 27, 1919, would not invade the rights of the contractor and his surety, if the later form were to be held applicable. In other words, the contractor and his surety might well say that they entered into the contract upon the basis that in case of failure of the contractor to complete it, the State Highway Commissioner should have the full liberty given him in section 1209 before its recent amendment of completing the contract in such manner as he might deem for the best interest of the public. As was said by Davis, J., in discussing the matter of competitive bids in the course of the opinion in Mackenzie vs. State, 76 O. S. 369, at page 374:

> "Every man has realized in his own experience that the lowest price does not always secure satisfactory results, and that some things which are most desired are not open to competition."

Therefore, the contractor and his surety have the right to insist on the terms of the contract as entered into, including the provisions of section 1209 as it existed when the contract was entered into; and they are not to be bound

by new stipulations put into said section subsequent to the entering into of said contract, even though such stipulations may relate only to procedure on the part of the State Highway Commissioner, and even though there might be some ground for the claim that such new stipulations were favorable rather than otherwise, to the contractor and his surety.

You are therefore advised as to contracts entered into in accordance with section 1224 G. C. at any time on and after June 28, 1917, up to and including August 26, 1919, that section 1209 as in effect between those dates is the governing authority in the matter of removing the contractor and completing his work.

As to contracts of the third class above mentioned—improvement by State Highway Commissioner where local authorities do not avail themselves of their right to apply for state aid. It has been learned, upon conference at your department, that contracts of this character are infrequent and that it is not likely that you will be called upon to take action toward removing contractors therefrom; for which reason no opinion is herein expressed as to the construction of section 1209 in connection with such contracts. It is suggested that should occasion arise, you submit the facts for opinion.

Respectfully,

JOHN G. PRICE,
Attorney-General.

649.

ROADS AND HIGHWAYS—SECTION 6927 G. C. NOT APPLICABLE TO IMPROVEMENTS UNDERTAKEN UNDER PROVISIONS OF FORMER SECTIONS 6956-1 TO 6956-16 G. C. REPEALED BY CASS ACT—BONDS ISSUED AND CONTRACT LET PRIOR TO PASSAGE OF CASS ACT—COMMISSIONERS MAY LEVY A TAX UNDER FORMER SECTION 6956-14 G. C.

1. *Section* 6927 *G. C., as it appeared in the Cass act* (106 *O. L.* 574) *and as it was amended in the White-Mulcahy act* (107 *O. L.* 69), *is not applicable to improvements undertaken under the provisions of former sections* 6956-1 *to* 6956-16 *G. C. repealed by the Cass act.*

2. *Where, under said former sections* 6956-1 *to* 6956-16 *G. C. an improvement was undertaken and the petition therefor granted prior to the passage of the Cass act, but bonds therefor were issued and the contract let after the passage of the Cass act—the resolution of the county commissioners for the issuing of such bonds containing a provision for a tax levy upon the taxable property of a township for its share—the county commissioners, in order to provide funds for the payment of such bonds, may now proceed, subject to general tax limitations, to levy a tax in accordance with former section* 6956-14 *G. C. upon the taxable property of the township for its share of the bonds.*

COLUMBUS, OHIO, September 24, 1919.

HON. MERVIN DAY, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date reading as follows:

> "In several townships of Paulding county there have been constructed certain pike road improvements under favor of section 6956-1

to 16. The petitions therefor were allowed and the proceedings begun before said laws were repealed. The work was done and assessments were made after this law was repealed.

A large part of the pike work done in this county in the last few years has been done in these several townships under the expectation that the county commissioners were authorized to levy upon all the taxable property of the township or townships affected, a tax levy not to exceed ten mills (see Sec. 6956-14) for the purpose of paying the township's share for the improvement. This year it will require a tax levy in these townships for said pike purposes, in an amount in excess of three mills.

1. Does the limitation of three mills mentioned in section 6927 G. C., enacted 106 v. 603 and re-enacted in 107 v. 101 apply in this situation to prevent the county commissioners this year from levying a sufficient tax to pay the township's portion thereof in these various townships?

The obligation already exists upon the county officials to levy a tax sufficient to pay for these pikes, of course with the understanding that they must keep within the general tax limitations provided by law.

A sufficient fund can be raised for this purpose if the three mill limitation is exceeded, and the levy can still be kept within the general tax limitations."

In response to a request for additional information you have stated in subsequent letters that funds for the improvements in question were provided by fourteen separate bond issues under section 6956-15, the dates of which several issues range from March 9, 1915, to May 1, 1917. The auditor's certificate mentioned in section 5660 was made and filed, and the contract for each particular improvement was let shortly after the date of the bonds issued for such improvement. In their several resolutions providing for the sale of bonds, the commissioners included provision for a levy for the township's share. The improvement work was let to be done on contract; but some of the work has not yet been done.

Sections 6956-1 to 6956-15 were enacted in 1910 as found in 101 O. L. 247, and the general purpose of the sections is indicated by the title of the act enacting them, namely, "To provide for the laying out, construction, repair or improvement of any public road or any part thereof, and for the straightening, widening, or altering, and draining of the same by the county commissioners." The entire series of sections was specifically repealed by the so-called Cass act (106 O. L. 574), effective as of the first Monday in September, 1915. Section 6956-10 as it appeared in said series provided that the cost of an improvement should be paid in certain proportions by the county, township, and owners of lands adjoining the improvement; while section 6956-14 as it appeared in said series read as follows:

"The said proportion of the cost and expense of said improvement to be paid by the county shall be paid out of the state and county road improvement fund or out of any road, road improvement or road repair fund of the county available therefor. If there are not sufficient funds available therefor, then for the purpose of providing by taxation funds for the payment of the county's proportion of the cost and expense of all the improvements made under the provisions of this act, the county commissioners are hereby authorized to levy upon all the taxable property of the county a tax or taxes not exceeding in the aggregate in any one year the sum of one mill upon each dollar of the valuation of the

taxable property in the county. Said levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force. For the purpose of providing by taxation funds for the payment of said proportion of the cost and expense of all improvements made under the provisions of this act to be paid by the township or townships in which such road improvement may be situated in whole or in part, the county commissioners are hereby authorized to levy upon all the taxable property of any township or townships in which such road improvement is situated, in whole or in part, a tax not exceeding ten mills in any one year upon each dollar of the valuation of the taxable property in such township or townships. Said levy shall be in addition to all other levies authorized by law, notwithstanding any limitation upon the aggregate amount of such levies now in force."

Section 6956-15 as it appeared in said series and as it was amended in 103 O. L. 574, provided that the county commissioners in anticipation of the collection of the taxes mentioned in section 6956-14, as well as in anticipation of the collection of assessments, might issue bonds of the county in the aggregate amount necessary to pay the respective shares of the county, township and land owners.

The broad authority granted the county commissioners in said section 6956-14 to levy up to ten mills in any one year on the taxable property of the township has been held in former opinions of this department to be subject to certain general tax limitations; but in view of the statement in your communication that a levy sufficient for the purposes in hand may be made within general limitations, there need be no discussion here as to such limitations. However, you are concerned with the effect of section 6927, as it appeared in the Cass act and as it was subsequently amended in 107 O. L. 101. The amendment is not material to a consideration of your inquiry, so that the section is quoted in its form as appearing in 107 O. L.:

"For the purpose of providing by taxation a fund for the payment of the proportion of the compensation, damages, costs and expenses of such improvement to be paid by the township or townships interested, in which such road may be in whole or part situated, the county commissioners are hereby authorized to levy a tax not exceeding three mills in any one year upon all the taxable property of such township or townships. Such levy shall be in addition to all other levies authorized by law for township purposes, and subject only to the limitation on the combined maximum rate for all taxes now in force."

This section, it may be noted in passing, is in form a statute making a grant of authority rather than imposing a limitation. Hence, the real purport of your question is whether, on the one hand, said section as between itself and said repealed section 6956-14 must be looked to as the source of authority in the commissioners for the making of a levy as to the improvements in question, or whether, on the other hand, there is any "reserve authority" in the commissioners to make a levy at this time by virtue of said repealed section—the fact to be borne in mind being that, according to your statement, the improvement proceedings were begun and the petitions allowed before the repeal of section 6956-14, but the actual physical improvement work being done after such repeal, and paid for out of the proceeds of bonds issued in some instances before and in others after the repeal.

In view of the holding of the Circuit Court of Cuyahoga County in the case

of Alexander vs. Spencer, 13 C. C. (n. s.) 475; 22 C. D. 306 (affirmed without report 83 O. S. 492) that a tax levy as distinguished from an assessment is not such a part of an improvement proceeding as to come within the scope of an enactment saving "pending proceedings" from the effect of a repeal, it would seem that if there is any "reserve authority" in the commissioners as above stated, the same must be found, if at all, in an express "saving provision."

It is evident that as a premise for holding that there is such reserve authority, there must be found in the commissioners authority to proceed with the actual physical improvement after the repeal. That they did have such authority was the view of this department as set forth in an opinion dated November 29, 1915, found in Opinions of Attorney-General for that year, Vol. III, p. 2266. Accompanying that opinion is the following syllabus:

> "Where road petitions were filed under section 6956-1 G. C., and the county commissioners under section 6956-2 G. C. acted favorably thereon prior to September 6, 1915, the roads covered by such petitions should be improved under the law in force at the time such petitions were filed and acted upon."

The concluding sentence of the opinion reads:

> "In other words, the commissioners, having made a favorable finding upon the petitions presented to them, a right now exists in the petitioners to have the improvements completed, and it is therefore my opinion, in answer to your specific question, that under the saving provision of section 303 of the Cass highway law, quoted above, it is the duty of the county commissioners to proceed with the construction of the improvements in question and to prosecute the work to completion under the law in force at the time the petitions were filed, and the resolutions making a favorable finding thereon adopted by the board of county commissioners."

Said opinion was referred to with approval in a further opinion of this department of date January 25, 1916, appearing in Opinions of Attorney-General for 1916, Vol. I, p. 129.

We are thus brought to a consideration of the saving provisions of the Cass act. These provisions read in part (106 O. L. 662):

> "Sec. 300. All proceedings for the construction, improvement or repair of stone, gravel or other roads in this state under the provisions of sections 6956-1 to 6956-16 inclusive, of the General Code, had since May 10, 1910, and all petitions granted, bonds issued, taxes and assessments levied or to be levied on account of such roads, and all contracts made or entered into, under the provisions of said sections, and any and all steps taken thereunder, are hereby declared and held to be valid, and boards of county commissioners or other officials shall have full power and authority to complete all roads in process of construction under said sections, and shall have full power and authority to levy taxes and assessments for such roads, and to sell bonds, to pay for the construction and improvement of all such roads, and to do any and all things contemplated by the provisions of said sections."
>
> "Sec. 303. This act shall not affect or impair any contract or any act done, or right acquired of, any penalty, forfeiture or punishment incurred prior to the time when this act or any section thereof takes effect, under or by virtue of any law so repealed, but the same may be

asserted, completed, enforced, prosecuted or inflicted as fully and to the same extent as if such laws had not been repealed. The provisions of this act shall not affect or impair any act done or right acquired under or in pursuance of any resolution adopted by the board of commissioners of any county, the trustees of any township, or the commissioners of any road district prior to the time of the taking effect of this act." * * *

It may be doubted whether these provisions of section 303 when taken alone, and considered in the light of the rule stated in Alexander vs. Spencer, supra, authorize the continuance of tax levies under the repealed sections; and on the other hand, it is true that the provisions of said section 300 are, generally speaking, curative provisions rather than saving provisions. However, the following clause appearing in said section 300 is plainly a saving clause:

"* * * and boards of county commissioners or other officials shall have full power and authority to complete all roads in process of construction under said sections, and shall have full power and authority **to levy taxes and assessments** for such roads, and to sell bonds, to pay for the construction and improvement of all such roads, and to do any and all things contemplated by the provisions of said sections."

What is the meaning of the words "all roads in process of construction," as here used? Do they refer only to the actual work of road building, or, do they also embrace roads, petitions for the improvement of which have been granted but on which actual building work has not yet been started? The following considerations, it is submitted, point clearly to the conclusion that an affirmative answer to the latter question, rather than to the former, is in accord with the legislative intent:

(a) The clause above quoted from section 300 contains the expression "shall have full power and authority to levy taxes and assessments for such roads, and to sell bonds, to pay for the construction and improvement of all such roads," which expression immediately follows and relates to the reservation of **power in the commissioners and other officials** to complete all roads in process of construction under said sections (that is, sections 6956-1 to 6956-16, referred to in your inquiry). At the time said section 300 was enacted, the so-called Burns law, embodied, as applicable to counties and townships, in section 5660 G. C., was in full force and effect, providing, among other things, that no obligation should be incurred unless the funds to pay the same were either in the treasury, or were levied and in process of collection. Hence, as to all roads to be constructed directly from tax income on which actual building had been begun when section 300 was enacted, the necessary funds, in legal contemplation, were either in the treasury, or a levy to produce such funds had been made, thus making unnecessary any saving clause as to such improvements; in which situation the conclusion follows that the legislature in making use of the expression last above quoted, must have intended to reserve to the commissioners authority to raise tax funds for improvements on which the building had not yet begun. This view is fortified by recurring to the latter part of the expression "and to sell bonds, to pay for the construction and improvement of all such roads;" for whatever may be the meaning of section 5660 as to whether or not bond issue funds should be in the treasury before the incurring of an obligation to be paid from such funds, the fact remains that the practice is to award an improvement contract only after bonds have been sold—a practice so rarely departed from as to warrant the conclusion that the legislature was fully cog-

nizant of it when using the language noted. It is also worthy of note that in the curative provisions of said section 300 the words "taxes and assessments levied *or to be levied*" are twice used.

(b) As has already been pointed out, the saving provisions of section 303 above quoted have been construed by this department, and have been accepted in practice, as meaning that road improvement proceedings begun before the repeal should be carried to fruition in the manner pointed out by the repealed section, even though actual building had not been begun at the time of the repeal; and if the provisions of section 300 be read with those of section 303, as thus understood, the conclusion is clear that the provisions first named are intended to keep in force the tax-levying power necessary to carry out the improvements.

(c) In an opinion of this department rendered to the Tax Commission of Ohio, of date September 11, 1916, Opinions of Attorney-General for 1916, Vol. II, p. 1532, it was held that neither the three mill limitation of section 6927 (which was enacted as section 106 of the Cass act and which is the section forming the basis of your inquiry), nor any other limitation of the Cass act, had any application to tax levies made under authority of former section 6945 G. C., repealed by said Cass act. An examination of said former section 6945 shows that it was very similar to section 6956-14 in authorizing a levy by county commissioners upon township property for certain road purposes. The opinion therefore would seem particularly in point here. It is true that all of the bonds mentioned in said opinion seem to have been issued prior to the passage of the Cass act; but inasmuch as it is entirely clear that by the saving clauses of the Cass act, county commissioners were vested with authority to issue bonds under section 6956-15 subsequent to the passage of the Cass act as to improvements in process of construction at the time of the passage of that act, there would seem to be no difference in principle, so far as concerns supposed Cass act limitations on tax levies, whether the bonds which such levies are to pay were issued before or after the passage of the Cass act.

The views thus expressed lead to the conclusion that section 6927 does not apply in the situation stated by you. However, in a letter of date subsequent to that in which your inquiry was submitted, you express some apprehension as to the validity of the proposed levies because of the fact that some of the contracts were not let until after the passage of the so-called White-Mulcahy act; and you call attention to the saving clause passed as part of that act and found in 107 O. L. 141—which clause reads in part:

> "This act shall not affect or impair * * * any obligation incurred prior to the time when this act takes effect, under or by virtue of any statute hereby amended or repealed * * * but the same may be completed * * * as fully * * * as if such statute had not been amended or repealed."

Inasmuch as this is a saving clause, it is not to be taken as providing by inference or implication that obligations may be incurred after the passage of the act of which it is a part, in no other way than in accordance with the terms of said act. In other words, the White-Mulcahy act did not expressly repeal the saving clause of the Cass act; and the saving clause of the former act may not be construed as in any way repealing or affecting the saving clause of the latter act.

You are therefore advised that under the facts as stated by you, section 6927 as it appeared in the Cass act and as it was amended in the White-Mulcahy act, is not applicable; and that your county commisisoners may, within general

limitations, proceed to levy in accordance with former section 6956-14 upon the property of an interested township for the payment of that township's share of bonds issued under former section 6956-15.

Respectfully,
JOHN G. PRICE,
Attorney-General.

650.

REMOVAL FROM OFFICE—PROCEDURE—WHEN SECTION 10-1 G. C. APPLICABLE—BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES EXERCISES NO OFFICIAL FUNCTION IN MATTER OF REMOVALS FROM OFFICE.

1. *The laws relating to removal from office prior to the enactment and exclusive of section* 10-1 *et seq. G. C., do not define causes or fix the procedure for removal from office which applies uniformly to all officers. Such causes for and procedure of removal are found in the various acts creating and defining the duties of such office..*

2. ***By the enactment of section*** 10-1 *et seq. G. C., in addition to the causes and procedure fixed and provided by earlier statutes, causes for the removal from office generally are fixed and procedure therefor is provided. The power of removal of state officers is vested in the governor of the state and in the court of appeals of the district where the state officer resides. The power of removal of the officers other than state officers, excepting upon complaint against a judge of the common pleas court, is vested in the judge of the court of common pleas of the county in which the officer against whom the complaint is filed resides. The power of removal of a common pleas judge from office is vested in the court of appeals of the district in which such judge resides.*

3. *The Bureau of Inspection and Supervision of Public Offices has no official power or function, as such, to exercise in the matter of removals from office.*

COLUMBUS, OHIO, September 24, 1919.

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

GENTLEMEN:—Acknowledgment is made of your recent request for the opinion of this department as follows:

> "We are respectfully calling your attention to section 283 of the General Code, together with section 286 G. C., in part as follows:
>
> 'Sec. 286. * * * If a report sets forth any malfeasance, misfeasance or gross neglect of duty on the part of any officer or employe for which a criminal penalty is provided by law, a certified copy thereof shall be filed with the prosecuting attorney of the county in which the offense is committed, and such prosecuting attorney shall, within ninety days after receipt thereof, institute criminal proceedings against such officer or employe. * * *"
>
> *Statement of Facts.* Much trouble is occasioned this department, owing to the fact that quite occasionally records necessary are not kept in any shape or form and in many cases where the conduct of the office from the standpoint of properly accounting for collections is most ques-

tionable, it is impossible to make a consistent audit as there is no foundation, the records not being there.

Question 1. In view of the provisions to which we have called your attention, as well as the constitution and general laws of the state, in whom may the power of removal from office be vested?

Question 2. Has this department any power other than report in the matter?

We are respectfully requesting your written opinion in answer to the above."

It is noted that your inquiries do not relate to removals from any specific offices, but rather to the removal from office generally.

Section 38, Article 2 (1912) of the constitution of Ohio, and sections 10-1 et seq. and 283 G. C., are of general application.

Section 38 in part is as follows:

> "Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, * * * for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution."

Section 283 G. C. provides that all public officers or employes who neglect to keep the accounts of his office in the form prescribed by the Bureau of Inspection and Supervision of Public Offices, or to make the reports required by such bureau, "shall be removed from office on hearing before the proper authority."

Until the enactment of sections 10-1 et seq. (infra) in 1913 (103 O. L., 851), there was no statute which defined the causes or fixed the procedure for removal from office which applied uniformly to all offices. Specific causes, however, and methods of removal from office, are found in the various earlier acts creating and defining the duties of each office and therefore no general rule is established by them.

For example, sections 2913, 3036, 3049, 2579, 2790 and 2713 G. C. relate to the removal of certain county officers.

In section 2913 G. C. the power of removal of the prosecuting attorney is lodged with the common pleas court on complaint of a tax payer.

In section 3036 G. C. provision is made for the removal of the clerk, sheriff or prosecuting attorney who neglects to comply with the four preceding sections "at the discretion of the court," meaning the common pleas court. In this section no procedure is outlined.

In section 3049 G. C. provision is made that certain county officers failing to make certain reports upon conviction, shall be "adjudged" guilty of misconduct in office, and be "immediately removed therefrom."

Without providing the procedure for such removal, nor specifically designating who shall exercise the power of removal, section 2790 provides:

> "Any person may bring civil action in the common pleas court for removal of the surveyor."

Section 2713 G. C. empowers the county commissioners to remove the county treasurer for embezzlement "upon examination of the county treasury."

In reference to municipal officers, there are likewise special provisions for the removal of specific officers. Under section 4268 G. C. the mayor may be re-

moved by the governor on complaint "on file in his office." Who may make the complaint is not specified in this section. Department heads may be removed under section 4265 by council on complaint of the mayor.

A more general provision as to municipal officers is found in section 4670 G. C., which places the power or removal for certain causes in the probate judge. The complaint under this section must be filed and sworn to by the electors of the municipal corporation.

However, by the adoption of section 38 (supra) in 1912, and the enactment of sections 10-1 et seq., a general rule for the removal of public officers was provided.

Section 10-1 defines misconduct in office and provides for the removal therefrom of "any person holding an office in this state, or in any municipality, county or any subdivision thereof."

Section 10-2 relates to the procedure for removal and requires that when the complaint is against an officer other than a state officer, the complaint shall "be signed in their own hand writing by at least twenty per cent of the qualified electors within the designated limits for which said officer was elected", and when the complaint is against a state officer, "it shall be signed in their own hand writing by at least six per cent of the qualified electors of the state."

Under this section complaints against state officers shall be filed with the governor or court of appeals of the district where the state officer resides, which officials have the power of removal. Complaints against officers other than state officers may be filed with the judge of the court of common pleas of the county wherein the officer against whom the complaint is filed resides, except that a complaint against a common pleas judge may be filed in the court of appeals of his district.

For the purpose of this opinion, it is not necessary to cite or quote further provisions of these sections, but it is sufficient to state that the power of removal is vested in the governor and courts, as above indicated, and that the procedure for hearing of the complaints is provided in this act, being section 10-1 to section 10-4, inclusive.

It is to be noted, however, that this act is cumulative to "other methods of removal now authorized by law," as provided in section 10-1.

Consideration of these various sections result in this answer to your first question:

1. The laws relating to removal from office prior to the enactment of and exclusive of section 10-1 et seq. G. C., do not define causes or fix the procedure for removal from office which applies uniformly to all offices. Such causes for and procedure of removal are found in the various acts creating and defining the duties of each office.

2. By the enactment of section 10-1 et seq. G. C., in addition to the causes and procedure fixed and provided by earlier statutes, causes for the removal from office generally are fixed and procedure therefor is provided.

The power of removal of state officers is vested in the governor of the state and in the court of appeals of the district where the state officer resides. The power of removal of the officers other than state officers, excepting upon complaint against a judge of the common pleas court, is vested in the judge of the court of common pleas of the county in which the officer against whom the complaint is filed resides. The power of removal of a common pleas judge from office is vested in the court of appeals of the district in which such judge resides.

Your second question is, has your department "any power other than report in the matter?"

In addition to those sections quoted in the discussion of your first ques-

tion, sections 283 and 286 G. C. are pertinent. Section 286, construed in connection with other sections of the act creating the bureau of inspection and supervision of public offices, clearly shows its auditing and supervising function. After the creation and organization of the department, provision is made for inspection and supervision, the making of findings and the filing and effect of such reported findings. Authority is given by this section to the law officers of the various subdivisions to enforce the findings of the bureau.

Section 286 G. C. in part provides:

> "If a report sets forth any * * * misfeasance or gross neglect of duty * * * for which a criminal penalty is provided by law,"

a copy thereof shall be filed with the prosecuting attorney, who is charged with the duty of instituting criminal proceedings.

Consideration of the purpose of the act creating the bureau and defining its powers and duties, together with the further fact that no authority is given to it, as such, to prefer or prosecute any charges for official misconduct, results in this department's conclusion that the bureau has no official power or functions, as such, to exercise in the matter of removal from office. It may be added, however, that with reference to initiating charges of misconduct, where the statute as to any given office does not require that the complainant possess residential, tax-paying or other special qualifications, the head of your bureau or any member thereof could initiate and prosecute a complaint for official misconduct in the manner provided in the statutes relating to each particular office.

Respectfully,
JOHN G. PRICE,
Attorney-General.

651.

BOARD OF EDUCATION—STATE AID—BOARD MUST BE DILIGENT IN SEEING LEVIES MADE IN PROPER PROPORTION AND THAT THE ACTION OF BUDGET COMMISSION PRESERVES PROPER PROPORTIONS TO RECEIVE STATE AID—COUNTY AUDITOR HAS NO AUTHORITY TO APPORTION TAX EXCEPT AS DETERMINED BY ACT OF BUDGET COMMISSION—WHERE BOARD OF EDUCATION HAS PLACED IN ITS TAX LEVY FOR SCHOOL PURPOSES, A PROPORTION OF TWO-THIRDS OF TOTAL AMOUNT TO TUITION FUND, IT IS DUTY OF BUDGET COMMISSION TO MAINTAIN SAME WHERE STATE AID DESIRED FOR WEAK SCHOOL DISTRICT—WHEN SCHOOL DISTRICT DISQUALIFIED.

1. *A board of education which desires to apply for state aid must be diligent in seeing that its levies are made in the proper proportions, inasmuch as the action of the county budget commission is involved and it is incumbent upon the board of education to present the facts to that tribunal and see to it that the rights of the board are preserved; and neither the board of education of a weak school district nor the county auditor has authority to distribute or apportion the tax yield among the funds of the district in any other proportion than that determined by the act of the budget commission.*

2. *Where a board of education has placed in its tax levy for school pur-*

poses, a proportion of two-thirds of the total amount to the tuition fund, it is the duty of the budget commission to maintain the same proportion in those cases where the board of education desires state aid for a weak school district; but where the budget commission has failed, in the adjustment of the levies, to observe the proper proportion as between the levy for tuition fund and the remainder of the levies, such school district is thereby disqualified to receive state aid as provided for in section 7595-1 G. C.

COLUMBUS, OHIO, September 24, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgement is made of the receipt of your request for an opinion on the following statement of facts:

> "A very unfortunate situation is developing in many of the weak school districts in the state of Ohio, and we are presenting the facts to you for opinion as to the law.
>
> A board of education made out its annual budget calling for a levy for its several purposes of tuition, contingent, building and sinking funds. In making its adjustments the budget commission found that it was not possible to allow the school district the total levy for which it asked. The budget commission in making its adjustments thoughtlessly, or perhaps not being conversant with the provisions of the law governing state aid to weak school districts, allowed to such district a levy for tuition purposes which was less than two-thirds of the total and for other purposes levies which aggregated more than one-third of the total. When the county received the yield of this levy, the county auditor, in making his distribution of the tax yield on the school distribution ledger, followed the adjustments made by the budget commission, and the clerk of the board of education carried that apportionment upon the school cash book, so that the school district carried upon its books less than two-thirds of the total yield required by the state aid law to be placed in the tuition fund.
>
> This condition which is developing in more school districts as each day goes by is deplorable, because under the state aid statute such districts are barred from receiving any state aid, and in some instances nearly one-half of the tuition fund will have to come in the way of state aid if the schools of the district are to be maintained.
>
> While we have been inclined to believe that the special provisions of the state aid to weak school districts' law controlled the more general provisions of the other statutes governing distribution of funds, and that it is within the power of the board of education and its duty to make a distribution of its funds in such cases in accordance with the state aid statute, ignoring the action of the budget commission in that regard, we do not care to trust to our own judgment in this matter and desire that you shall advise us whether or not it is within the power of boards of education in weak school districts, which qualify under the state aid law, to readjust the apportionment of the tax yield upon the books of the school board so that two-thirds of the yield shall be placed in the tuition fund.
>
> Also, we would be pleased if you would advise us—in the event you find it is the duty of the board of education to make this readjustment—whether or not the county auditor can be directed to make the

apportionment of the funds on his school distribution ledger correspond to the reapportionment made by the board of education."

This statement of facts raises three questions of law, which should be separately considered as follows:

1. May the board of education of a weak school district, or a county auditor, or either of them, distribute or apportion the tax yield among the funds of the district in any other proportion than that determined by the act of the budget commission, assuming the action of the budget commission to be valid?

2. In case at the time levies are made and the budget commission was engaged in the adjustment of them, it is anticipated that an application for state aid will be made by a school district, covering either or both of the years for part of which the levy is made, has the budget commission any duty to perform in adjusting the amounts to be raised by taxation for the several purposes allowed by law growing out of such anticipated fact?

3. Assuming a negative answer to both of the preceding questions, does the budget commission's failure, in the adjustment of the levies, to observe the proper proportion as between the levy for tuition fund and the remainder of the levies, disqualify the district to receive state aid?

It will be noted that the first question involves an assumption with respect to the answer to the second question. It has been found most convenient to conduct the discussion in this form.

We are assuming, therefore, in considering the first question, that under existing laws (other than the Freeman law passed by the last session of the general assembly, which it is presumed is not involved in your inquiry) the budget commission has no duty to perform in adjusting the levies in a school district growing out of the fact that the school district is or expected to be "weak"; so that the budget commission is absolutely untrammeled in the exercise of its discretion and may adjust the levies, so far as necessary, to enforce the limitations of the Smith one per cent law, so called, as it deems best.

The question now is as to whether or not, after such adjustment has been made, the county auditor must be guided in his computation of rates for the several purposes, by the action of the budget commission, and in its distribution of taxes to the various funds of the school district by the yield of the rates so computed; and whether or not the board of education of the district, after receiving the distribution resulting from such levies can, because of the necessity for state aid, redistribute the funds by transfer or otherwise on any other bases than that so determined, and so affect retroactively the "levies" which have been made.

The question thus phrased involves an interpretation of the following sections of the General Code:

"Sec. 7595. No person shall be employed to teach in any public school in Ohio for less than fifty dollars a month. When a school district has not sufficient money to pay its teachers such salaries as are provided in section 7595-1 of the General Code, for eight months of the year, after the board of education of such district has made the maximum legal school levy, *at least two-thirds of which shall be for the tuition*

fund, then such school district may receive from the state treasurer sufficient money to make up the deficit."

Sections 7586 and 7587 are as follows:

"Sec. 7586. Each board of education, annually, at a regular or special meeting held between the third Monday in April and the first Monday in June, shall fix the rate of taxation necessary to be levied for all school purposes, after the state funds are exhausted."

"Sec. 7587. Such levy shall be divided by the board of education into four funds: First, tuition fund; second, building fund; third, contingent fund; fourth, bonds, interest and sinking fund. A separate levy must be made for each fund."

Sections 7586 and 7587, however, are not in force at present, having been supplanted by the Smith one per cent law, which is an act of more recent enactment. Without quoting the provisions of this act in detail, it is sufficient to state that the original levying authorities, such as boards of education, city councils, county commissioners, etc., no longer have the power to fix rates of taxation. Instead they are required by section 5649-3a to submit annual budgets to the county auditor, setting forth their needs for each purpose for which taxes may be levied for the incoming year. These budgets are then to be paid before the budget commission (section 5649-3a) and that commission is to examine all the budgets calling for the levy of taxes within the limits of any taxing district, for the purpose of seeing whether or not they call, in the aggregate, for the levy of taxes at rates in excess of those allowed by law. If it appears that such is the case, it is the duty of the budget commission to reduce the items in such budget. The statute provides:

"In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein."

The same section goes on to provide:

"When the budget commissioners have completed their work they shall certify their action to the county auditor, who shall ascertain the rate of taxes necessary to be levied upon the taxable property therein of such * * * taxing district."

In other words, the budget commission fixes the amounts and certifies its action to the county auditor, who computes the rates according to the estimated duplicate. The duplicate is then made up and the taxes are collected. Then it becomes the duty of the county auditor, under section 7603 G. C., to distribute the proceeds of the levies as therein provided. The section is as follows:

"The certificate of apportionment furnished by the county auditor to the treasurer and clerk of each school district must exhibit the amount of money received by each district from the state, the amount received from any special tax levy made for a particular purpose, and the amount received from local taxation of a general nature. The amount received from the state common school fund and the common school fund shall be designated the 'tuition fund' and be appropriated only for the pay-

ment of superintendents and teachers. Funds received from special levies must be designated in accordance with the purpose for which the special levy was made and be paid out only for such purpose, except that, when a balance remains in such fund after all expenses incident to the purpose for which it was raised have been paid, such balance will become a part of the contingent fund and the board of education shall make such transfer by resolution. Funds received from the local levy for general purposes must be designated so as to correspond to the particular purpose for which the levy was made. Moneys coming from sources not enumerated herein shall be placed in the contingent fund."

In performing his duties under this section, as well as those under section 5649-3c, the county auditor acts purely in an administrative capacity. He must compute such rates under the latter section as correspond to the amounts fixed by the budget commission for the several items in the budget; he must make his apportionment in accordance with the yield of the several rates which he has so computed. Assuming the action of the budget commission to have been correct in a given instance, therefore, it is clear that the county auditor has committed no error when he does these things.

Your letter suggests the possibility of holding that the state aid law (prior to its amendment by the Freeman act) constitutes an exception to the general rule thus laid down. No warrant of law is found for such a statement. It is true that section 7595, above quoted, provides that "at least two-thirds" of the maximum legal school levy "shall be for the tuition fund." This phrase, however, is found in a clause which deals with the action of the board of education. It is not equivalent to a command that the county auditor shall always apportion at least two-thirds of a weak school district tax yield to the tuition fund. Whether or not it is binding upon the budget commission is a question which will be hereinafter considered. It is not, however, binding upon the county auditor. That much is clear.

Postponing, therefore, some of the discussion which might appropriately come under this heading, to a consideration of the second question, it is concluded, as the opinion of this department, on the first part of the first question, as above stated, that the county auditor, in his ministerial capacity, has no duty to perform with respect to the distribution of the levies of a weak school district other than what he would have to perform with respect to the levies of any other school district. Whether or not the district is qualified or disqualified for state aid is a question which does not affect his duty.

The latter part of the first question, as stated, pertaining to the action which may be taken by the board of education, bears close relation to the third question, as above framed. At the present time, however, the following statement will suffice as an answer to it; whatever may be the power of the board of education to transfer from the contingent or other fund to the tuition fund, so as to produce an ultimate distribution of funds which will leave at least two-thirds of the total yield from general taxes to the credit of the tuition fund, such action can in no wise affect what has preceded for the purposes of section 7595 G. C. That section does not say that in order to qualify for state aid a school district must merely exhibit a statement of accounts showing that two-thirds of the money in its treasury and arising from local taxation is in the tuition fund; the qualifying action under section 7595 G. C. pertains to the original levy. It is the weakness of the whole scheme of state aid that nothing is provided therein as to the handling of the funds after they are once in the treasury of the school district. The sole question under the section is as to the proportions in which the levies were made. It is clear that a transfer of funds,

after distribution, cannot have the legal effect of changing the levies that were actually made.

For all the foregoing reasons, it is the opinion of this department that the fact that a school district is weak or intends to apply for state aid is one which has no influence upon the action of the county auditor in computing tax rates, nor upon his action in distributing the proceeds of such rates to the school district; and that any action which a board of education might take after distribution by way of transfer, or otherwise, to bring into the tuition fund a proportion of the entire yield from the general property taxes, equal to at least two-thirds of the whole, cannot have any retrospective effect as to the levies themselves and the proportions in which they were made for the purposes of section 7595 G. C. All this is upon the assumption previously stated, that the budget commission has it within its power to ignore the fact that a school district is weak or intends to apply for state aid when it is making its adjustment under section 5649 G. C. This question will be next considered.

The fundamental and outstanding characteristic of section 7595 G. C. is that it describes a condition upon which a school district may obtain state aid. It has, therefore, not the force and effect of a binding law as to any one. Suppose the budget commission were not in existence at all and the machinery of levying taxes was the same as it was before the Smith law was enacted, and when the state aid law was passed it was not obligatory upon a board of education to ask for state aid at that time and in that state of the law. It might disqualify the district for state aid by failing to make levies in the proper proportions which originally were three-fourths for tuition fund purposes and one-fourth for other purposes. That such action would have the effect of disqualifying the district for state aid would not affect the validity of the levies made nor the power of the county auditor to ignore such levies and either actually make the levies on the qualifying basis or distribute them on such basis under section 7603 G. C. The auditor would be a ministerial officer and would be obliged to follow the action of the board of education. In other words, section 7595 does not now and never did provide that any particular board of education should make its general levies in any particular proportion. Read in connection with the remainder of the state aid law it simply had the effect of providing that if the board of education of a school district should intend or desire to apply for state aid, it must lay the foundation for a successful application by doing certain things, one of which was the making of its levies in the prescribed proportion. This relation of section 7595 G. C. to the powers and duties of the board of education is at least clear. However, in the cases described by you the boards of education have taken the initial step by making their estimates of needs for budgetary purposes in the proper proportions indicated by section 7595. The question now arises as to whether or not the board having done so, the budget commission, in scaling down the levies, must observe these proportions. It will be borne in mind, in this connection, that the law does not recognize any such thing as a school district with a permanent "weak" status. In point of fact there doubtless are many districts in the state which are perennially in this condition. But the condition of any such permanent class is not taken cognizance of by the law. The question of the necessity for state aid is one which comes up *de novo* each year for each district. It cannot be assumed as a matter of law that any district in any year is necessarily going to be obliged to ask for state aid. In fact it cannot be assumed as a matter of law that when a school district makes its levies in the first instance, by submitting its annual budget, such budget is necessarily going to be reduced by the budget commission; that would depend upon the needs of the other taxing districts levying over the same territory as well as the amount of the duplicate.

Now a school district makes its levies by the submission of the budgetary estimates by the board of education in the month of June. These estimates relate to the last half of the school year commencing the following March and the first half of the succeeding school year commencing in the following September. When an application for state aid is made in the month of October, or between that month and December of any year, as the law now provides, the estimated deficiency of the district is based upon the actual yield of the last half of the tax levied a year and four months previous and the yield of the first half of the tax levied about four months previous to the making of the application. In other words, it would seem that two annual levies would have to be taken into consideration in determining the qualification of the district for state aid. This is a fact apparently not taken into account by the framers of the state aid law, which seems to assume that the year from which levies are made is the same from which state aid is rendered. This, however, is not the case and never was.

Without going further into detail, it is sufficient to observe that the power of the budget commission under section 5649-3c is discretionary. That section is of later enactment than the original state aid law, though the latter has since been amended in other particulars.

As stated by Hon. Timothy S. Hogan, who has considered this question in an opinion found in the annual report of the Attorney General for the year 1912, Vol. 1, page 89, the act of levying on the part of a board of education is not complete until the budget commission has acted. That opinion held that there were two steps as to which the (then) three-fourths test of section 7595 would have to be applied: (1) the action of the board of education itself, and (2) the action of the budget commission. Failure of either of these bodies to observe the proper proportion would disqualify the district for state aid. The disposition should be to give a liberal interpretation to the state aid law in order to effect the largest measure of relief. In view, however, of the amendment of the state aid law by the Freeman act, which is designed to provide for all matters concerning which you inquire, it is felt there is no longer any necessity for stretching the law, if such a course of conduct was ever justifiable.

What, then, was the duty of the budget commission? It had discretionary power; its action was a part of the machinery for levying taxes; section 7595 G. C. applies to it *just the same* as it applied to the board of education—viz., by its provision to the effect that if certain proportions were not observed, the district would be disqualified to receive state aid. An intention on the part of the board of education to apply for state aid, and its own action in observing proportions marked out in section 7595, would undoubtedly give to the school district represented by the board a right to have such intention and such fact considered by the budget commission. An inadvertent oversight on the part of the commission in this matter would be a mistake which the commission, were it in session, would have a right to correct. A deliberate ignoring of such a condition would be, in the opinion of this department, an abuse of discretion of a sufficiently arbitrary nature to entitle the board of education to an appropriate remedy. But when the budget commission has completed its work and the auditor has computed his rates, and the taxes have been collected and the apportionment to the school district made, it is in the opinion of this department too late to correct such matters. In other words, the action of the board of education, in attempting to qualify itself for state aid by submitting a proper annual budget, as measured by the requirements of section 7595, does impose a duty upon the budget commission to observe these proportions in making its adjustments. But this is a duty which must be discharged by the budget commission. Should the budget commission fail to discharge that duty, no one

else can be substituted for it and no other official action can have the efficacy that the commission's action would have. The only remedy must be worked out through the action of the commission.

This conclusion is irresistible because if the allowance for the tuition fund is to be increased, that of some other fund or funds must be correspondingly reduced in order to get the total within the limitation of the law. Such a reduction might be made in the contingent fund or in the building fund, or in some levy made by some other district, such as a municipal corporation levying within the same territory. No officer or tribunal, other than the budget commission, is empowered to select the levy or levies which must be reduced in order to increase the tuition fund levy of the school district. The county auditor cannot take such action, a court could not do it, the board of education itself is without power to do it. There is therefore no escape from the conclusion that whatever action is taken to remedy an inadvertent, mistaken or erroneous determination of the budget commission of the kind under consideration, must be taken by that body itself.

The answer to your second question is, therefore, that while the budget commission does have a duty to perform, under circumstances like those detailed by you, if that commission should not discharge its duty, its failure to do so does not amount to an error of such a ministerial character as can be corrected by the purely ministerial action of the county auditor, or by any one else.

This conclusion introduces the last question, which is as to whether or not the circumstances stated in your letter disqualifies the board of education from receiving state aid. It was the conclusion of Mr. Hogan, in the opinion cited, that such would be the case. For the reasons supporting that conclusion, I am referring you generally to that opinion.

In the opinion of this department a board of education, which desires to qualify its district for state aid has a continuing duty to perform. In the first instance it must make its budget estimates in the proper proportions. In the second instance it must advise the budget commission of its purpose in doing so. The budget commission's action is taken after public hearing and investigation. If the board of education allows the matter to go by default without advising the budget commission of its intention or need; or if having presented its needs to the budget commission it allows the budget commission to make such a distribution of the levies as will disqualify it for state aid without availing itself of such remedies, before the budget commission or in the courts, as it may have, it may fairly be said that it is the action of the board of education, as much as the action of the budget commission, that has had the effect of disqualifying the district. In other words, while the board of education has not direct or immediate control over its levies, it is a party in interest before the budget commission; it has its day in court, so to speak; and if it permits the budget commission to complete its work and to become *functus officio* without objection to a result of disqualifying a district to receive state aid, such a result is, in a measure at least, its own fault.

A board of education which desires to apply for state aid and intends to do so, must be diligent in seeing that its levies are made in the proper proportions. Inasmuch as the action of another tribunal is involved, it is incumbent upon the board of education to present the facts to that tribunal and to see to it that its rights are preserved.

This is, of course, precisely the policy that is embodied in the Freeman act, to which reference has been made. Without quoting that measure it is sufficient to observe that the board of education must, under its provisions, notify the budget commission that it intends to apply for state aid, as the very first

step in its qualification to receive such aid. Thereupon the budget commission becomes subject to certain duties that, as has been held in this opinion, the commission is not subject to under pre-existing laws; but such duties are after all different only in kind from the duty which the budget commission has previously rested under in the same behalf. It still remains incumbent upon the board of education to see to it that the budget commission's work is properly done.

In this same connection attention is called to the fact that the tax commission has always exercised, without question, the power to reconvene the budget commission when its work was not properly done.

In a personal conference with the auditor's department it was indicated that the number of schools in the state that would be affected on account of failure to secure state aid through a strict construction of the law would be limited to two or three schools and that possibly none of this limited number would suspend operations because of other financial arrangements made following the "two mill levy" permitted under Senate Bill 187.

Every school district that is legally entitled to state aid should receive it and no schools should be closed during a term where it is at all legally possible to keep them going, and the state aid law should be construed as liberally as possible, that the intent of the legislature in assisting weak school districts to maintain their schools be carried out. But the local board of education desiring to be considered for state aid for its district should see that the proportion of two-thirds for tuition, which they originally set aside in their action on the total tax levy for school purposes, is later maintained by the county budget commission.

It is the opinion of the Attorney-General, therefore, that under the facts stated by you no relief is open under the state aid law to the districts which find themselves in the plight referred to therein.

Respectfully,
JOHN G. PRICE,
Attorney-General.

652.

WHEN STEAM BOILER OR ENGINE OF MORE THAN THIRTY HORSEPOWER IS BEING "OPERATED"—QUESTION OF MECHANICAL ENGINEERING—SECTION 1047 G. C. CONSIDERED.

1. *The question arising under section* 1047 *G. C. as to when and under what circumstances a steam boiler or engine of more than thirty horsepower is being "operated", is a question of mechanical engineering, rather than of law.*

2. *It appearing that the practical construction given to the word "operated" by the Industrial Commission, Division of Steam Engines, is in accord with the opinions of experts in mechanical engineering, it is suggested that such construction be adhered to until the same is proved invalid by court decision to the contrary.*

3. *Whether such a boiler or engine is being operated "directly in charge of a duly licensed engineer", as required by said section* 1047 *G. C., depends upon the question whether such engineer is in such a relation to the boiler or engine that he*

can give it the care and attention necessary to its operation with entire safety to life and property.

COLUMBUS, OHIO, September 24, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date reads as follows:

> "Enclosed find copy of letter from Malcolm Jennings, secretary of the Ohio Manufacturers' Association, with reference to section 1047 of the General Code.
>
> Will you please let us have your construction of this statute, and oblige?"

The letter from the executive secretary of the Ohio Manufacturers' Association, to which your letter refers, reads in part as follows:

> "Some differences have arisen between the officers of the Bureau of Examination of Stationary Engineers and citizens of Ohio with relation to the construction of the above statute and the differences hinge upon the words 'operate', and also upon the words 'unless it is directly in charge of a duly licensed engineer'. The Bureau, which is a subordinate branch of your department, through its officers, has been holding that 'operation' with respect to a steam boiler applies whenever there is a fire in such boiler without reference to the pressure carried or with reference to the fact that the plant is not in operation.
>
> To be more specific, the Bureau has held that a licensed engineer or boiler operator must be in charge immediately of any boiler under which there is a fire. In many plants it is the practice during the night when the plant is not in operation to maintain a small fire under the boilers for the purpose of preventing freezing and to keep the water warm in order that steam may be gotten up quickly when the plant goes into operation. Our people have held on the contrary that this does not constitute the operation of a boiler within the meaning of the law."

Section 1047 G. C. reads as follows:

> "No person shall operate a stationary steam boiler or engine of more than thirty horsepower without obtaining a license to do so as provided in this chapter. A horsepower as used in this section shall mean twelve square feet of boiler heating surface. No owner or user or agent of an owner or user of any such steam boiler or engine shall permit it to be operated unless it is directly in charge of a duly licensed engineer."

The question now before us is as to the meaning of the word "operate," as used in the section just quoted. In other words, it is this: When and under what circumstances is a stationary steam boiler or engine *in operation?*

It is apparent from mere statement that the question is a matter of mechanical engineering, rather than of law. Accordingly, an effort has been made to ascertain from persons familiar with boiler operation just what the word "operate" is understood to mean in this regard, from an engineering standpoint. While I am entirely willing to assume any responsibility which is properly mine with regard to the conclusions of this opinion, I feel that it is not inappropriate to point out that the same is based on premises which are really non-legal in character.

Pertinent to our inquiry is a written statement recently made by William T. Magruder, Professor of Mechanical Engineering at Ohio State University. Mr. Magruder says, in part:

> "When the generation of steam is no longer needed, as at the end of the working period of the day and for several hours, it is customary and accepted practice to clean the fire of ashes and clinkers, collect the live coals in a heap, or bank, on the grate, cover them with fresh and fine coal so as to greatly retard combustion and yet maintain it without extinguishing the fire, to close the air inlets to the furnace, and partly to close the gas outlet from the furnace to the chimney, thereby preventing the usual amount of cold, fresh air from entering the furnace to lower its temperature while the boiler is not in the operation of generating steam. This process is commonly known as 'banking the fire', and is the usual and accepted practice when steam is not needed for several hours. Its object is to retain the heat in the boiler and its furnace between the periods of operation, or working periods, and so as to maintain the boiler as nearly as possible at a uniform temperature in the interest of economy and safety. When a boiler is not to be used to generate steam for several days or weeks, its fire is either allowed to die out or is removed, or 'drawn', and the boiler is allowed to cool down, and it is then said to be 'out of commission', or 'laid up'."

After making further observations not necessary to be quoted here, Professor Magruder concludes:

> "For these reasons I am of the opinion that a steam boiler is being 'operated' in the usual and accepted sense of the word, when it is generating steam from the water and by the heat which are being supplied to it; and that if the fire is properly banked and if no person is at the boiler to supply fuel and water in proper ways so as to generate steam, then the boiler is not being operated."

That a boiler with a "banked fire is a boiler not in operation", is also the opinion of Mr. J. C. Callery, a mechanical engineer of Columbus, Ohio, as evidenced by his letter of August 9, 1919, addressed to this department.

In reply to my request for information as to the construction which had been given to section 1047 G. C. by your bureau in practice, you forwarded a copy of a letter sent you by your Mr. Joseph McCue, Chief Deputy, Division of Steam Engineers. This letter, touching the matter in question, says:

> "Generally speaking, it has always been the attitude of this department to consider a steam boiler to be 'in operation' at all times that an active fire was being maintained under it, and when a steam pressure was available for any purpose, either power or heat. There is a condition, known as 'banked fires', during which there is usually no steam being taken from the boiler, and no firing is done, and we do not require the attendance of a licensed man at such times. When, however, the banked fires are raked over the grates and fresh coal added, we consider the boiler is being put into operation, and only a licensed man should perform such work, should the boiler be over 30 h. p."

It thus appears that the interpretation given by your department, as evidenced by the statement of Mr. McCue just quoted, is consistent with the above

quoted views of Professor Magruder and Mr. Callery, relative to the condition known as a "banked fire", and that your department does not now take the view ascribed to it by that part of the letter from the executive secretary of the Ohio Manufacturers' Association, which says:

> "* * * the Bureau has held that a licensed engineer or boiler operator must be in charge immediately of any boiler *under which there is a fire.*"

In another part of the letter of said secretary of the Ohio Manufacturers' Association, there is a statement which seemingly indicates that the writer is of the opinion that a stationary steam boiler or engine of more than thirty horsepower is not in operation if the fact be that "the *plant* is not in operation." By "plant" is meant, we presume, the machinery, tools, etc., necessary to carrying on the work in any given establishment. Such a view, we think, is not tenable. In the first place, and as a matter of mechanics, we take it to be true that a steam boiler or engine can "operate"; that is, can *function*, regardless of the use made of the power or energy thereby created. Secondly, such a view is opposed to consideration of public safety. That is to say, the danger consequent upon careless and incompetent operation of a steam boiler might be quite as great when the plant is *not* in operation, as when it is.

I therefore suggest that your bureau continue to give the word "operate" the same practical construction referred to by Mr. McCue in his letter to you, until such time as a court of competent jurisdiction otherwise decides. As above noted, under this view a steam boiler is not regarded as being in operation when an inactive or "banked" fire is maintained thereunder.

The second question for our consideration is raised by that part of the letter above referred to which says:

> "In a number of our plants batteries of boilers or steam engines are installed sometimes in separate buildings and all are directly in charge of a highly competent and licensed engineer when the plants are in operation. The Bureau has held that each of these engines and each of these boilers must have a licensed engineer or boiler operator in charge immediately and continuously at all times when there is a fire under the boiler or steam in the pipes."

The last sentence of section 1047 G. C. says:

> "No owner or user or agent of an owner or user of any such steam boiler or engine shall permit it to be operated *unless it is directly in charge of a duly licensed engineer.*"

The word "directly", according to the Century dictionary, means: "Without the intervention of any medium; "immediately". The question whether a steam boiler or engine is directly, that is to say, immediately, in charge of a licensed engineer, is really a question of fact, and no categorical answer, available for any and all circumstances, can be given. The law does not expressly require that such an engineer be in the same room or building where the boiler is located; nor does it expressly require that each separate boiler be in charge of a different licensed engineer.

The test to determine whether or not a steam boiler or engine is directly in charge of a duly licensed engineer is, it seems to me, to be found in considerations of safety to life and property. That is to say, if a duly licensed engineer is in

such a relation to a steam boiler or engine as that he can give it the care and attention necessary to its operation with entire safety to life and property, such boiler or engine can properly be said to be "directly in charge of a duly licensed engineer", as provided by section 1047 G. C. In other words, the phrase "directly in charge" is not a rigid legal formula, but a phrase whose meaning is to be sought in the peculiar circumstances of each individual case. If a duly licensed engineer were but twenty feet away from a steam boiler or engine, all would probably agree that the same was directly in his charge; and if he were a mile away from the boiler or engine, all would probably agree that the same was not directly in his charge. But where the line is to be drawn between the extremes mentioned, it is not possible to say as a matter of law. The same reasoning applies to the question as to whether the law requires a licensed engineer for each separate engine or boiler.

Respectfully,
JOHN G. PRICE,
Attorney-General.

653.

BOARD OF EDUCATION—CAN AVAIL ITSELF OF EITHER SENATE BILL NO. 187 (108 O. L. 924), OR HOUSE BILL NO. 567 (108 O. L. 709), BUT NOT BOTH—IF ELECTORS VOTE AGAINST LEVY UNDER SENATE BILL NO. 187 BOARD MAY AVAIL ITSELF OF PROVISIONS OF HOUSE BILL NO. 567.

Where an election was held in a school district under and by virtue of Senate Bill 187 *on August* 12, 1919, *and a vote of the majority of the electors of said district was against any levy under Senate Bill* 187, *the board of education is not precluded thereby from taking advantage of the provisions of House Bill* 567, *since both laws are extraordinary measures for the raising of revenue, and a board of education can avail itself of either Senate Bill* 187 *or House Bill* 567, *but not both, in order to carry on the function of public education until permanent revenues can be provided.*

COLUMBUS, OHIO, September 24, 1919.

HON. HAVETH E. MAU, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Acknowledgment is made of the request of William K. Marshall, assistant prosecuting attorney of Montgomery county, for an opinion upon the following statement of facts:

> "Where an election was held in a school district under and by virtue of Senate Bill No. 187 (108 O. L. 924), and the vote of the majority of electors in said district was against any levy under said bill, is such board of education thereby precluded from issuing bonds under House Bill No. 567 (108 O. L. 709)?
>
> In view of the fact that both of these acts were passed for the purpose of furnishing relief to school districts, it seems to me that a board of education would be entitled to issue bonds under House Bill No. 567, although electors of the district refused to authorize by vote a levy under Senate Bill No. 187.
>
> In case bonds were issued under House Bill No. 567 under such circumstances, and were offered to the Industrial Commission and accepted, the proceedings under which they were issued would be undoubtedly submitted to your office for approval, and you would then have the matter to

pass upon, so I deemed it wise to have your opinion before advising the issuing of bonds."

Senate Bill 187 reads in part as follows:

"Section 1. In lieu of proceeding under an act entitled 'An act to authorize the taxing authorities of counties, municipal corporations, townships and school districts to fund deficiencies in operating revenues for the year 1919, issue bonds and to levy taxes for such purpose' but not otherwise, the board of education of any school district may levy in the year 1919 not to exceed two mills for any and all purposes for which such boards may levy taxes, *upon securing the approval of the electors of such district* * * *."

Then follows the manner and method by which the special school election may be held on the twelfth day of August, 1919, and the respective duties devolving upon the board of education and the deputy state supervisors of elections in the proper submission of the question of levying an additional tax not to exceed two mills for any and all purposes for which such boards may levy taxes.

Section 3 provides:

"If a majority of the electors voting on the proposition so submitted vote in favor thereof, upon the certification and canvass of such result it shall be lawful for such board of education to levy taxes on the duplicate made up in the year 1919 at the aggregate rate so authorized for such purposes in addition to all other taxes for like purposes * * *."

You indicate in your statement of facts that an election was held in a school district under and by virtue of Senate Bill 187 and the vote of the majority of the electors voting in such district was against the levy asked for by the board of education. In a personal interview you indicate that this was an entire township district situated in Montgomery county, in which the vote was approximately 40 votes against the levy and 24 votes in favor of the same, a total vote of possibly 64, or less than one-fourth of the electors of such township. You now inquire if after such levy was defeated on August 12th, under Senate Bill 187, such action on the part of the electors who went to the polls would prevent the board of education from issuing bonds and taking care of the proper school expenses in the second tax measure known as House Bill 567.

It is important to notice the opening section of Senate Bill 187, quoted above, but which if transposed will read as follows:

"* * * *Upon securing the approval of the electors* * * * the board of education of any school district may levy in the year 1919 not to exceed two mills for any and all purposes for which such boards may levy taxes *in lieu of proceedings* under an act entitled 'an act to authorize the taxing authority of counties, municipal corporations, townships and school districts to fund deficiencies in operating revenues for the year 1919, issue bonds, and to levy taxes for such purposes, but not otherwise' * * *."

It would seem from an analysis of the language used in section 1 that the prime factor necessary is "upon securing the approval of the electors", then the provisions mentioned in Senate Bill 187 can be used. In other words, if no approval of the electors has been received, it would seemingly follow that the electors have not taken advantage of Senate Bill 187, which is a law that may be used by

the board of education in lieu of proceedings under House Bill 567. Here an attempt was made to provide the necessary funds for the school board when operating under Senate Bill 187. The approval of a majority of the electors was not secured.

The intention of Senate Bill 187, as well as House Bill 567, was to provide immediate revenues for urgent needs in the operation of the schools until permanent revenues can be provided. Clearly a board of education cannot use both House Bill 567 and Senate Bill 187, for the latter says that in lieu of proceedings under House Bill 567, and upon securing the approval of the electors, Senate Bill 187 may provide the necessary revenue.

Prior opinions of the Attorney-General hold that the mere fact that the electors in a school district have, by a majority vote, failed to authorize bond issues or taxes under certain sections, does not cut off the school board from recourse to other sections, and bearing upon this point attention is invited to the following excerpt from an opinion of the Attorney-General, found in Annual Reports of the Attorney-General for 1911-1912, page 1384:

> "When it becomes necessary for a board of education to improve school buildings by reason of an order from the inspector of workshops and factories, and such improvements cannot be made within the ordinary limitations of the Smith tax law, and when, furthermore, the electors have repeatedly refused to authorize bond issues, under sections 7625 and 7628, General Code, the board of education may have recourse to sections 7629 and 7630, General Code.
>
> By these sections, they may issue bonds for this purpose in a sum not to exceed the amount of a tax at the rate of two mills for the year next preceding the issue, and may extend the payment of such bonds over a period of forty years."

It will be noted that the above opinion speaks of an emergency that exists where the inspector of workshops and factories has condemned a school building and that the improvements necessary cannot be made within the ordinary limitations of the Smith tax law. The case is parallel to the one at hand in a sense, because section 4 of Senate Bill 187 provides as follows:

> "This act is hereby declared to be an emergency law necessary for the immediate preservation of the public peace and safety. The necessity therefore lies in the fact that in many school districts of the state, under the limitations on tax levies provided by law, deficiencies exist in operating revenues, arising from the abnormal increase of operating expenses and the desirability of increasing the compensation of school teachers; so that *unless afforded extraordinary means* of raising revenues the boards of education of such district will be unable to carry on the function of public education until permanent revenues can be provided. Therefore this act shall go into immediate effect."

House Bill 567 is also an emergency act and its emergency clause is section 14, which reads as follows:

> "This act is hereby declared to be an emergency law necessary for the immediate preservation of the public peace, health and safety. Such necessity arises from the fact that under existing limitations on tax levies deficiencies exist in many of the subdivisions of the state, arising largely from the recent abnormal increase of operating expenses, and the anticipated loss of revenue from the liquor tax; and by reason thereof such subdivi-

sions, unless immediately afforded extraordinary means of extinguishing such deficiencies and meeting fixed charges and current expenses will be unable to carry on the ordinary operations of government until permanent revenues can be provided and made available. Therefore, this act shall take effect immediately."

A comparison of the two emergency sections appearing in the two laws, Senate Bill 187 and House Bill 567, indicates that the necessity in each case was the same, the exception being that Senate Bill 187 was a measure which school boards alone could use and House Bill 567 is a law which all taxing subdivisions, including counties, municipal corporations, townships or school districts, may take advantage of.

The intention of the general assembly seems to have been primarily to give temporary financial relief to school districts and boards of education were given two avenues which they might use, selecting either bill as their avenue. Senate Bill 187 provides that in lieu of using House Bill 567, the board of education can use Senate Bill 187, but provides clearly that the approval of the electors in the district is necessary. It would seem, therefore, that where a school board had attempted to use the provisions of Senate Bill 187 and had failed, none of their rights of operation under House Bill 567 would be lost; it cannot be denied that their debts would be just the same as they were before, their obligations unchanged, and the need of relief would still exist. Had they availed themselves of Senate Bill 187, clearly they could not use House Bill 567, because the former says in its opening sentence, "in lieu of", but if they accomplish nothing in their attempt under Senate Bill 187, the question is, was any burden put upon the tax payers by that board of education through Senate Bill 187? Clearly not.

It would therefore follow, and the opinion of the Attorney-General is, that where an election was held in a school district, under and by virtue of Senate Bill 187 on August 12, 1919, and a vote of the majority of the electors of said district was against any levy under Senate Bill 187, such board of education is not precluded thereby from taking advantage of the provisions of House Bill 567, since both are extraordinary measures for the raising of revenue and boards of education can avail themselves of either Senate Bill 187 or House Bill 567, but not both, in order to carry on the function of public education until permanent revenues can be provided.

Respectfully,
JOHN G. PRICE,
Attorney-General.

654.

SECRETARY OF STATE HIGHWAY COMMISSIONER—APPROVAL OF BOND.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am transmitting bond of William E. Martin of Columbus, Ohio, in the sum of five thousand dollars, with Chicago Bond and Insurance Company as surety, conditioned for the faithful performance by Mr. Martin of his duties as secretary to the state highway commissioner, under appointment dating September 22, 1919.

Section 1183 G. C. directs that such bond be filed in your office with the approval of the state highway commissioner as to sureties and the approval of the

Attorney-General as to form. You will note that Mr. Taylor has given his approval as to the amount of the bond and the surety thereon, and that I have given my approval as to the form.

I am sending a copy of this letter to Hon. A. R. Taylor, State Highway Commissioner.

Respectfully,
JOHN G. PRICE,
Attorney-General.

655.

COUNTY BOARD OF EDUCATION—MAY TRANSFER TERRITORY TO OR FROM CENTRALIZED SCHOOL DISTRICT UPON PETITION—NOT MANDATORY—SECTION 4727 G. C. CONSTRUED AS AMENDED BY HOUSE BILL 163 (108 O. L. 235)—IN TRANSFER OF TERRITORY UNDER SECTION 4692 G. C. NO PROVISION FOR PETITION OF ELECTORS.

1. *Under section 4727 G. C., as amended by House Bill 163, the county board of education may transfer territory to or from a centralized school district upon the petition of two-thirds of the qualified electors of the territory petitioning for transfer. But there is nothing mandatory in such section that the county board of education shall make such transfer.*

2. *In transfers of school territory under section 4692 G. C., there is no provision for any petition on the part of the electors, the only provision in such section being that a remonstrance and not a petition can be filed with the county board of education.*

COLUMBUS, OHIO, September 25, 1919.

HON. LEWIS F. HALE, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion from this department on the following statement of facts:

> "The Monroe township rural school district, Logan county, Ohio, is a centralized school district with a bonded indebtedness. More than two-thirds of the electors of a certain part of this district adjacent to the West Liberty village school district have petitioned the county board of education, acting under the authority of section 4692 and section 4727 as recently amended by H. B. 163 (108 O. L. 235), to transfer that part of the said West Liberty district. Counsel for the Monroe township board of education has advised the county board that they are without authority to make such transfer, I have advised them that they have full authority under section 4727 as recently amended. Kindly give the county board of education your decision on the following question:
>
> "Has the Logan county board of education authority under section 4692 4727, as amended to transfer territory from the Monroe township rural centralized school district to the West Liberty village district?
>
> "It is my opinion that the authority granted the county board by the above mentioned law is clear and needs no interpretation, but our county board wishes your opinion before they take action."

Section 4727, prior to the recent amendment by the present General Assembly, read as follows:

"When the schools of a rural school district have been centralized, such centralization shall not be discontinued within three years and then only by petition and election, as provided in section 4726. If at a special election more votes are cast against centralization than for it, the division into subdistricts as they existed prior to centralization shall thereby be re-established."—(104 O. L., 133).

Under House Bill 163, which was passed by the present general assembly and became law on and with August 11, 1919, section 4727 was amended by adding the following language to original section 4727 G. C., above quoted:

"Nothing in this or the foregoing sections, viz., sections 4726 and 4726-1, shall prevent a county board of education upon the petition of two-thirds of the qualified electors of the territory petitioning for transfer from transferring territory to or from a centralized school district, the same as to or from a district not centralized."

In reply to your question as to whether the Logan county board of education has authority under sections 4692 and 4727, as amended, to transfer territory from a rural centralized school district to a village school district, it is advised that the language of section 4727, as amended, is very clear that a county board of education, upon the petition of two-thirds of the qualified electors of the territory petitioning for transfer, *may* make such transfer if in its judgment it should be done. There is nothing mandatory in the amended section that compels a county board of education to comply with the petition, even if presented by two-thirds of the qualified electors of the territory petitioning for transfer, for the language of the section says that "nothing * * * shall prevent," and does not say that such transfer *shall* be made. It is eminently proper that this authority should rest with the county school board, that is, that they should have some discretion in the matter of transfer, for the reason that a centralized district, by vote of the electors in the district, might issue bonds for say $100,000 for the erection of a large centralized school building; such election may have been carried in the affirmative by a comparatively close vote. Soon thereafter the very electors who created a majority in the affirmative and caused the bond issue to be made, seek to be transferred to another district for any reason, one of which might be that the tax rate in the district which was centralized was too high. It is important to note that the party who purchases the bonds usually makes a thorough investigation and possibly pays a premium on the bond issue, because such issue is based upon a large tax duplicate as the district originally existed. It would seem that until all bonds or indebtedness of the district were properly taken care of, unusual care should be had in the transfer of school territory, for several transfers following in succession from a school district, which had bonded itself for a large amount, might sooner or later show that the tax duplicate was but three-fifths of what it was when the bond purchaser purchased the bonds.

It can be seen that the rights of the purchaser of the bonds might be infringed upon by transfers of school territory until the district issuing the bonds had but a fraction of its former duplicate. This is presumed to be one of the important things that a county board of education should take into consideration in making transfers, for the courts have held that where school territory has been transferred to a new district, it must at once become a part of such new district and begin to assume the taxes and indebtedness of such new district. Possibly the latest decision upon this point is that in the case of Ewing vs. Schopf, auditor, decided in the court of appeals for Wayne county February 5, 1919, and reported in the Ohio Law Reporter of July 21, 1919. In this opinion the court said:

"We think the rule in Ohio is well fixed that when territory for school purposes is transferred, pursuant to statutory authority, as is clearly attempted in the petition now before us, that those residing in such annexed territory may be taxed to pay pre-existing indebtedness embraced in the new territorial district."

Section 4692 provides as follows:

"The county board of education is authorized to make an equitable division of the school funds of the transferred territory, either in the treasury or in the course of collection, and also an equitable division of the indebtedness of the transferred territory."

It is very important that great care should be taken in carrying out the last sentence of the above quotation, that is, that an equitable division of the indebtedness of the transferred territory should be made, for by following this out it can be seen that a resident in the territory which had been transferred one or more times might really be subject to double taxation, that is, a portion upon the bond issue which he helped to make in the old district and the pre-existing indebtedness of the new district to which he had been transferred.

You say that more than two-thirds of the electors of a certain territory have "petitioned the county board of education, under authority of 4692, to transfer that part of their school district to the West Liberty school district." Attention is invited to the fact that there is no provision for a petition on the part of the electors in the matter of a transfer of school territory under section 4692 G. C. The only provision in such section is for a protest or remonstrance, as indicated in the following language from section 4692:

"Nor shall such transfer take effect if a majority of the qualified electors residing in the territory to be transferred, shall, within thirty days after the filing of such map, file with the county board of education a written remonstrance against such proposed transfer."

There is no particular objection to the presentation of a petition to a county school board, where a transfer of territory is desired under section 4692 G. C., in order to show the sentiment of the territory, but such county board of education is without authority to officially act upon such petition, but must act upon any remonstrance. The only condition under which the county board of education is compelled to make the transfer of school territory upon petition of the electors of the territory affected is where such transfer is to be made under the provisions of section 4696 G. C., that is, transferring to an adjoining exempted village or city school district, or another county school district, which in this case would not apply unless the West Liberty school district was a properly exempted village school district, as provided in section 4688 G. C.

Coming then to the conclusions upon the statement of facts given by you, it is the opinion of the Attorney-General that:

1. Under section 4727 G. C., as amended by House Bill 163, the county board of education may transfer territory to or from a centralized school district upon the petition of two-thirds of the qualified electors of the territory petitioning for transfer. But there is nothing mandatory in such section that the county board of education shall make such transfer.

2. In transfers of school territory under section 4692 G. C., there is no provision for any petition on the part of the electors, the only provision in such section being that a remonstrance and not a petition can be filed with the county board of education.

Respectfully,
JOHN G. PRICE,
Attorney-General.

656.

EMERGENCY BOARD—EXPENSES OF STATE OFFICERS ATTENDING CONVENTIONS OUTSIDE OF STATE—SECTION 2313-3 G. C. GOVERNS—APPROPRIATION TO BOARD OF STATE CHARITIES FOR TRAVELING EXPENSES CAN ONLY BE USED TO PAY SUCH EXPENSES WITHIN STATE.

1. *Section 2313-3 G. C., which provides that no state officer or employe shall attend at state expense any conference or convention outside the state unless authorized by the Emergency Board, applies to the members and executive force of the Board of State Charities.*

2. *The general appropriation made to the Board of State Charities for traveling expense can only be used to pay such expenses within the state. The expense of attending conferences and conventions outside the state are payable from the emergency fund referred to in section 2313-3 G. C.*

COLUMBUS, OHIO, September 25, 1919.

HON. H. H. SHIRER, *Secretary, Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Your letter of September 15, 1919, inquiring whether or not the provisions of section 1352 G. C. relating to the authority of the members and executive force of your board to attend national conferences, take precedence over section 2313-3 G. C., was duly received.

The provisions of Section 1352 G. C., referred to in your letter, read as follows:

> "The members of the board and such of its executive force as it shall designate may attend state and national conferences for the discussion of questions pertinent to their duties. The actual traveling expense so incurred by the members and such of its executive force as it shall designate shall be paid as provided by section 1351 of the General Code."

The provisions just quoted were not contained in original section 1352 G. C., but first came into the section upon its amendment in 1913 (103 O. L. 865).

About two years after that amendment, the General Assembly enacted original supplementary section 2313-3 G. C. (106 O. L. 183), as follows:

> "No executive, legislative, or judicial officer, board, commission or employe of the state shall attend at state expense any association, conference or convention outside the state unless authorized by the emergency board. Before such allowance may be made, the head of the department shall make application in writing to the emergency board showing necessity for such attendance and the probable cost to the state. If a majority of the members of the emergency board approve the application, such expense shall be paid from the emergency fund."

Whether or not, prior to the enactment of section 2313-3 G. C., members of the Board of State Charities and such of its executive force as it might designate, were authorized to attend conferences outside the state at state expense, is not involved in the present inquiry, and no opinion is expressed on the question. But since its enactment, however, the question is free from doubt, for the General Assembly has thereby expressly and clearly established and declared the general policy of the state to be that no state officer, board, commission or employe shall attend at state expense any conferences or conventions outside the state "unless author-

ized by the emergency board," and, when such attendance has been authorized, that the expense must be paid from the emergency fund.

It is a well settled rule of statutory construction, which is applicable to the statutes now under consideration, that the provisions of a statute must be construed in connection with all laws in *pari materia,* so that all provisions may, if possible, have operation according to their plain import; for it is to be presumed that statutes relating to one subject are governed by the same spirit and policy, and intended to be consistent and harmonious. So that when a general policy is plainly disclosed special provisions should, when possible, be given a construction which will bring them in harmony with that policy. See Cincinnati vs. Comer, 55 O. S., 82-89.

Reading sections 1352 and 2313-3 G. C. together, no difficulty is encountered in giving full force and effect to both. The clear legislative intent is, in my opinion, that the members of the Board of State Charities and such of its executive force as it may designate, are authorized to attend certain conferences outside the state at state expense, provided such attendance has been authorized by the State Emergency Board under section 2313-3 G. C.

It is true that the General Assembly has made a general appropriation to the Board of State Charities for "traveling expense," but the same is equally true of other state officers and boards. Such appropriations, however, in the absence of a clear legislative intent to the contrary, must, in view of the general policy expressly declared in section 2313-3 G. C., be held to be made for the purpose only of paying traveling expenses within the state. When the expense is incurred in attending conferences and conventions outside the state, section 2313-3 G. C. requires that it be paid from the emergency fund, and not from the funds referred to in section 1351 G. C.

Section 1352 G. C. was amended at the present session of the General Assembly, but not with respect to the provisions or subject now under consideration. Those provisions have remained the same since their original enactment in 1913, and the recent amendment cannot have the effect of exempting the board and its executive force from the requirements of section 2313-3 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

657.

TAXES AND TAXATION—LEVIES ON GENERAL DUPLICATE—MADE BY LOCAL LEVYING AUTHORITIES AND BUDGET COMMISSION FOR EACH PURPOSE AND FUND SEPARATELY—COUNTY AUDITOR, MUST DISTRIBUTE TAXES TO SCHOOL DISTRICTS IN PROPORTION TO LEVIES ON DUPLICATE—NO MUNICIPAL COUNCIL, BOARD OR OFFICER AND NO BOARD OR OFFICER OF SCHOOL DISTRICT OR TOWNSHIP HAS AUTHORITY TO VARY PROPORTIONS—NO METHOD IS PROVIDED BY LAW FOR CERTIFYING ACTION OF BUDGET COMMISSION OR COUNTY AUDITOR IN ALLOWING AND COMPUTING TAX LEVIES TO MUNICIPAL AND TOWNSHIP OFFICERS.

1. *Taxes must be levied on the general duplicate through the agency of the local levying authorities and the budget commission for each purpose or fund separately.*

2. The county auditor must distribute the proceeds of general property taxes to school districts in proportion to the levies as made on the duplicate.

3. No municipal council, board or officer, and no board or officer of a school district or township has authority to vary the proportions in which the proceeds of tax levies accrue to their respective treasuries, except by way of transfer of funds and subject to the laws governing such transfers.

4. No method is provided by law for certifying the action of the budget commission or the county auditor in allowing and computing tax levies to municipal and township officers. Such officers must, however, take notice of such official action and govern themselves accordingly.

COLUMBUS, OHIO, September 25, 1919.

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

GENTLEMEN:—I have your request of recent date for the opinion of this office, as follows:

"STATEMENT OF FACTS.

Both municipal and school and township examiners of this bureau have reported to this office that the budgetary levy in a certain county of the state is made in a lump sum and that the distribution of taxes is made in keeping therewith in lump sum, allowing municipalities, school boards and townships in such county the apportionment of the tax settlements to suit their own tastes. We have had several discussions upon this matter and it is the opinion of the writer that the provisions of the Smith 1 per cent. tax law (See sections 5649-3a and 5649-3d G. C.), plainly show that the levies in all taxing districts must be made for each particular fund and particular purpose. Section 5649-1 G. C., plainly shows that the sinking fund levies must come first and in preference to all others, and we also are of the further opinion that sections 7587 and 7603 G. C., plainly call for distribution by the county auditor in pro rata to the budgetary levies. We are also calling your attention to an opinion of the Attorney-General under date of September 24, 1914, Annual Reports for 1914, Volume 2, page 1290, and since we have been asked to show the law making it mandatory for the county auditor to make distribution of the tax yield to the various purposes and funds, we are asking as follows:

Question 1. Must not the levy allowed by the budget commission be made to cover each purpose or fund?

Question 2. Must not the county auditor make such tax distribution pro rata in keeping with such budgetary levy?

Question 3. Must not such distribution as made by the county auditor be honored by the officers of each municipality, school board and township in their local distribution?

Question 4. If it be not the county auditor's duty to make such distribution, whose duty may it be?

P. S. While we have cited section 7587 and section 7603 of the school laws we want this opinion to cover municipalities and townships as well."

So far as your questions relate to the making and distribution of school levies they are covered substantially in full by an opinion addressed to the Auditor of State, under date of September 24, 1919, copy of which is enclosed herewith. In that opinion affirmative answers are returned to your questions Nos. 2 and 3, thus making unnecessary an answer to your question No. 4. In other words, it is held

therein that it is the duty of the county auditor, under the provisions of the laws regulating the levy and distribution of taxes and particularly the Smith one per cent. law, so-called (sections 5649-1 to 5649-5b, inclusive, of the General Code), to take the amounts fixed by the budget commission for the various items in each annual budget submitted to it by a board of education and, on the basis of the estimated duplicate of taxable property in the school district, compute a rate of taxation which will produce such amount; that upon settlement with the county treasurer it is further the duty of the county auditor to apportion to the several school funds pro rata shares of the collections accruing to such school district on the basis of the rates so determined; and that it is not within the power of the county auditor or any other board or officer to alter or vary this distribution. The sections of the General Code upon which this opinion is based are cited in the opinion and, generally speaking, are those referred to by you.

Your first question, in so far as it relates to school districts, will be considered as a general question in connection with the other general questions as relating to municipal corporations and townships, for the question is common to all taxing districts.

It is indeed the duty of the budget commission, as you suggest, to require the submission to it of itemized budgets and to act upon the budgets so submitted to it by items. This is sufficiently apparent from the provisions of section 5649-3c, quoted in the other opinion, and particularly the following provisions thereof:

> "If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district * * *, the budget commissioners shall adjust the various *amounts to be raised* so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the *items* in any such budget, but shall not increase the total of any such budget, or any *item* therein."

Indeed, the duty to segregate the several levies begins with the levying authorities themselves, that is to say, the council or other legislative body of the municipal corporation, the trustees of the township or the board of education of the school district. This results from various provisions of the statutes. In the first place, such sections as section 3794 G. C., as to municipal corporations, sections 3282, 3282-1 and 5646 G. C., as to townships, and sections 7586 and 7587 G. C., as to boards of education, which are modified but not expressly repealed by the Smith one per cent. law, require the levies to be segregated according to "funds" or "purposes," which are substantially the same thing. The sections which have been referred to are typical merely of many which exist, and the following quotations from some of them will illustrate their purport and policy:

Section 3794:

> "* * * The ordinance prescribing the (municipal) levy shall specify distinctly each and every purpose for which the levy is made and the per cent. thereof."
>
> (The modification of this section effected by the Smith law, as will hereinafter become apparent, is that instead of a rate being fixed for "each and every purpose" an amount is fixed by the council; and the ordinance, instead of becoming directly of its own force a levying ordinance, takes on the character of a budget).

Section 5646:

> "The trustees of each township, * * * shall determine the amount

of taxes necessary for all township purposes. * * * The county auditor shall levy, annually, for township purposes, including the relief of the poor * * * such *rates* of taxes as the trustees of the respective townships certify to him to be necessary. * * *"

(The modifying effect of the Smith law here is similar to that which it has exerted upon section 3794;; but it is apparent that the levy for township purposes is to be segregated according to the various rates or purposes).

Section 7586:

"Each board of education, * * * shall fix the rate of taxation necessary to be levied for all school purposes. * * *"

Section 7587:

Such levy shall be divided by the board of education into four funds: * * *. *A separate levy must be made for each fund.*"

Before the Smith law went into effect, then, it was the policy of the state to specify the various legal purposes for which taxes might be levied by municipal corporations, townships and school districts, and to require separate levies for each purpose. The proceeds of such a levy, of course, constituted a "fund"—or rather (for other revenues might accrue to the several funds from sources other than property taxation), the proceeds of each levy constituted a trust fund for the purposes for which they were made and could be credited to such funds only as might be appropriated and expended for such purposes. An attempted levy by a municipal corporation, township trustees or a board of education which did not comply with this requirement was certainly not a valid levy under laws existing prior to the enactment of the Smith law.

Upon this system, the Smith law was superimposed, with its scheme of the submission of budgets and the exercise of the revisory jurisdiction or power of the budget commission for the purpose of enforcing certain all-inclusive limitations. Section 5649-3a is the section which took the place of sections, examples of which have been quoted. Probably it is a complete substitute for those sections, and therefore what has been intimated respecting the continuing force and effect of such other sections may be, strictly speaking, erroneous. However, it is believed that section 5649-3a was enacted in the light of these sections, and no purpose being discernable in it to do away with that policy which has been discerned in these sections, it should be interpreted consistently with that policy. The following provisions of that section are in point:

"On or before the first Monday in June, each year, the county commissioners of each county, the council of each municipal corporation, the trustees of each township, each board of education and all other boards or officers authorized by law to levy taxes, within the county, except taxes for state purposes, shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. Such annual budgets shall specifically set forth:

(1) The amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year.

(2) The balance standing to the credit or debit of the several funds at the end of the last fiscal year.

(3) The monthly expenditures from each fund in the twelve months and the monthly expenditures from all funds in the twelve months of the last fiscal year.

(4) The annual expenditures from each fund for each year of the last five fiscal years.

(5) The monthly average of such expenditures from each of the several funds for the last fiscal year, and also the total monthly average of all of them for the last five fiscal years.

(6) The amount of money received from any other source and available for any purpose in each of the last five fiscal years, together with an estimate of the probable amount that may be received during the incoming year, from such source or sources.

(7) The amount of the bonded indebtedness setting out each issue and the purpose for which issued, the date of issue and the date of maturity, the original amount issued and the amount outstanding, the rate of interest, the sum necessary for interest and sinking fund purposes, and the amount required for all interest and sinking fund purposes for the incoming year.

(8) The amount of all indebtedness incurred under authority of section 5649-4 and the amount of such additional taxes as may have been authorized as provided in section 5649-5 of the General Code, setting out each issue in detail as provided in the next preceding paragraph.

(9) Such other facts and information as the tax commission of Ohio or the budget commissioners may require.

* * * * * *

Such budget shall be made up annually at the time or times now fixed by law when such boards of officers are required to determine the amount in money to be raised or the rate of taxes to be levied in their respective taxing districts. * * *"

Attention is called to the following features of this provision:

(1) The budget is to be "in itemized form."

(2) It is to be made up by the levying authorities at the time they are required to make their levies under existing statutes, and apparently as a substitute for their action in making direct levies.

(3) The very first specification required of such budgets is that they shall set forth "the amount to be raised for *each and every purpose allowed by law for which it is desired to raise money.*"

The word "purpose" in this connection must, I think, be given the same meaning that it had possessed in the previously existing statutes, namely, a purpose in the legal sense, as the general object or public need for which the levying authorities are empowered to make a distinct levy. It is the meaning found in Article XII, section 5 of the Constitution, which provides that—

"Every law imposing a tax, shall state, distinctly, the *object* of the same, to which only, it shall be applied."

In other words, "purpose allowed by law for which it is desired to raise money" and "object of the tax" mean substantially the same thing.

(4) Attention is called also to the fact that "the several funds" as they existed prior even to the enactment of the Smith law are mentioned and their condition is required to be reported by section 5649-3a.

If section 5649-3a could be said to have any effect upon the policy of our law, dictated as it is to a considerable extent at least by Article XII, section 5 of the Constitution, with respect to the separation of the legal purposes for which taxes may be levied, such effect could only be, in the light of what has been pointed out, by way of emphasizing that policy.

Coming now to section 5649-3a, which deals with the powers and duties of the budget commission, and recurring to those sentences which have been previously quoted therefrom, we find first therein the use of the phrase "amounts to be raised." A verbal identity exists between this phrase as found in section 5649-3c and the phrase found in subparagraph 1 of section 5649-3a. They are evidently intended to mean the same thing. In other words, the budget is to set forth the amount to be raised for each and every purpose, i. e., object, for which taxes may be levied, or, putting it in another way, each fund. The budget commissioners are to adjust the "various amounts to be raised;" that is, the various amounts which are intended to be turned into levies. They may go further and act upon items, which might constitute subdivisions of a levy or "amount to be raised," in making their reductions, but they must at least take action with respect to each "amount to be raised" or fund.

From what has been said it follows that the answer to your first question must be in the affirmative, not only as to school districts but also as to the levies of municipal corporations and townships.

In the other opinion it is pointed out that section 7603 G. C. in and of itself contains a rather clear answer to your questions Nos. 2 and 3 so far as school districts are concerned. No statute quite so explicit as this section exists with respect to the apportionment of the proceeds of taxation due to municipal corporations and townships, respectively. However, it must be apparent at the very outset that the same rule must apply to townships and school districts even in the absence of any such express statutory provision. In the first place, it is a general principal that the proceeds of a tax levy for a particular purpose constitute a trust fund for that purpose. The purpose of a tax is inherent in the very idea of a tax. It is impossible to think of a tax as not being levied for some purpose. Its legality is tested by the purpose for which it is levied.

> Loan Assn. vs. Topeka, 20 Wall. 655;
> Hubbard vs. Fitzsimmons, 57 O. S. 436.

But in this state we have this fundamental principle of taxation in the form of a constitutional limitation expressed in Article XII, section 5, supra. Every tax must be levied for some distinctly stated purpose and its proceeds must be applied to that purpose only. In the face of these constitutional and other fundamental principles, it would be impossible to arrive at the conclusion that any ministerial officer, such as a county auditor with respect to his action in distributing proceeds of tax levies, could lawfully ignore the rates for each purpose and make distribution on some other basis. Indeed, the statute authorizing him to do this would, if it went to the extreme suggested, be unconstitutional, though certain diversions of general revenues to particular lawful public purposes have been sanctioned by the courts.

> See Porter vs. Hopkins, 91 O. S. 74.

It would follow from these general observations that at least in the absence of express statutory authority neither the county auditor nor any other board or officer would be empowered to apportion the proceeds of taxes otherwise than in proportion to the rates for the various purposes for which they were levied.

No such statutes exist. Yet the statutes are not perfectly silent as reflecting upon the questions now under consideration. The following are worthy of notice in this connection:

> "*Section* 2598. In making the settlement required by the preceding two sections, the auditor shall carefully examine the tax duplicate and ascertain, from the entries of taxes and penalty paid, in whole or in part, and from such other source of information as are within his reach, the true amount collected by the treasurer on account of each of the several taxes charged on such duplicate, the amount remaining in the hands of the treasurer belonging to each fund, and shall give to the treasurer separate certificates in duplicate of the separate sums found to have been collected by him."

> "*Section* 2599. The county auditor shall also make and deliver to the treasurer a certificate specifying the amount charged on the tax duplicate of the county for each of the several purposes for which taxes have been levied, and also certificate or an abstract of the taxes which have become due and payable and which remain unpaid. Provided that in making the settlement in February of each year, the auditor may ascertain the amount of taxes collected from the statements required by law to be made to him by the treasurer."

> "*Section* 2602. The auditor shall open an account with each township, city, village, and special school district in the county, in which, immediately after his semi-annual settlement with the treasurer in February and August of each year, he shall credit each with the net amount so collected for its use.

> "On application of the township, city, village or school treasurer the auditor shall give him a warrant on the county treasurer, for the amount then due to such treasurer, and charge him with the amount of the warrant but the person so applying for such warrant shall deposit with the auditor a certificate from the clerk of the township, city, village, or district, stating that he is treasurer thereof, was duly elected or appointed, and that he has given bond according to law."

These sections show that a separate account is required to be kept by the county auditor with each "purpose for which taxes have been levied." It is true that in making his payments to the various taxing districts (other than school districts, as to which section 7603 G. C. applies), he need draw but a single warrant covering the "net amount collected for its use." Here the statute does not seem expressly to require the separation of funds for the purpose of making payment.

> "*Section* 3795. The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation in the same manner and under the same laws, rules and regulations as are prescribed for the collection and paying over of state and county taxes. The corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall be at all times open to public inspection. Unless expressly otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the appropriate fund, and the treasurer shall thereupon give notice of such deposit to the auditor or clerk. * * *"

This section, applying to municipal corporations, is explicit. It requires an

account to be kept with "each fund for which taxes are assessed." It requires all money collected or received on behalf of the corporation to be deposited "in the appropriate fund." No authority is given to the city auditor or treasurer or the council of the municipal corporation, or any other body, to dispense with this requirement.

The township statutes appear on cursory examination of them to be silent as to the specific duties of the treasurer or clerk in setting up accounts with funds. In view of this silence the general policy of the constitution and laws and the general principles of taxation previously referred to would, of course, apply. Both the treasurer and clerk are required to keep books, and the result would be that these books would have to show correctly the amounts in the various township funds as produced by tax levies and other sources of revenue.

But there is one significant and conclusive feature of our statutes which has not yet been mentioned. I refer to statutory provisions which will not be quoted or specifically cited, dealing with the transfer of funds in various treasuries. These transfers are to be made in certain ways and subject to certain conditions, which are very carefully safeguarded. If it were true that the council of a municipal corporation or the trustees of a township had power to control the disposition of funds accruing to their respective treasuries as the proceeds of tax levies, the provisions for transfers would not only be unnecessary but their restrictions could be effectually avoided.

From all these considerations it follows that tax levies must be made for specific purposes, and when made for such purposes and extended as rates on the grand duplicate, the proceeds of these rates are automatically appropriated to various funds corresponding with the purposes for which they were levied, and, except in strict pursuance of statutes providing for transfers and the segregation of revenues for particular purposes and the like, cannot be diverted from those funds by any officer or board.

What has been said, of course, relates only to the levy of taxes on the general property duplicate. Miscellaneous revenues accruing to a municipal corporation, for example, may properly be subject to the control and disposition of council as to the funds to which they shall be credited. Council has control over the finances of the corporation subject to the provisions of law, and this control is broad enough, in the absence of statutes to the contrary, to permit undesignated revenues to be controlled by ordinance. This was the holding of my predecessor in an opinion found in the Opinions of the Attorney-General for the year 1918, page 1484, and relating to the disposition of the municipality's share of the collateral inheritance tax. I mention that opinion only to distinguish it from the questions which have been discussed in this opinion.

Your second and fourth questions, though answered as to school districts by the reasoning of the enclosed opinion to the Auditor of State on the basis of section 7603 G. C., cannot be answered in the same way as to municipal corporations and school districts. That is to say, while it is the duty of the county auditor to segregate funds and issue a certificate of apportionment in the case of school levies, he has no similar duty to perform in the case of municipal and township levies. The duty to make the apportionment in accordance with the rates of levy is imposed upon the auditor and treasurer of the municipality and the clerk and treasurer of a township by the sections which have been cited. The statutes contain no machinery for officially notifying such officers of the rates computed by the auditor on the basis of the budget allowances. The work of the budget commission is, under section 5649-3c, to be certified to the county auditor, but he is not required to certify his action in computing the rates to anybody. Nevertheless, both in the respects under consideration in this opinion and in other respects, such as the making of appropriations (section 5649-3d), such action is binding on the local

authorities. A hiatus in the statutory machinery exists here, though no real difficulty exists because the tax rates are a matter of public concern, spread upon a public record, and all public officers and citizens must take notice of them. Possibly the Bureau of Inspection and Supervision of Public Offices has specified, or may specify, some appropriate method of accounting to supply the purely formal omission in the statute.

Respectfully,
JOHN G. PRICE,
Attorney-General.

658.

OHIO AGRICULTURAL EXPERIMENT STATION—ANSWERS TO A NUMBER OF QUESTIONS RELATIVE TO SAID STATION.

1. *The Ohio Agricultural Experiment Station may, at the expense of the state, furnish the county experiment farms with labor, live stock, machinery, seeds, feed and other kinds of equipment or supplies whenever the same are reasonably necessary for the carrying on of bona fide experimental work of said station.*

2. *The Ohio Agricultural Experiment Station may not legally apply the proceeds of the sale of agricultural products from the station farms to the purchase of supplies for the use of such station. Such proceeds should be paid into the state treasury as provided by section 24 G. C., and said purchases should be paid for out of the regular appropriations made for the station.*

3. *It is not illegal to pay the salary or wages of the operator of a ditching machine belonging to the Ohio Agricultural Experiment Station out of funds in the state treasury which have been appropriated to said station, when such salary or wages relate to a period of time during which said machine is used by such operator on county experiment farms in furtherance of bona fide drainage experiments conducted thereon by the officials of the Ohio Agricultural Station.*

4. *The publication known as the Ohio Station News is a "bulletin" of the experiments and work of the Ohio Agricultural Experiment Station, within the meaning of section* 1173 (106 *O. L.*, 123).

5. *Rights of the state under certain lease and option discussed.*

6. *When the owner of a farm leases the same to the board of control of the Ohio Agricultural Experiment Station, and there are situate on said farm at the time of lease certain buildings which are annexed to and form a part of the land demised, neither the director nor the burser of said station has any legal authority to grant permission to the lessor to remove from said land any of said buildings. Nor would this conclusion be in anywise affected by the added fact that such lease contained a clause giving the lessee an option to purchase said premises at any time prior to the expiration of such lease.*

COLUMBUS, OHIO, September 26, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have recently propounded to me a number of questions relating to the Ohio Agricultural Experiment Station, located at Wooster, Ohio. Your first question reads thus:

"1. May the Ohio Agricultural Experiment Station, at the expense

of the state, furnish the county experiment farms with labor, live stock, machinery, seeds and feed, or any other kind of equipment or supplies?"

The Ohio Agricultural Experiment Station has no authority to furnish county experiment farms, at the expense of the state, with any of the things stated in your question, unless it can be said that such authority is given, either expressly or by necessary implication, by some statute. It is essential, therefore, at this point to consider the statutes affecting the functions of such station.

The original act for the establishment of an agricultural experiment station was passed April 17, 1882, and is found in 79 Ohio Laws, page 113. Section 1 of that act was as follows:

> "Section 1.—Be it enacted by the General Assembly of the State of Ohio, that for the benefit of the interests of practical and scientific agriculture, and for the development of the vast agricultural resources of the state, an Ohio agricultural experiment station is established as hereinafter provided."

Section 1170 G. C. (106 O. L., 122) describes the experiment station in practically the same language, said section reading thus:

> "There shall be a state agricultural experiment station for the benefit of practical and scientific agriculture and the development of the agricultural resources of the state. It shall be known as the 'Ohio Agricultural Experiment Station.'"

Other sections relating to the Ohio Agricultural Experiment Station are as follows:

> *Section* 1171.—"The state agricultural experiment station shall be under the supervision and direction of a board of control which shall consist of five members, who shall be practical farmers and who shall be appointed by the governor with the advice and consent of the senate, one member to serve for one year, one for two years, one for three years, one for four years and one for five years. Thereafter one member shall be appointed each year who shall hold his office for a term of five years. Not more than three members shall belong to the same political party."
>
> *Section* 1171-1.—"Members of the board of control shall receive no compensation for their services, but their necessary expenses while in the discharge of their official duties shall be paid by the state."
>
> *Section* 1171-2.—"The board of control shall organize by the election of a president, a secretary and treasurer; the president shall be a member of the board. Three members of the board shall constitute a quorum for the transaction of business. It shall hold a meeting in Columbus on the first Wednesday after the second Monday of January of each year and special meetings at other times and places upon the call of the president or upon the written request of two members. The board shall adopt by-laws, rules and regulations for the government of the station."
>
> *Section* 1171-3.—"The board of control of the Ohio Agricultural Experiment Station shall be a body corporate, with power to sue and be sued, to contract and be contracted with, to make and use a seal and to alter it at its pleasure. It may receive and hold in trust for the use and benefit of the station a grant, or devise of land, or a donation or bequest of money or other personal property to be applied to the general or special use of the station as directed by the donor."

Section 1171-4.—"The board of control shall appoint a director, who shall be a person of acknowledged ability and training in the principles and practice of scientific agriculture. It shall fix the terms of office and salaries of all officers and employes of the station and upon written charge for good and sufficient cause may remove them. The directors shall have control of the affairs of the station, and be responsible to the board of control for the management of all of its departments. With the approval of the board of control he shall appoint chiefs of departments, assistants and other employes necessary for the proper management of the station and shall assign them to their respective duties. He may suspend an officer or employe of the station for cause, which suspension with the reasons therefor he shall immediately report to the board of control for its final action."

Section 1172.—"The title of all lands for the use of experiment station shall be conveyed in fee simple to the state, but no title shall be conveyed for such purposes unless the Attorney-General is satisfied that it is free from defects and incumbrances."

Section 1173.—"From time to time the board of control shall issue bulletins of its experiments and work. It shall make an annual report to the governor which shall be published in pamphlet form for free distribution."

Except as hereinafter noted, the above are all the statutes which describe the powers and activities of the Ohio Agricultural Experiment Station. It will be noticed that such statutes confer upon the station no express authority to furnish county experiment farms with anything.

In fact, resort to the doctrine of implication is necessary to give the station authority for almost any of the important undertakings in which it is now engaged.

Speaking of this doctrine, Mr. Black, in his work on "Interpretation of Laws," page 62, says:

> "Every statute is understood to contain, by implication, if not by its express terms, all such provisions as may be necessary to effectuate its object and purpose, or to make effective the rights, powers, privileges, or jurisdiction which it grants, and also all such collateral and subsidiary consequences as may be fairly and logically inferred from its terms."

I am informed that upon the establishment of the Ohio Agricultural Experiment Station, and frequently thereafter, the officials in charge of said station carried on large numbers of experiments on lands in various parts of the state, which were not owned by the state and which constituted no part of the lands of the experiment station. This work was and still is carried on as "field experiment work" and is considered important in ascertaining the adaptability of soils to different crops. In carrying on such work said officials evidently construed the statutes affecting the station to mean that the conduct of agricultural experiments was not restricted to the station itself or to any particular geographical area, but that the boundaries of the state itself were the only limits upon that kind of undertaking.

That this construction—a contemporaneous and practical construction given the statutes in question—was acquiesced in by the legislature, seems evident from the fact that many legislative appropriations were made from time to time for work of this character. For instance, in 1891 (88 O. L., 534), the General Assembly appropriated $1,000.00 to the station for "sub-station for field experiments

with fertilizers," which moneys, according to a letter received by this department from Hon. Charles E. Thorne, present director of the Ohio Agricultural Experiment Station, were used for experiments conducted on unproductive soils in northern Ohio.

In other appropriation bills, covering a considerable period of years, provision was made by the legislature for what were styled "co-operative experiments." See 98 O. L., pp. 102, 370,; 99 O. L., pp. 40, 547; 100 O. L., p. 31; 101 O. L., pp. 19, 178; 102 O. L., pp. 23, 381, 407; 103 O. L., 54, 640.

Speaking of these "co-operative experiments," Mr. Thorne, in the letter above referred to, says:

> "In much of this work seeds, plants, spray materials and fertilizers were furnished to the co-operator as a partial offset to the time, labor and rental value of the land employed in the experiment, the object of the work being, not merely so much to help the individual farmer in solving his particular problems as to obtain information concerning the character and best method of treatment of the diverse soil formations of the state, or further knowledge respecting the behavior of varieties of plants under different climatic conditions, or concerning the remedies for plant disease and insect pests. The outcome of this work has been, however, that very few farmers have been willing to continue experiments for a sufficient length of time to secure reliable results, and in 1911, on the initiative of a member of the General Assembly, the county experiment farm law was passed."

It may be argued, however, that even if the Ohio Agricultural Experiment Station may, at the expense of the state, legally furnish labor, live stock, machinery, seeds, feed and other materials to individuals co-operating with the station officials in carrying on experiment work on privately owned lands, there is no authority for the furnishing of such things, at the expense of the state, to *county experiment farms*—this for the reason that the statutes governing county experiment farms contain provisions negativing any such claim of authority. It is necessary, then, at this point to consider the county experiment farm statutes.

Authority for the establishment of such farms was first given by the legislature by the act of April 13, 1910 (101 O. L., 124).

The provisions of this act, generally speaking, are found in section 1165-1 G. C. et seq. (106 O. L. 122).

Section 1174 G. C. says:

> "In order to demonstrate the practical application under local conditions of the results of the investigations of the Ohio Agricultural Experiment Station, and for the purpose of increasing the effectiveness of the agriculture of the various counties of the state, the commissioners of any county in the state are hereby authorized and empowered to establish an experiment farm within such county as hereinafter provided for."

Section 1175 G. C. says:

> "The county experiment farms established under this act shall be used for the comparison of varieties and methods of culture of field crops, fruits and garden vegetables; for the exemplification of methods for controlling insect pests, weeds and plant diseases; for experiments in

the feeding of domestic animals and in the control of animal disease; for illustrations of the culture of forest trees and the management of farm woodlots; and for the demonstration of the effects of drainage, crop, rotation, manures and fertilizers, or for such part of the above lines of work as it may be practicable to carry on."

Sections 1176, 1177, 1177-1 and 1177-2 G. C. relate to the submission of the question of the establishment of such a farm to the electors of the county, and are not pertinent to the present inquiry.

The close relationship between the county experiment farm and the Ohio Agricultural Experiment Station appears from sections 1177-3, 1177-5, 1177-6 and 1177-7 G. C., which sections are as follows:

Section 1177-3.—"When the funds provided for in this act are deposited in the county treasury, the county commissioners shall notify the board of control of their action, on receipt of which notice it shall be the duty of the board of control to visit the county and assist in the selection of a farm to be used for the purpose specified in this act, provided that no farm shall be purchased except with the approval of the majority of the board of control and also of a majority of the board of county commissioners of the county."

Section 1177-5.—"The management of all county experiment farms established under authority of this act shall be vested in the director of the Ohio Agricultural Experiment Station, who shall appoint all employes and plan and execute the work to be carried on, in such manner as in his judgment will most effectively serve the agricultural interests of the county in which such farm may be located, the director and all employes being governed by the general rules and regulations of the board of control."

Section 1177-6.—"Before entering upon any line of investigation or demonstration upon any of the county experiment farms established under this act, the director of the experiment station shall submit a written plan of such contemplated work to an advisory board, consisting of the county agricultural society of the county in which such experiment farm may be located, or if there be no county agricultural society, then the board of county commissioners of such county, and if such plan is not approved by such advisory board, then the work shall not be undertaken."

Section 1177-7.—"The county commissioners of any county may equip and assign to the board of control such portion of any farm now owned by the county as may be mutually agreed upon between the county commissioners and the board of control, the land thus assigned to be occupied and used by the experiment station for the purpose specified in the act and under the management of the director of the station."

Sections 1177-4 and 1177-8 G. C. relate to the equipment and maintenance of the county experiment farm and are important to our question. They read:

Section 1177-4—"The equipment of an experiment farm shall consist of such buildings, drains, fences, implements, live stock, stock feed and teams as shall be deemed necessary by the board of control for the successful work of such farm, and the initial equipment shall be provided by the county in which the farm is established, together with a sufficient fund to pay the wages of the laborers required to conduct the work of such farm during the first season. The county commissioners shall appropriate

for the payment of the wages of laborers employed in the management of such farms as may be established under this act, and for the purpose of supplies and materials necessary to the proper conduct of such farms such sums not exceeding two thousand dollars annually for any farm, as may be agreed upon between such county commissioners and the board of control."

Section 1177-8.—"The produce of each county experiment farm as may be established under this act, over and above that required for the support of the teams and live stock kept on the farm, shall be sold and the proceeds applied to the payment of the labor and to the purchase of the supplies and materials required for the proper management of the farm as contemplated by this act, and for the maintenance of its equipment. Any surplus beyond these requirements shall be covered into the county treasury and placed to the credit of the general fund of the county, except in the case of the use of farms already belonging to the county, in which case the proceeds shall be placed to the credit of such fund as the county commissioners may designate."

By virtue of the sections last quoted, it is the duty of the county commissioners, in counties where experiment farms are established, to provide not only the initial equipment and to pay the wages of laborers required to conduct the work during the first season, but also to make annual appropriations thereafter for the payment of the wages of laborers and for the purchase of supplies and materials needed for the conduct of the farm, the sum of such appropriation not to exceed $2,000.00 per annum. Provision is also made for the sale of the produce of such farm and for the application of the proceeds of such sale to the purchase of supplies and materials for farm use.

In view of the seemingly adequate provision which the legislature has made for the operation and maintenance of county experiment farms, does it necessarily follow that the Ohio Agricultural Experiment Station is without authority to furnish such farms, at the expense of the state, with the things mentioned in your letter? I think not.

The gratuitous furnishing by the Ohio Agricultural Experiment Station of labor, live stock, machinery, seeds, feed, etc., to the county experiment farms is, of course, a great benefit to such farms and thus to the counties maintaining them. Yet the theory upon which these things are furnished is not necessarily one of generosity by the state. On the contrary, these things are furnished, presumably, because the officials in charge of the Ohio Agricultural Experiment Station are in good faith satisfied that such action is necessary to carry on in a proper manner the experimentation which the station is bound to conduct "for the benefit of practical and scientific agriculture and the development of the agricultural resources of the state." In other words, the furnishing of these things inures to the benefit of the state as well as to the county.

Thus far we have assumed that the provision made by sections 1177-4 and 1177-8 G. C., for the operation and maintenance of the county experiment farm, is in all cases adequate. We now make the point that such assumption is unwarranted. That is, it cannot be said, as a matter of law, that the revenues derivable from those sections are always adequate. For example, there is a possibility that the annual appropriation made under section 1177-4 G. C. may not be $2,000.00, for the provision of that section is:

"* * * such sums not exceeding two thousand dollars annually for any farm, *as may be agreed upon between such county commissioners and the board of control.*"

It is, of course, conceivable that the county commissioners may not agree to the payment of $2,000.00 per annum, either because they are not personally favorable to the appropriation of such sum, or because the finances of the county are in such a condition as to make such appropriation, under the circumstances undesirable. Again, the circumstances of seasonable conditions, etc., surrounding the operation of the farm, may, in a given year, be such as that there would be no surplus available for sale, as contemplated by section 1177-8 G .C., heretofore quoted.

In other words, to hold that an arrangement of barter and sale must precede the legal furnishing by the Ohio Agricultural Experiment Station to county experiment farms, of labor, machinery, seeds, fertilizer and other things which are factors in bona fide experimental work, might prove a great embarrassment to the successful carrying on of such work, and militate against the success of the very thing the Ohio Agricultural Experiment Station was established to secure.

Answering your question specifically, I am of the opinion that the Ohio Agricultural Experiment Station may, at the expense of the state, furnish the county experiment farms with labor, live stock, machinery, seeds, feed, and other kinds of equipment or supplies, whenever the same are reasonably necessary for the carrying on of bona fide experimental work of said station.

(2) Your second question reads:

> "If we find that any or all of these things have been done, and it is held to be unauthorized, whom shall we hold responsible?"

The nature of my answer to your first question makes it unnecessary to consider further your second question.

(3) Your third question reads:

> "May the Ohio Agricultural Experiment Station legally apply the proceeds of the sale of agricultural products from the station farm to the purchase of supplies for the use of such station, or should such proceeds be paid into the state treasury and the said purchases paid for out of the regular appropriations made for the station?"

As hereinbefore mentioned, the produce of county experiment farms may, by reason of section 1177-8 G. C., legally be sold and the proceeds applied to the purchase of supplies for the use of such farm. I am unable to find any such statute with reference to the sale of agricultural products from the farms of the Ohio Agricultural Station, and am therefore of the opinion that disposition of the proceeds of the sale of such products therefrom should be made as provided by section 24 G. C. (104 O. L., 178), which says:

> "On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed, verified statement of such receipts. Where tuitions and fees are paid to the officer or officers of any college, normal school or university receiving state aid, said officer or officers shall retain a sufficient amount of such tuition fund and fees to enable said officer or officers to make refunds of tuition and fees incident

to conducting of said tuition fund and fees. At the end of each term of any college, normal school or university receiving state aid the officer or officers having in charge said tuition fund and fees shall make and file with the auditor of state an itemized statement of all tuitions and fees received and disposition of the same."

Answering your question specifically, I am of the opinion that the Ohio Agricultural Experiment Station may not legally apply the proceeds of the sale of agricultural products from the station farms to the purchase of supplies for the use of such station; that such proceeds should be paid into the state treasury as provided by section 24 G. C., and that said purchases should be paid for out of the regular appropriations made for the station.

(4) Your fourth question is:

"If we find that such proceeds have been applied as above stated, and such action is held to be unauthorized, whom shall we hold responsible?"

It is understood that no findings for recovery are contemplated by you in this conection, and that you are asking whom to hold "responsible" for the purpose of definitely pointing out in your report the person or persons whose duty it will be to prevent subsequent misapplications of a similar nature.

The management and control of the Ohio Agricultural Experiment Station is, to some extent, divided between a board of five members, known as the "board of control," and the executive officer of the station, known as the director. Section 1171 G. C. says in part:

"The state agricultural experiment station shall be under the *supervision and direction* of a board of control * * *."

In section 1171-2 it is said that:

"The board of control shall adopt by-laws, rules and regulations *for the government of the station.*"

Section 1171-4 G. C. is here again cited:

"The board of control shall appoint a director, who shall be a person of acknowledged ability and training in the principles and practice of scientific agriculture. It shall fix the terms of office and salaries of all officers and employes of the station and upon written charge for good and sufficient cause may remove them. *The director shall have control of the affairs of the station, and be responsible to the board of control for the management of all of its departments.* With the approval of the board of control he shall appoint chiefs of departments, assistants, and other employes necessary for the proper management of the station and shall assign them to their respective duties. He may suspend an officer or employe of the station for cause, which suspension with the reasons therefor he shall immediately report to the board of control for its final action."

In view of the provision just quoted, it is considered that the director is chargeable with the duty of seeing to it that proper application of the proceeds of the sales in question is had and that he is responsible for any error in this regard. If it should appear that such erroneous application was in pursuance of some by-

law, rule or regulation of the board of control, then the members of such board who voted for the adoption of such by-law, rule or regulation are also responsible.

(5) Your fifth question is:

> "May the salary or wages of any of the employes at the county experiment farms other than that of the person assigned to have general supervision over the work at such farms be legally paid out of the state treasury?"

From personal conference with Mr. Bliss, it is learned that the situation giving rise to the question is as follows: The Ohio Agricultural Experiment Station owns a certain machine used for digging ditches or trenches. This machine is sent to various county experiment farms and used there in drainage work, being operated by a person employed for that purpose by the Ohio Agricultural Experiment Station. The salary or wages of said operator is paid out of the state treasury from funds appropriated by the legislature to the Ohio Agricultural Experiment Station.

The operator of said machine is thus an employe *at* the county experiment farms, but not an employe *of* such farms.

Speaking of the use of such machine, Mr. Thorne, in the letter above mentioned, says:

> "In making these drains the cutting of the trenches, which probably averages about one-third the total expense, has been done chiefly by a machine owned and operated by the experiment station, but these experiments in drainage are fundamentally necessary to the improvement of Ohio's agriculture."

It thus appears that the machine is used in connection with experiments carried on by the station, and this question is really answerable by what has been said in response to your first question.

Answering your question directly, I will say that assuming your question relates to facts as above stated, I am of the opinion that it is not illegal to pay the salary or wages of the operator of said ditching machine out of funds in the state treasury which have been appropriated to the station, when such salary or wages relate to a period of time during which said machine is used by such operator on county experiment farms, in furtherance of bona fide drainage experiments conducted by the officials of the Ohio Agricultural Station.

(6) Your sixth question is:

> "If we find such salaries or wages to have been thus paid, and it is held to be unauthorized, whom shall we hold responsible?"

In view of my answer to your fifth question, it is unnecessary to consider further your sixth question.

(7) Your seventh question is:

> "May the Ohio Agricultural Experiment Station legally publish at the expense of the state a newspaper such as the accompanying copy. See section 1173, 106 O. L., page 123."

The publication to which you refer is a small pamphlet known as the "Ohio

Experiment Station News," and you attach to your letter, in explanation of your question, a copy of the edition dated February 17, 1919.

You also call attention to section 1173 G. C. (106 O. L., 123), which says:

> "From time to time the board of control shall issue bulletins of its experiments and work. It shall make an annual report to the governor which shall be published in pamphlet form for free distribution."

With the assumption that the number dated February 17, 1919, is typical of the publication in general, the question for determination is whether this publication is a "bulletin of the experiments and work" of the station.

The word "bulletin," according to the Century Dictionary, has three meanings, which are as follows:

> "1. An authenticated official report concerning some public event, such as military operations, the health of a sovereign or other distinguished personage, etc., issued for the information of the public.
> 2. Any notice or public announcement, especially of news recently received.
> 3. A name given to various periodical publications recording the proceedings of learned societies."

After carefully perusing the copy of the Station News above referred to, I am of the opinion that the same may properly be regarded as a bulletin, that is to say, a "notice or public announcement" of the experiments and work of the Ohio Agricultural Experiment Station. It is true that the publication contains some items of information that do not concern the "experiments and work" of the station. For instance, the item that

> "Prof. and Mrs. A. D. S.——— are enjoying the delightful oceanic climate on the Isle of Pines."

Yet that item is only one of 44 items contained in the entire issue, and it is only fair to say that most of the items do relate to the experiments and work of the station, particularly the activities of various members of the station personnel, while in the course of their various duties. While there might be an honest difference of opinion as to the utility of such a publication, it cannot, I think, be said as a matter of law that its issuance is illegal.

(8) Your eighth question is:

> "If the last preceding question should be answered in the negative, whom shall we hold responsible?"

In view of my answer to question seven, it is unnecessary to answer further your eighth question.

(9) What may be called your ninth question reads:

> "I am enclosing a copy of the lease and option taken by the Ohio Agricultural Experiment Station on the Fry farm and desire you to inform me just what the rights of the state are under the terms of the lease and option and what they will be when the premises have been purchased, and the following facts which do not appear in the copy of the lease herewith submitted."

The copy of the lease in question which accompanies your letter shows a lease, in ordinary form, between one C. F., and E. F., his wife, party of the first part, and the board of control of the Ohio Agricultural Experiment Station, party of the second part. The lease states that "the first party does hereby lease to the State of Ohio, for the use of said Agricultural Experiment Station, the following described real estate, to-wit: Then under a subhead called "a," follows a detailed description of a tract of land consisting of 200 acres of land. Also follows, under a subhead called "b," a tract of land containing 12.95 acres of land more or less. Three tracts of land, consisting of 5 acres, 26.38 acres, and 5 acres respectively, are specifically excepted from the premises leased. No mention is made in the lease of any oil or other lease then existing between the lessor and any third party. On the contrary, the lessor's promise is "to defend the second party in the enjoyment and peaceable possession of the above described premises during the term aforesaid."

Special attention is called to the next to the last paragraph of the lease, reading as follows:

> "And the said First Party, for himself, his heirs, executors, administrators, and assigns, further covenants and agrees to and with the said Second Party that all rents being paid, and all their covenants in this lease being performed by said Second Party, they will at any time previous to the expiration of this lease, convey the said premises to the State of Ohio, by a good and sufficient deed of general warranty, with release of dower, and *free from all encumbrances of every description,* upon the payment to them by the said Second Party of One Hundred Twenty-Five Dollars per acre."

The particular question asked by you, with reference to this lease, is:

> "Under the terms of the option will the state have the right to purchase the whole premises described in the descriptions indicated as "A" and "B," or will it have the right to purchase only the amount of land covered by the lease?"

It is noted that the total acreage of the premises described in the lease under subheads "a" and "b" is 212.95 acres of land, more or less, and that the amount of land covered by the specific exceptions made in such lease is 36.38 acres, more or less. In other words, the amount of land actually leased by the party of the first part to the party of the second part is 176.57 acres, more or less. Your question is whether the optionee has the right, in the event of the exercise of the above quoted option, to compel the optionor to convey 212.95 acres, or only 176.57 acres.

The answer to this question depends upon the meaning to be given the words "said premises," found in that part of the option which reads:

> "* * * will * * * convey the *said premises* to the State of Ohio * * *."

The words in question being ambiguous, it is necessary to resort to other parts of the instrument in order to ascertain, if possible, what the parties to such instrument had in mind when they employed such words.

As said before, the description contained in subheads "a" and "b," is immediately followed by the description of three tracts of 5, 26.38 and 5 acres, respectively, all of which are excepted from the premises leased. The habendum clause next follows and reads:

"To have and to hold *the same* for the term of ten years * * *."

The covenant as to proper use of the premises says:

"And it is mutually covenanted and agreed, by and between the parties hereto, that the *aforesaid* premises shall be occupied in a careful and proper manner by the second party."

The agreement not to sublet or assign says:

"That *said* premises, or any part thereof shall not be sublet, nor shall this lease be assigned * * *."

The lease also contains an agreement by the second party to surrender, at the end of the term, "possession of the premises *hereby leased.*"

The insurance clause extends to the buildings *"of these premises,"* and the clause relating to the removal of buildings erected by the lessee speaks of buildings which may be erected on "these *premises.*"

Then follows the option clause hereinabove set forth, which obligates the optionor to convey *"the said premises."*

Looking at the lease as a whole, I have no difficulty in reaching the conclusion that the words "the said premises," as used in the option clause, refer only to the amount of land covered by the lease, which amount is the land described in subheads "a" and "b" as cut down and limited by the specific exceptions made in the lease.

Another question upon which you request my opinion is as to the effect of the oil lease mentioned in your letter upon (a) the rights of the lessee under the lease proper, and (b) the rights of the lessee under the option of purchase given by the lease.

The last paragraph of the lease reads as follows:

"The First Party will, and his heirs, executors, administrators or assigns shall defend the Second Party in the enjoyment and peaceable possession of the above described premises during the term of aforesaid, if the Second Party shall perform all and singular the covenants herein agreed to be performed on the part of the Second Party."

By virtue of this provision the lessor has undertaken to secure to the lessee the enjoyment and peaceable possession of the whole of the premises leased. There being no mention made in the lease of the prior oil lease, the lessee is entitled to hold the lessor responsible for damages (if any) flowing from the partial eviction consequent upon the action of the lessee of the oil lease in exercising the privileges given by such oil lease.

Coming now to consider the option clause of the lease, we observe that in it the lessor undertakes, in case the option is exercised, to convey the premises by a good and sufficient deed of general warranty with release of dower, and free from all encumbrances of every description.

If the lessee exercises the option, and a deed of the character mentioned is executed by the lessor, and the fact should be that at the time of the execution of such deed there should be an outstanding oil lease, duly filed for record as provided by section 8519 G. C., then clearly there would be an "encumbrance" against said premises, within the meaning of the covenant against encumbrances. For the breach of such a covenant, an action in damages would lie.

(10) What may be called your tenth question reads as follows:

"When the Ohio Agricultural Experiment Station takes an option on a farm with the intention of subsequently buying same, has the board of control or the director of the station any right to permit the owner of said farm to remove a building therefrom between the time of taking such option and the final purchase of the premises without making a suitable deduction from the option price?"

It is assumed, of course, that the building removed was affixed to, and constituted a part of, the premises leased. If it was not so affixed, this fact would change the conclusions herein expressed.

We understand, from personal conference with Mr. Bliss, your supervising examiner, that the option to which the above question refers is the option (as yet unexercised) contained in the lease whose provisions have just been construed in answering your ninth question. We also understand that investigation made subsequent to the time when your question was written shows that the permission accorded to the owner of the farm to remove the building was given, not by the board of control, but by an official of the station known as the bursar. The bursar is, by reason of section 1171-4 G. C., an appointee of the director of the station, he being a person whose services are considered "necessary for the proper management of the station."

It appears that the records of the board of control are entirely silent upon the matter of the removal of such building, and that your best information is that said board at no time took any action relative to granting such permission. It is suggested, however, that the director of the station may possibly have known of, and consented to, such removal.

Under the statement of facts just set forth, it becomes unnecessary to consider what, if any, right the board of control has, under the law, to permit the removal of a building under circumstances like those stated in your letter. If the fact is that the board of control took no action whatever in the matter, there is no justification for any inference of knowledge or permission on their part, and the question becomes, as to such board, purely hypothetical.

I so far as your question affects the director and bursar of the station, it is observed that neither one has any authority to enter into a land lease or land option on behalf of the station, nor any authority to consent to a modification or waiver of any of the terms of such a lease or option after the same have been once consummated by the proper parties. By reason of section 1171-4 G. C., the relation of the director (and that of his appointees, including the bursar) to the station is a managerial one. He is an executive, having "control of the affairs of the station" and "responsible to the board of control for the management of all its departments." The matter of making contracts for the purchase, sale or lease of lands is, we think, the sole concern of the board of control, by reason of section 1171-3 G. C., which expressly makes such board a body corporate, with power to contract and be contracted with, and also to receive and hold, in trust for the use and benefit of the station, a grant or devise of land.

You are therefore advised that when the owner of a farm leases the same to the board of control of the Ohio Agricultural Experiment Station, and there are situate on said farm at the time of lease certain buildings which are annexed to and form a part of the land demised, neither the director nor the bursar of said station has any legal authority to grant permission to the lessor of said farm to remove from said land any of said buildings. Nor would this conclusion be in anywise affected by the added fact that such lease contained a clause giving the lessee an option to purchase said premises at any time prior to the expiration of such lease.

Respectfully,
JOHN G. PRICE,
Attorney-General.

659.

ELECTIONS—ELECTOR NOMINATED IN PRIMARY OR BY PETITION FOR PUBLIC OFFICE—WITHDRAWAL OF CANDIDACY—HOW MADE—VACANCY HOW FILLED.

1. *An elector nominated in a primary or by petition for public office, can withdraw his candidacy and decline such nomination and resign from such ticket, but such resignation should be addressed to the deputy state supervisors of elections if the original nomination papers are filed in a county.*

2. *Where a primary election is held under the provisions of section* 4963 *G. C., in a municipality other than a charter city, and candidates run in such primary as the candidates of political parties, and a candidate so nominated in such primary as the candidate of a political party later submits his resignation of such nomination to both the board of deputy state supervisors and the controlling party committee of his party in such municipality, there is thereby created a vacancy for that particular nomination and the power to fill vacancies on a party ticket is vested in the city central committee of such political party, but such vacancy must be filled in proper manner by the proper party committee before provision is made for the printing of the ballots.*

COLUMBUS, OHIO, September 27, 1919.

HON. JARED P. HUXLEY, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of September 24, 1919, in which you request the opinion of this department upon the following statement of facts:

> "At the primary election held in this city August 12, 1919, M. D. was nominated on the Democratic ticket to the office of mayor of this city. On September 15 Mr. D. tendered the board of deputy state supervisors of elections his resignation and withdrawal as a candidate for that office (copy enclosed.)
>
> On September 20, 1919, the Democratic city central committee met and accepted the resignation and withdrawal of Mr. D. as a candidate and nominated A. W. C. for the office and so certified to the deputy supervisors of elections. The Democratic county central committee took similar action (copies enclosed.)
>
> "*QUERY*: Has the election board the right to accept this withdrawal of Mr. D. and should they certify the name of A. W. C. as the Democratic nominee?
>
> I beg to call your attention to decision of our Supreme Court in case of State ex rel Jones vs. O'Dwyer et al., 97 O. S., page 22.
>
> I have always been of the opinion that the controlling party committee had the legal right to fill vacancies on the ticket, but do not just understand the meaning of this part of the court's decision,
>
> 'The statute formerly relating to vacancies in municipal elections has been repealed and the amended statute relating to municipal elections has omitted all reference to municipal candidates,' "

Accompanying such letter were three exhibits, the same being copies of the original papers filed with the deputy state supervisors of elections of Mahoning county, Ohio. Exhibit No. 1 is a copy of the resignation of M. D., as the Democratic candidate for mayor of Youngstown, Ohio, following his nomination at the

primaries held in that city on August 12, 1919. Such letter of resignation on the part of Mr. D. reads as follows:

"Youngstown, Ohio, September 15, 1919.

Board of Deputy State Supervisors of Elections, for Mahoning County, Ohio.

Gentlemen:—You are hereby notified that I do hereby resign and withdraw as candidate for the office of mayor of the city of Youngstown, for which office I was nominated by the Democratic electors of the city of Youngstown at the primaries held in this city on August 12, 1919.

I have also notified the Democratic city and central committees to like effect, and request that they duly fill the vacancy occasioned by my withdrawal.

Respectfully yours,

M. D."

Exhibit No. 2 is a letter to the deputy state supervisors of elections of Mahoning county, Ohio, from the Mahoning County Democratic central committee and duly signed by its chairman and secretary. It is not clear as to just why this letter from the Mahoning County Democratic central committee was sent to the deputy state supervisors of elections of that county, inasmuch as the nomination in question is a municipal nomination in a registration city in that county and a matter with which the Democratic county central committee would have nothing to do, inasmuch as such latter committee is composed in part of members elected from the townships outside of the city of Youngstown. This communication reads in full as follows:

"THE MAHONING COUNTY
DEMOCRATIC CENTRAL COMMITTEE

Chairman, W. L. S.
Secretary, J. V. S.

Youngstown, Ohio, September 23, 1919.

Deputy State Supervisors of Elections, Mahoning County, Ohio.

Gentlemen:—You are hereby notified that a meeting of the Mahoning County Democratic central committee was held at the Ohio Hotel on Saturday, September 20, 1919, at 2:30 p. m., which was regularly and duly called, and at which meeting was a quorum of the said committee, there being present fourteen of the twenty-three members of the committee.

Immediately after the meeting was called to order, the withdrawal and declination of M. D., the Democratic candidate who was nominated for mayor of the city of Youngstown, Ohio, at the primaries held in the city of Youngstown, Ohio, on the 12th day of August, 1919, was duly read and accepted by the unanimous vote of said committee.

The committee thereupon set about to fill the vacancy caused by Mr. D.'s withdrawal and declination, and duly nominated and selected A. W. C. of the city of Youngstown, Ohio, as the Democratic candidate for mayor of the city of Youngstown, Ohio, to be voted upon at the coming election to be held in the city of Youngstown, Ohio, on the 4th day of November, 1919.

The ballot was taken and A. W. C. received the unanimous vote of the said committee and therefore A. W. C. is hereby certified as the Democratic candidate for the office of mayor of the city of Youngstown, Ohio, to fill the vacancy caused by the withdrawal and declination of M. D., to

be voted upon at the next regular election to be held in the city of Youngstown, Ohio, on the 4th day of November, 1919.

Very truly yours,
W. L. S., Chairman.
J. V. S., Secretary."

AFFIDAVIT

"State of Ohio, Mahoning County, ss:

Personally appeared before me, a notary public within and for the county of Mahoning, State of Ohio, W. L. S. and J. V. S., who, after being first duly sworn according to law, say they have been duly selected as chairman and secretary respectively, of the Mahoning County Democratic central committee; that they were present at a meeting of the above committee held at the Ohio Hotel on Saturday, September 20, at 2:30 p. m.; that the contents of the foregoing statement are true.

(Signed) W. L. S.
J. V. S.

Sworn to before me and subscribed in my presence this 23d day of September, A. D., 1919.

W. H. M., Notary Public."

Exhibit No. 3 is a copy of the letter to the deputy state supervisors of elections of Mahoning county, Ohio, from the Democratic city committee, composed of central committeemen elected from the various wards of the city of Youngstown, though it is noted that the letter head used carries the title of Mahoning County Democratic central committee and not the Youngstown Democratic city central committee. This letter, signed by the chairman and secretary of the Democratic city committee, reads in full as follows:

"THE MAHONING COUNTY
DEMOCRATIC CENTRAL COMMITTEE

Chairman, W. L. S.
Secretary, J. V. S.

Youngstown, Ohio, September 23, 1919.

The Deputy State Supervisors of Elections, Mahoning County, Ohio.

Gentlemen:—You are hereby notified that a committee of the Democratic city committee composed of central committeemen elected from the various wards in the city of Youngstown, Ohio, was held at the Ohio Hotel in this city on Saturday, September 20, 1919, at 2:30 p. m., duly and regularly called, and at which meeting all members of the above committee were present.

Immediately after the meeting was called to order, the withdrawal and declination of M. D., the Democratic candidate who was nominated for mayor of the city of Youngstown, Ohio, at the primaries held in said city on August 12, 1919, was duly read and accepted by unanimous vote of said committee.

The said committee thereupon set about to fill the vacancy caused by Mr. Dunn's withdrawal, and declination, and duly nominated and selected A. W. C. of the city of Youngstown, Ohio, as the Democratic candidate for mayor of the city of Youngstown, Ohio, to be voted upon at the coming election to be held in the city of Youngstown, Ohio, on November 4, 1919. The ballot was taken and A. W. C. received the unanimous vote of said committee and therefore A. W. C. is hereby certified as the Democratic

candidate for the office of mayor of the city of Youngstown Ohio, to fill the vacancy caused by the withdrawal and declination of M. D., to be voted upon at the next regular election to be held in the city of Youngstown, Ohio, on November 4, 1919.

Very truly yours,
W. L. S., Chairman.
J. V. S., Secretary."

AFFIDAVIT

"State of Ohio, Mahoning County, ss:

Personally appeared before me, a notary public within and for the county of Mahoning, State of Ohio, W. L. S. and J. V. S., who, after being first duly sworn according to law, say that they have been duly selected as chairman and secretary respectively, of the Democratic city committee; that they were present at a meeting of the above committee held in the Ohio Hotel on Saturday, September 20, at 2:30 p. m.; that the contents of the foregoing statement are true. W. L. S.
J. V. S.

Sworn to before me and subscribed in my presence this 23d day of September, A. D., 1919.
(Seal) W. H. M., Notary Public."

A comparison of the two letters above given shows that both the Mahoning County Democratic central committee and the Democratic city central committee both met on the same hour and minute, that is, 2:30 p. m., and that the chairman, according to the letters given, presided over both committees at one and the same time. The letter of the Mahoning County Democratic central committee shows that it set about to fill the vacancy caused by Mr. D.'s withdrawal and nominated and selected A. W. C., of the city of Youngstown, as the Democratic candidate for mayor of Youngstown, one of the municipalities in the county in which the Mahoning County Democratic central committee is the controlling committee in the Democratic party. It would seem that this communication is irregular in that a county committee has no authority to fill a vacancy upon a party ticket in a city which has wards and which has a city central committee, as provided by law.

Your query is as to the right of the election board to accept this withdrawal of Mr. D. and whether they should certify the name of A. W. C. as the Democratic nominee.

Such query really consists of two questions: 1. Has the election board the right to accept the withdrawal of Mr. D. as Democratic candidate for mayor of the city of Youngstown; and, 2. Should the election board certify, that is, place upon the ballot, the name of A. W. C. as the Democratic nominee in the place of Mr. D., under the circumstances stated.

On the first question there can be little doubt as to the right of the election board to accept the withdrawal of Mr. D. as a nominee for mayor and it is their duty to do so upon the receipt of a proper resignation, as given above under date of September 15, 1919, and signed by M. D. The right of an elector to withdraw or resign from a ticket cannot be questioned, and after such withdrawal has been received by the board of elections, the name of the person withdrawing should not appear upon the ballot unless the circumstances were that such withdrawal had been received after provision had been made for the printing of the ballots to be used in the election to follow later.

Bearing upon this question, attention is invited to an opinion of the Attorney-General issued on May 6, 1910, the following language occurring therein:

"An elector who has filed nomination papers may withdraw his name as a candidate. After a candidate has withdrawn his name and his withdrawal has been accepted by the board, the board is without authority to reconsider its acceptance and such elector may thereafter have his name placed upon the official ballot only on nomination papers as provided in the first instance."

Various sections of the statutes speak of withdrawals and declinations and it must be presumed that the law takes full recognition that such withdrawals or declinations can be properly made before the time of election and nowhere is there found any authority in law that compels an elector to remain upon a ticket even though he has been properly nominated in a primary for a place upon such ticket.

The city of Youngstown, it is understood, is not a charter city and therefore holds its primary elections under chapter 6 of the General Code, beginning with section 4948 and running to section 4991-1 G. C. Pertinent parts of such chapter upon primary elections are as follows:

"Section 4949.—Candidates for * * * municipal offices * * * shall be nominated or selected in such * * * municipality, in accordance with the provisions of this chapter, and persons not so nominated shall not be considered candidates and their names shall not be printed on the official ballots, nor shall delegates or alternates to such convention, or party controlling committees whose members have not been so selected, be recognized by any board or officer." (104 V., 9).

"Section 4960.—The controlling committees of each voluntary political party or organization shall be * * * a county central committee, consisting of one member from each precinct in the county, or one member from each ward and township in the county as the outgoing committee may determine, *and the members of the central committee chosen from a city shall constitute a city committee.* * * *" (106 V., 544).

'Section 4961.—Within fifteen days after their selection all such state and county central committees shall meet and organize by the election of a chairman and secretary, and shall elect an executive committee." (103 V., 480).

It will be noted in section 4961 G. C. that the county central committee shall select an executive committee, but such section has no provision that the members of the central committee chosen from a city and constituting a city committee, shall elect an executive committee for that city. Hence the controlling committee of a political party in a city would be the city committee composed of the members of the central committee chosen from such city by direct vote at the primary held in the even numbered years.

"Section 4963.—* * * and primaries under this chapter to nominate candidates for township and municipal offices * * * shall be held in each county at the usual polling places on the second Tuesday in August of the odd numbered years." (107 O. L., 400).

"Section 4969.—* * * Such declarations of candidacy * * * shall be accompanied by the certificate of five electors of the * * * municipality * * * for which such nomination is to be made, and shall be in the form hereinafter provided * * *." (106 O. L., 545).

Section 4969, supra, provides that a certificate of five electors of a municipality

should simply certify that the candidate for whom they sign is a member of their political party and is well qualified to perform the duties of the office for which he is a candidate, and in elections held under the party primary system, such list of five electors does not constitute a committee to fill vacancies, such duty, if a vacancy occurs, devolving upon the controlling party committee in the municipality.

> "Section 4989.—In case of a vacancy or vacancies in the list of nominations, occurring by death or *otherwise,* after the result has been declared, such vacancy or vacancies shall be filled by the proper controlling committee of the party in which such vacancy or vacancies occur, and the names of the candidates, delegates or committeemen, as the case may be, selected by such committee, shall, in the case of offices, the nomination papers for which have to be filed with the state supervisor of elections, be reported to such state supervisor and, in case of other offices, shall be reported to the proper board or boards of deputy state supervisors, and such state supervisor or board, or boards, shall cause such name or names to be placed on the official ballots, lists or rolls." (103 O. L., 486).

Following chapter 6 of the Ohio election laws, which treats upon primary elections, we come to chapter 7, which treats of the nomination of candidates and which starts off with section 4992 G. C., which reads as follows:

> "Except as provided by the *preceding chapter* of this title, nominations of candidates for public office may be made as herein prescribed." (103 O. L., 843).

Section 4992, as quoted, is the first section of an act relating to "nomination by petition" and filed in the office of the secretary of state May 13, 1913. It is important to note that in such act relating to nomination by petition, the closing section of the act was as follows:

> "The power to fill vacancies on a party ticket shall be vested in the central committee of such party or in the case of a vacancy occurring in a list of candidates nominated by petition in the committee named in such petition."

Coming to your second question, you ask whether the election board should certify the name of A. W. C. as the Democratic nominee for mayor of the city of Youngstown, vice M. D., whose resignation as such Democratic nominee for mayor of such city bears the date of September 15 and addressed to the deputy state supervisors of elections of Mahoning county.

You call attention to the decision of the Supreme Court of Ohio in the case of State ex rel. Jones vs. O'Dwyer et al., 97 O. S., p. 22, and say that you do not just understand the meaning of this part of the court's decision:

> "The statute formerly relating to vacancies in municipal elections has been repealed and the amended statute relating to municipal elections has omitted all reference to municipal candidates."

The opinion of the Supreme Court in the above case being very short, the Attorney-General has made a thorough examination of the various papers filed in this case, being No. 15778, and decided October 23, 1917, on file in the office of the clerk of the Supreme Court, with a view of ascertaining just what was meant

by the court in the sentence above quoted, which carries no reference to any particular statute, and we are unable to advise what specific statute bearing upon vacancies in municipal elections that the Supreme Court had in mind when the above sentence was used. It may be said, however, that the case under consideration by the Supreme Court in the above decision was one in which the nominations were made in a charter city, that is, the city of Toledo, Ohio, and not in a city where party nominations obtained. The primary in question was held on the 11th of September, 1917, under the charter of the city of Toledo and hence was not a primary held under the Ohio primary laws above given. Under these circumstances, there being no political parties appearing upon the primary ballots used in the Toledo primary under the charter, different conditions were present than those appearing in the primary held in Youngstown on August 12, 1919, when party primaries were held for the nomination of Democratic and Republican candidates for mayor. Under these circumstances the case cited by you is not in point on the question of nominations made in the primary election which was held under the Ohio primary law, and in which there was present the element of political parties and candidates running as partisan candidates with a party committee empowered to fill vacancies as might occur, as indicated in the statutes heretofore quoted. Whatever may have been the particular statutes that the Supreme Court had in mind in using the above language, the sections heretofore quoted are still the law of Ohio and seem to cover the case at hand.

It is therefore the opinion of the Attorney-General that:

1. An elector nominated in a primary or by petition for public office, can withdraw his candidacy and decline such nomination and resign from such ticket, but such resignation should be addressed to the deputy state supervisors of elections if the original nomination papers are filed in a county.

2. Where a primary election is held under the provisions of section 4963 G. C., in a municipality other than a charter city, and candidates run in such primary as the candidates of political parties, and a candidate so nominated in such primary as the candidate of a political party later submits his resignation of such nomination to both the board of deputy state supervisors and the controlling party committee of his party in such municipality, there is thereby created a vacancy for that particular nomination and the power to fill vacancies on a party ticket is vested in the city central committee of such political party, but such vacancy must be filled in proper manner by the proper committee before provision is made for the printing of the ballots.

Respectfully,
JOHN G. PRICE,
Attorney-General.

660.

WILBERFORCE UNIVERSITY—CONTROL OF NORMAL AND INDUSTRIAL DEPARTMENT VESTED IN BOARD OF TRUSTEES.

Exclusive authority, direction and control over the operation and conduct of the normal and industrial department of Wilberforce University is vested in the board of trustees of such department.

COLUMBUS, OHIO, September 30, 1919.

HON. THOMAS M. NORRIS, *Member of Ohio Senate, Cleveland, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department as follows:

"The committee appointed under the above resolution to investigate and report on the combined and industrial department at Wilberforce, had its first meeting at the institution the 18th, 19th and 20th of August. Practically all of the University trustees, as well as the trustees of the combined normal and industrial department were given hearings, and these hearings show that the cause of dispute between these two institutions results through there being two institutions there apparently instead of one. Bishop Jones states that there was a compact whereby this department was given as an aid to the University, and that the president of the University is really president also of the normal school. Our students are enrolled through the University, in fact the students outside of the state attending the state school in most cases pay their tuition fees direct to the University, only part of same coming to the state funds. Bishop Jones has said that the agreement with regard to giving them the normal school was through Messrs. Nash, McKinley, Foraker, and others. He was unable, however, to give any documentary support to this, and I am going to ask you to inform the committee as to the status of the C. N. & I. department of Wilberforce University. Mr. Sheets, when he was Attorney-General, rendered an opinion that it was separate and distinct from the University, under date of November 30, 1903, and we would value it, and in fact will need, before we can arrive at our report under the resolution above referred to, your opinion as to this. Our next meeting will be September 30 and October 1, and if you could send me an opinion to take to that meeting, it will be keenly appreciated.

The first building that the state erected, O'Neill Hall is situated on land owned by the University. This is the only building that is so situated. There may have been some agreement at that time. It would seem to the committee that there must have been some agreement whereby this land was used which would have provided for our continuous use of it, but I am firmly of the opinion that the aid to the University intended by this department of normal and industrial work was simply the building up for the colored people a great institution at the one point, Wilberforce, and could not have implied what the A. M. E. church officials insist is their understanding that the state institution was never to have a separate head, or to parallel any of the instruction taught in the University."

It is noted that your inquiry may be stated generally to be as to the status of the combined normal and industrial department at Wilberforce University. You also state that the dispute between the department and the university "results through there being two institutions there apparently instead of one," and that it is claimed that there was "a compact whereby this department was given as an aid to the University and that the president of the University is really president also of the normal school." It is further noted that the source of this claim is stated to be: "Bishop Jones has said that the agreement with regard to giving them the normal school was through Messrs. Nash, McKinley, Foraker and others," and you ask this department "to inform the committee as to the status of the C. N. & I. department of Wilberforce University." Your opinion is also noted

"that the aid to the University intended by this department * * * was simply the building up for the colored people a great institution at the one point, Wilberforce, and could not have implied what the * * *church officials insist is their understanding that the state institution was never to have a separate head, or to parallel any of the instruction taught in the University."

Sections 7975 to 7986 G. C., both inclusive, under the subtitle of "Wilberforce University," in the chapter of title 5 relating to colleges and universities, are pertinent to your inquiry. Section 7975 provides:

> "A combined normal and industrial department shall be established and maintained at Wilberforce University in Greene county, Ohio."

Section 7976 provides for the creation of a board of trustees, five members of which shall be appointed by the governor, by and with the consent of the senate, and three members to be chosen by the trustees of the University. It also provides that the president of the University "shall be ex-officio *a member of the board.*" To this board this section plainly commits the government of the department in this language:

> "The government of such department shall be vested in a board of nine trustees to be known as 'the board of trustees of the combined normal and industrial department of Wilberforce University.'"

The powers and duties of the board of trustees are clearly stated in section 7981, which in part is:

> "The board of trustees shall take, keep and maintain *exclusive authority* * * * and control over the operations and conduct of such normal and industrial department * * *. The board shall determine the branches of industry to be pursued, purchase through a suitable and disinterested agent, the necessary means and appliances, select a superintendent for the industrial branch of the department, fix his salary and prescribe his duties and authority. The expenditures of all moneys * * * shall be made *only* under such regulations and for such specific purposes * * * as the board of trustees of such department establish. No money appropriated by the state shall be used for any purpose not in direct furtherance and promotion of the objects of the department."

Section 7982 in part provides:

> "No sectarian influence, direction or interference in the management or conduct of the affairs or education of such department shall be permitted by its board."

Section 7986 provides in part:

> "All revenue arising from tuition * * * or otherwise, under the aforesaid department, shall be applied by its board of trustees to defray its expenses, or to increase its efficiency, a strict account of which shall be kept by the department board, and accompany the report to the governor."

With reference to any informal understanding or agreement entered into, as stated to your committee, but concerning which you say no "documentary support" was given, you are advised that the law relating to such department is the sole source of the power and authority of the trustees of the board and of the University in this matter.

The statutes relating to the combined normal and industrial department of Wil-

berforce University very clearly and definitely place its government and control in the board of trustees, as provided in sections 7976 and 7981 G. C. (supra). As to the application of and accounting for revenue arising from tuition, section 7986 needs no explanation and no further comment is, therefore, made on this feature of your inquiry.

You are therefore advised that exclusive authority, direction and control over the operation and conduct of the normal and industrial department of Wilberforce University is vested in the board of trustees of such department selected under section 7976. The opinion of the former Attorney-General, to which you refer (Annual Reports Attorney-General 1904-1905, p. 227), is not in conflict with the conclusion here reached and a copy of that opinion is herewith enclosed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

661.

SCHOOLS—WHERE RURAL SCHOOL DISTRICT PARTICIPATES IN SCHOOL ELECTION ON QUESTION OF CENTRALIZATION OF SCHOOLS IN TOWNSHIP BOUND BY VOTE—COUNTY BOARD OF EDUCATION HAS AUTHORITY TO ORDER ELECTION ON CENTRALIZATION OF SCHOOLS IN A TOWNSHIP—SECTION 4726 G. C. MUST BE READ IN CONJUNCTION WITH SECTION 4726-1 G .C.

1. *Where a rural school district, formerly created as a special school district, participates in a school election on the question of centralization of schools in a township, such special district is bound by the result of the majority vote in the whole of such township, even though the majority of the votes cast in the special district in question would be against centralization.*

2. *A county board of education has authority to order an election on centralization of schools in a township which has one or more rural school districts, under section 4726 G. C., which must be read in conjunction with section 4726-1 G. C. in order to make the latter section effective.*

COLUMBUS, OHIO, September 30, 1919.

HON. ROBERT E. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department on the following statement of facts:

> "In a township in which there are several special school districts, and some rural school districts, they propose to hold an election to submit the question of centralization under section 4726-1 of the General Code.
>
> If a majority of the votes cast would be in favor of centralization, although in one of the special districts the majority of the votes cast would be against centralization, what would be the result to the district voting against it under section 4726-1?"

Section 4726-1 G. C. reads:

> "In townships in which there are one or more school districts, the qualified electors of such school districts may vote on the question of

centralizing the schools of said township district, or of special school districts therein, without interfering with the existing school district organization until the result of the election shall have been determined. If at such election in any township a majority of all the votes cast shall be in favor of centralizing the schools in said township, the probate judge of the county shall create a new board of education for the said township, without delay, by selecting from the several boards of education thus consolidated, five suitable persons, giving each former district its fair representation in such selection, which such five persons so selected shall constitute the board of education for said township until the first township election thereafter; at such first township election thereafter the electors of such township shall elect two members of the board of education for two years, and three members to serve for three years, and at the proper elections thereafter their successors shall be elected for four years. If a majority of the electors in said township vote against said centralization at the time above designated, then the several school districts in said township shall proceed as though no election had been held."

Your question is very largely covered in Opinion No. 547, issued by the Attorney-General to Hon. George F. Crawford, prosecuting attorney of Darke county, Ohio, on August 5, 1919, copy of which is herewith enclosed.

Attention is invited to Opinion No. 1102, issued by the Attorney-General on March 25, 1918, found on page 476 of the Opinions of the Attorney-General for that year, bearing upon section 4726-1 G. C., in which the second branch of the syllabus reads:

"It is not permissible under the provisions of section 4726-1 G. C. for a part of the school districts of a township to vote on the centralizing of the schools of such districts and prevent the electors of other districts, located in whole or in part within the township, from participating in said election."

The syllabus of Opinion No. 547, issued by the Attorney-General on August 5, 1919, and bearing upon a case largely similar to the one which you present, reads as follows:

"1. Under section 4726-1 G. C. all rural boards of education in a township must each call an election in their respective districts for centralization of the schools of such township, in order that such question may be legally voted on in the manner provided in section 4839 G. C.

2. Section 4726-1 G .C. must be read in conjunction with section 4726 G. C., and a county board of education has authority to order an election on centralization of schools in a township which has one or more rural school districts as its school territory.

3. Centralization of schools must be voted upon by the electors of a township and not a part of it, village and city school districts being excluded.

4. County boards of education have full authority to create a new school district from one or more districts or parts thereof."

You say that in a certain township there are several special districts and some rural school districts and that they propose to hold an election to submit the question of centralization under section 4726-1 G. C. Attention is invited to the

fact that there are no longer any special school districts under the Ohio law and all of the districts in this township must, therefore, be rural school districts unless any of the former special school districts can be called village school districts. You further ask, if a majority of the votes cast would be in favor of centralization, although in one of the special districts the majority of the votes cast would be against centralization, what would be the result to the special district voting against centralization? From your statement of facts it is assumed that all these rural school districts in the township joined in the call for the election in their respective districts and, if such is the case, they become parties in every sense to the transaction, or full participants in the election along with the other districts, and must be bound by the ultimate desult of the election which they called in their districts jointly, along with the election on centralization in the other rural school districts. The question of school centralization must be submitted in the township in question, treating the township as a unit, and if a majority of the votes cast in such election in the whole of said township is in favor of centralization, then the schools of the township should become centralized as a whole and not a part of them.

While your letter indicates that all these districts jointly propose to call the election, in which event every district participating would be bound by the result one way or the other, it is possible that some certain district might not join in this call, in which event the county board of education has authority to order an election in such township on the question of centralization, under section 4726 G. C., which must be read along with section 4726-1 G. C., in order to make the latter section operative; for it will be noted that section 4726-1, taken alone, makes no provision for the calling of the election.

It is therefore the opinion of the Attorney-General that:

1. Where a rural school district, formerly created as a special school district, participates in a school election on the question of centralization of schools in a township, such special district is bound by the result of the majority vote in the whole of such township, even though the majority of the votes cast in the special district in question would be against centralization.

2. A county board of education has authority to order an election on centralization of schools in a township which has one or more rural school districts, under section 4726 G. C., which must be read in conjunction with section 4726-1 G. C. in order to make the latter section effective.

Respectfully,
JOHN G. PRICE,
Attorney-General.

662.

SCHOOLS—STATE AID TO WEAK SCHOOL DISTRICT—INTERPRETATION OF HOUSE BILL NO .406 (108 O. L. 431)—APPLICABLE TO STATE AID FOR YEAR 1919-1920.

House Bill No. 406, 108 *O. L.* 431, *relating to state aid to weak school districts, was intended to apply to applications for state aid for the year* 1919-20 *and must be given that effect, if possible. Though it became a law during the sessions of the budget commissions, its provisions relating to the duties of the budget commission may be given effect by taking the steps referred to in the law after the date of its effectiveness. If a board of education, acting under said act after said date, files with the budget commision a certificate of its "weak condition" it is the mandatory*

duty of the budget commission to consider such certificate and act in accordance with the section.

COLUMBUS, OHIO, September 30, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I note your request for immediate opinion upon the questions submitted in your letter of September 20, as follows:

> "In making out its budget for the ensuing year the county superintendent of Brown county reports that one of the school districts certified pursuant to the provisions of the Freeman law (H .B. No. 406) that it was a weak school district and would make application for state aid under that law. Thereafter the budget commission made its adjustments for that district and finally passed upon it after the Freeman law went into operation, and submitted its action to the state commission, which passed upon it favorably.
>
> The budget commission ignored the provisions of the Freeman law in making its apportionment of the levy, giving to the tuition fund of the school district less than the required two-thirds. This disqualifies the district from state aid. The district is in urgent need of this aid.
>
> Will you kindly advise us immediately whether it is within the power of the budget commission of Brown county to recall its action and observe the provisions of the law in making its adjustments, and if so how will the commission proceed to do this?
>
> If the commission refuses to act in the matter, what remedy has the school district? i. e., will an action in mandamus lie to compel it to act in pursuance to law?"

It is assumed from this statement that the budget commission has certified its action to the county auditor under section 5649-3c of the General Code and has finally adjourned. Possibly all this was done before August 18, 1919, when House bill No. 406 became effective as a law; for the budget commissioners are to meet on the first Monday in August and must complete their work "on or before the third Monday in that month, unless for good cause the tax commission of Ohio shall extend the time for completing the work." (Sec. 5649-3b). That is to say, it is possible for a budget commission, acting within the law, to have completed its work and certified its levies before H. B. No. 406 (108 O. L. 431) became a law.

Moreover, at the time when the board of education is required by section 5649-3a G. C. to submit its budget (the first Monday in June) H. B. No. 406 was far short of being an effective law; so that the conclusion is irresistible that at the time stated in your letter, viz.: "In making out its budget for the ensuing year," the school district was not entitled by existing law to the privilege of attaching thereto "a certification that it intends to make application for state aid pursuant to sections 7595-1 and 7595-2 of the General Code, and that it is entitled thereto," as authorized by section 7594-1 as enacted in H. B. No. 406. When the budget commission began its consideration of the budget requests there was no law to permit it to attach any significance to such a certification. It was then governed in making its adjustments only by the provisions of section 5649-3c G. C., which not only created no preference in favor of any kind of taxing district but, as interpreted by the Supreme Court in *State ex rel,* vs. *Sanzenbacher,* 84 O. S. 504, *Rabe* vs. *Board of Education,* 88 O. S. 403, and *State ex rel.* vs. *Patterson,* 93 O. S. 25, really prohibited it from doing so save in the exercise of sound discretion. After they may have completed their work, and at least some time after they were re-

quired to commence it, a law became effective not only authorizing the budget commissioners to proceed otherwise than in accordance with section 5649-3c, but expressly requiring such action on their part. This law (H. B. No. 406) provides, in section 7594-1 as therein enacted as follows:

> "Section 7594-1.—Whenever the board of education of a school district attaches to its budget a certification that it intends to make application for state aid pursuant to sections 7595-1 and 7595-2 of the General Code, and that it is entitled thereto, the budget commission shall proceed to make adjustments in accordance with the provisions of section 5649-3c, but shall lay such adjustment aside and thereupon proceed to make an adjustment which shall allow to such school district a levy of not less than four mills exclusive of the levy necessary to provide for indebtedness incurred prior to 1911 or incurred by a vote of the people. This last adjustment shall be certified by the budget commission pursuant to section 5649-3c. If it should thereafter appear that such school district did not so apply for such state aid or was not entitled thereto, then the adjustment first made and laid aside as above provided shall be deemed to be the final adjustment and the county auditor shall distribute, or redistribute the proceeds of tax collections in accordance with such first adjustment, or if such school district has received its distribution of the tax collections, the county auditor shall deduct from the sum due such school district on the distribution of the tax collections next following, the sum necessary to make such redistribution of tax collections."

As stated, this law was not in effect when the budget was filed and when the jurisdiction of the budget commission attached. If we were to apply to the proceedings of the budget commission the principles of section 26 G. C., which is the general saving clause as to "pending proceedings," there could be no escape from the conclusion that H. B. No. 406 could have no application to the work of the budget commission for the year 1919 in any respect, as not only had the time passed for the initiation of procedings before the budget commission, but the official processes of the budget commission were actually operating when H. B. No. 406 became effective.

But the question cannot be resolved upon any such ground for several reasons, which will be stated and discussed:

In the first place, if the enactment of section 7594-1 constituted an "amendment" or "repeal" within the meaning of section 26 G. C., yet the machinery for the levying of taxes has been held not to be a "proceeding" within the meaning of that section.

Alexander vs. Spencer, 13 C. C. N. S. 475.

In the second place, section 26 G. C. applies only "whenever a statute is repealed or amended." In this case no statute has been repealed or amended, unless we say that section 5649-3c has been amended by implication. The legislation embodied in H. B. No. 406 takes the form, not of an express amendment of section 5649-3c which its subject-matter affects, but of the enactment of an entirely new section which happens to modify the effect of the section referred to. Such modifying effect, known as "implied repeal" or "implied amendment," is not within the terms nor within the effect of section 26 G. C.

Railroad vs. Railroad, 72 O. S. 368.

Therefore, section 26 G. C. cannot by its own terms apply to the situation, and when H. B. No. 406 became a law by the expiration of the referendum period nothing was saved from its operation; so that you are correct in your statement that

unless some way can be found to comply with section 7594-1 as above quoted, the district (and perhaps all weak school districts in the state) will be disqualified to receive state aid this year. This follows because section 7595-1 as amended in said act sets up a condition which must be complied with by any weak school district in order to entitle it to receive state aid, in the following terms:

> "It shall place in the tuition fund at least two-thirds of the proceeds of the levy as adjusted by the budget commission pursuant to section 7594-1."

In this connection it will not do to say that this express amendment of section 7595-1 does not apply to applications for state aid to be made for the year 1919-20, because of the operation of section 26 G. C.; for while it is true that the reasons above given for the non-application of section 26 G. C. to newly enacted section 7594-1 do not apply to the express amendment of section 7595-1, it is nevertheless true that under section 7596 G. C., as it existed prior to the going into effect of H. B. No. 406, the determination as to the probable existence of a deficit must be made by a school district between October 1 and January 1 of any year; and under section 7595-2 as enacted by H. B. No. 406 the application is to be filed for the then current year between the first day of September and the first day of October, and is to be based on the preceding August settlement and the probable yield and distribution at the succeeding February settlement. It is thus apparent that in the middle of August of a year no proceeding is pending and no cause of proceeding exists with respect to applications for state aid to be made later in that year, even if by liberal construction the right of a district to have state aid could be called a "cause of proceeding" within the terms of section 26 G. C.

So the conclusion is irresistible that from all that thus far appears it will be simply impossible for the district of which you speak, and perhaps most of the weak school districts in the state, to receive state aid this year.

This could not have been the intention of the legislature; nor could the General Assembly have intended that the ability of a school district to avail itself of the benefits of H. B. No. 406, or to receive state aid at all, should depend upon the accident of the completion of the work of the budget commission in a given county before H. B. No. 406 should become effective. To impute either of these intentions to the legislature would be to reach a most improbable result. Some means must be found to avoid such a result.

It occurs to me that the General Assembly intended H. B. No. 406 to operate this year, and could have intended nothing else. Its intention must be given effect if possible (though, of course, it is conceivable that a law clearly intended to be effective at a given time must fail because of failure on the part of the legislature to take into consideration the referendum period.)

To give H. B. No. 406 effect this year it will be necessary to consider it as a command emanating from the General Assembly to the budget commissions of the state at a time when they might lawfully be in session, and in probably the greater number of instances were in session. Though such mandate might require such budget commissions to undertake work additional to that contemplated when their sessions commenced, this would not be a vital point. It will be observed that under section 7594-1 the first thing to be done is to make adjustments under section 5649-3c. The mandate of the section is that in the event its other provisions are complied with by the board of education the adjustments so made as to such school districts shall be laid aside and alternative adjustments made and certified to the county auditor in the first instance. It is to be observed also that section 7594-1 requires the budget commission to lay aside this second alternative adjust-

ment in the event that it "should thereafter appear that such school district did not so apply for such state aid or was not entitled thereto." Such facts could not be made to appear in any event before the first of September. The result is that under section 7594-1, a budget commission cannot complete its work prior to September 1 if it has a proper certification of a weak school district before it. Here is another modifying effect of section 7594-1 upon the existing law—this time upon section 5649-3b G. C., which prescribes the time when budget commissions shall complete their work.

However, another difficulty remains to be disposed of, for it has been hereinbefore stated that the certification made by the board of education under consideration was not entitled to any official cognizance on the part of the budget commission because it was filed at a time when there was no law authorizing it to be filed.

At this point it seems to me that the liberal construction required in order to effectuate the intention of the legislature should be indulged. While section 7594-1 requires the board of education to "attach" the certification in question "to its budget," there is nothing requiring such attachment to be made at any particular time, save by inference. It seems to me it would be perfectly lawful for a board of education at any time after filing its budget, and during the session of the commission, to perform this act of attaching the certification referred to in section 7594-1. These considerations lead me to express the conclusion that the proper thing to do would have been for the board of education in question, and others in a similar situation, to have waited until August 18, 1919, and then have offered to the budget commission of their respective counties for attachment to their respective annual budgets the certifications of which section 7594-1, which would then have been in effect, speaks. Probably this was not done anywhere. The initial operation of H. B. No. 406, as has been demonstrated, is surrounded by very complicated legal questions. The fact that that which ought to have been done was not done in any county should not prejudice the rights of any school district if it is possible to avoid that result.

In view of all these circumstances, I venture to suggest that the tax commission, which has from time to time, without question and under color of statutes, exercised the power of reconvening budget commissions to correct their work, should at the request of any board of education which through failure to understand the intricacies of the law in this respect failed to take the necessary steps to secure state aid, call the appropriate budget commission into session for the purpose of making the alternative adjustment referred to in section 7594-1, if it appears that the district has applied or will apply for state aid and is entitled thereto. The proper procedure would be for the board of education to send directly to the tax commission the certificate in question together with any statements of fact or affidavits showing the facts respecting its application for state aid. The tax commission, were it minded so to do, could then reconvene the budget commission as above suggested.

No course other than this will, in the opinion of this department, secure the desired result, unless it should happen that the budget commission in question was still in session, which as stated is a matter left to inference by the facts stated in your letter. If that were the case, then the immediate re-filing of the certificate in question with the budget commission would enable the commission to act in the premises, and if the commission should refuse to act mandamus would lie, if the above conclusions are correct, to compel action on such certificate. Without the filing of a new certificate, however, even though the budget commission happened to be in session at the present time, it would seem to me that such budget commission could not only be compelled to act as provided in section 7594-1 but that

it would not even have lawful authority to act, and this for the reason that the certificate filed prematurely by the board would be technically of no force and effect.

It is true that there is a dictum in *State ex rel.* vs. *Roose,* 90 O. S., 345, 349, which might justify the conclusion that in the case submitted by you the budget commission, if reconvened, could act immediately upon the certification already in its possession, though prematurely filed. The following is the language referred to:

> "It follows that such sections of a law as are not subject to the referendum will go into immediate effect notwithstanding other sections or other items may be subject to the delay incident to a referendum or the right to petition therefor. However that may be, the question is no longer of any importance in this case, for no referendum was in fact had upon any section of the law. The law in its entirety was in full force and effect before the auditor had placed the tax levy for state or local purposes upon the tax lists of the county. *It is, therefore, of no importance whether or not the certificate of this tax was prematurely issued by the auditor of state to the various county auditors.*"

However his may be, the course which has been suggested is at least the safer one to follow.

Respectfully,
JOHN G. PRICE,
Attorney-General.

663.

TEMPORARY OR OTHER RELIEF FOR THE POOR—HOUSE BILL NO. 150, 108 O. L., 266, CONSTRUED.

By the provisions of House Bill No. 150, 108 *O. L., 266, the obligation to provide temporary or "outdoor" relief for the poor rests upon the township or municipality in cases of such poor persons as have legal settlement therein; while in case of such persons requiring more than temporary relief, it is provided that upon proper ascertainment of that fact the county shall assume the obligation providing permanent relief, which shall only be provided however at the county home, except in case of persons whose peculiar conditions require that they be cared for under county control, and yet, on account of their physical condition or otherwise, may not be proper subjects for admission into the home, and persons whose physical condition will not permit their removal to the county home, in which cases the county shall provide necessary relief outside of the county home.*

In addition to the obligation to provide permanent relief, the county is to provide temporary or outside relief for those persons who have not the residential qualifications for township or municipal relief and whose condition requires less than the permanent relief to be provided only at the county home.

COLUMBUS, OHIO, September 30, 1919.

HON. LLOYD S. LEECH, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication of September 9, 1919, relative to the provision of House Bill No. 150, 108 O. L. 266, in its application to the administration of poor relief by the county and township respectively.

I advise that it appears to be the intendment of that act that townships and cities shall provide what is generally termed as "outside relief" to all persons within the township having the residential qualifications for township relief, and that with respect to such persons the county shall not be liable to afford relief except upon the conditions set forth in section 2544, which contemplates cases requiring more than temporary relief.

While the law prior to the recent amendment was construed as placing the primary responsibility of affording relief to indigent poor upon the townships and municipal corporations, subject to the county's obligation in case a more permanent provision was required, yet that view was by no means capable of general or universal application, inasmuch as it was provided, for example, in section 2544 that the county should provide for indigent persons in the county institution "or otherwise," and in section 2546 that the county commissioners should contract with physicians to furnish relief for persons of their respective townships under the charge of the county.

The intent to eliminate this apparent concurrence of jurisdiction of the county and the township in the matter of affording outside aid is very apparent in the new law in that the words "or otherwise" have been dropped from section 2544 and the provision of section 2546 for providing medical relief by the county is limited to inmates of the county home, and the policy of the law is further clarified in the provisions of section 3476 which states with particularity the intent of the act with respect to temporary relief of residents of the township or city.

What has been said relates to temporary or outside relief for those having residential qualifications for township aid, and of course there remain the class of indigent poor who by reason of lack of residential qualifications do not become a township charge; and for this class it is the apparent intent of the law that the county shall make the necessary provision, even by way of temporary outside relief where that course is proper.

This policy is evidenced not only by the latter provision of section 3476 to the effect that relief to be granted by the county shall extend to those persons not having the necessary residential qualifications for township or municipal relief, those requiring permanent relief and such other persons whose peculiar conditions require that they be cared for under county control, as well as the latter provision of section 2546 to the effect that no medical relief shall be furnished by the county for persons in their homes except those who have not acquired the residential qualifications to give them a legal settlement, and except under the provisions of sections 2544 which relate to a case where a person has been determined a county charge, but whose physical condition will not permit his removal to the county home.

Other language of the act indicates the same general policy, and you are therefore advised that under its provisions it is made the duty of the township or municipality to provide all temporary relief for indigent poor having a legal settlement therein, and that the county's obligation includes the provision of relief for those having legal settlement in the township or municipality, but whose condition requires more than temporary relief, as well as all those not having the residential qualifications, but whose condition requires permanent relief, all of which are to be provided for at the county institutions for the poor, except as to persons whose peculiar conditions require that they be cared for under county control, but may be such as to disqualify them from admission to the county home, and also those whose physical condition will not permit their removal to the county home; while cases requiring temporary relief only and not having the residential qualifications for relief from the township or municipality, are to be provided for by the county, and such provision may be made outside of the county institutions.

Respectfully,

JOHN G. PRICE,
Attorney-General.

664.

PROSECUTING ATTORNEY—EMPLOYMENT OF ASSISTANT COUNSEL BY SUCH OFFICER—STATUTES GOVERNING SUCH APPOINTMENT —CONSTRUCTION OF SECTIONS 2912, 3004 AND 13562 G. C.

1. *The prosecuting attorney may, subject to the restrictions contained in section 3004 G. C. employ an attorney to procure necessary evidence to be used in the prosecution of a criminal offender, and pay him for such services out of the fund referred to in that section.*

2. *When the prosecuting attorney is disabled from conducting a criminal prosecution, or requires the assistance of additional counsel, appointment and payment of an assistant is governed by section 2912 and 13562 G. C., and not by section 3004 G. C.*

3. *The expense of a private individual in attending a conference called by the Attorney-General on a matter involving the county treasurer, and whose selection for that purpose was made by the prosecuting attorney at the suggestion of the Attorney-General who stated that the conference was urgent, and which conference the prosecuting attorney was unable to attend because he was then engaged in the trial of a case, may be paid from the fund allowed to prosecuting attorneys under section 3004 G. C.*

COLUMBUS, OHIO, September 30, 1919.

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

GENTLEMEN:—Your letter of recent date relating to certain expenditures made by a prosecuting attorney from the fund allowed these officers under section 3004 G. C. and inquiring as to his authority to disburse the money for the purposes men- in your letter, was duly received.

The statute referred to provides for the creation of a fund to be used by the prosecuting attorney in paying expenses incurred by him in the performance of his official duties and in the furtherance of justice, which are not otherwise provided for, and, so far as pertinent to the present inquiry, reads as follows:

> "There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. Upon the order of the prosecuting attorney the county auditor shall draw his warrant on the county treasurer payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for herein, and to be paid out of the general fund of the county."

Inasmuch as the section 3004 G. C. fund can be used to pay expenses incurred only in the performance of official duties, and then only when their payment is not otherwise provided for in other statutes, it becomes necessary, in order to properly apply the statute to any given state of facts, to ascertain whether any duty has been imposed upon the prosecuting attorney with respect thereto, and if so, what provision, if any, has been made for the employment or appointment and payment of assistants to assist him in the discharge of the particular duty.

Section 2916 G. C. requires that the prosecuting attorney, except when otherwise provided by law, 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 and court of appeals.

In case of sickness or other disability of the prosecuting attorney, preventing him from discharging his duties, the common pleas court is empowered by section 2912 G. C. to appoint an assistant to perform the duties of the office "until the disability is removed," who shall receive such compensation as "the court fixes and the county commissioners allow."

Section 2914 G. C. may also be noticed in this connection. That section provides that the judge or judges of the common pleas court may fix the compensation of assistants to the prosecuting attorney, but that statute is probably confined in its operation to the general assistants. At least that was the view taken in State vs. Commissioners 8 C. C. (N. S.) 281, 287, affirmed 12 C. C. (N. S.) 202 and 81 O. S. 562, without report. See, however, as probably contra, 1914 Opinions of Attorney-General, Vol. II, p. 1150; 1916 Opinions of Attorney-General, Vol. II, p. 118, and 1917 Opinions of Attorney-General, Vol. I, p. 478.

Another section, 2917 G. C., which may also be referred to, provides that "no officer," and this includes a prosecuting attorney, "may employ other counsel or attorney at the expense of the county except as provided in section 2912 G. C."

Provision has also been made by section 13562 G. C. whereby the common pleas court and the court of appeals are authorized to appoint an attorney to assist the prosecuting attorney in the trial of a pending case, wherever the public interest so requires, and for the payment of such compensation for such services as the court and county commissioners approve.

Having briefly referred to the statutes imposing duties upon the prosecuting attorney in both civil and criminal matters, and those governing the employment and payment of assistants, as well as section 3004 G. C., we will now consider the items of expenditure involved in the order in which they are stated in your letter.

(1) *The* $5.00 *item.*

One Brown had been indicted for perjury on account of false statements made in obtaining a marriage license. In order to properly prepare the case for trial it was necessary to secure documentary evidence from Kentucky, and also to interview and arrange for the presence of witnesses from that state. The county being without a secret service officer, a member of the local bar was employed by the prosecuting attorney to secure the documents and witnesses referred to, and for his services in the matter was paid $5.00 from the section 3004 fund.

In my opinion this expenditure comes within the doctrine of 1916 Opinions of Attorney-General, Vol. II, p. 1453, that the section 3004 fund may be used in the employment of persons to procure evidence to be used in the prosecution of offenders when the county is without a secret service officer.

(2) *The* $50.00 *and* $25.00 *items.*

One Kirk had been arrested for contributing to the delinquency of a minor child. The prosecuting attorney was the brother-in-law of the defendant's father, and, considering himself disqualified from prosecuting the defendant, the matter was called to the attention of the common pleas judge who appointed a special prosecutor to prosecute the case under authority of section 13562 G. C. In the county involved, the probate and common pleas courts were combined, and are known as the court of common pleas, under authority of section 7 of article IV of the State Constitution.

The special prosecutor conducted the first trial of the case, and was allowed a fee for his services which the county commissioners, however, refused to approve. He thereupon announced to the court and prosecuting attorney his retirement from the case.

Thereafter, a new trial having been granted, the prosecuting attorney, without requesting and securing, as in the former instance, the appointment by the court of

a special prosecutor under section 13562 G. C. and without invoking the provisions of section 2912 G. C., employed the former special prosecutor to conduct the further prosecution of the case, which he proceeded to do until the final termination in the court of appeals, and for his services was paid the aggregate sum of $75.00.

From the foregoing statement it is evident that, at the beginning of the case, every one connected with the prosecution, namely, the judge, prosecuting attorney, and the former special prosecutor, considered that the employment and payment of a special prosecutor in such a case was specially provided for by section 13562 G. C., for it was under that section that the former appointment was made, and I am also of the same opinion.

The duty of prosecuting this case was imposed upon the prosecuting attorney by section 2916 G. C., and assuming, but not deciding, that he was disabled from discharging the duty imposed upon him by reason of his relationship to the defendant, he should have either invoked the provisions of section 2912 G. C. whereby the common pleas court is empowered to appoint a temporary assistant, and had his compensation allowed and paid as therein provided, or the provisions of section 13562 G. C., as in the former instance.

It is contended, however, that the prosecuting attorney was justified in employing and paying the special prosecutor under section 3004 G. C., because of the previous attitude and action of the commissioners in refusing to approve the compensation fixed by the court for services rendered under the previous appointment by the court. A complete answer to this contention is that none of the statutes referred to make any provision for such situation, and the failure or refusal of the commissioners from any cause, whether arbitrary or not, to approve or allow the compensation fixed by the court, does not, in my opinion, justify the prosecuting attorney in assuming an authority in the matter which has not been conferred upon him, and *a fortiori* when it has been denied to him in cases specially provided for, as in section 3004 G. C.

Whether or not the county commissioners acted arbitrarily in refusing to approve and allow the compensation of the special prosecutor appointed by the court at the beginning of the case, is a matter with which this department is not now concerned. The question for decision goes to the authority of the prosecuting attorney to employ a special or temporary assistant and pay him for his services from the fund allowed to prosecuting attorneys under section 3004 G. C. It is clear that he had no such authority, for the reason that such authority has by statute been expressly lodged elsewhere, and another fund provided out of which compensation for the services rendered is to be paid. See, also, 1917 Opinions of Attorney-General, Vol. III, p. 2005, involving the employment by the prosecuting attorney of an attorney to assist in the trial of a civil action.

(3) *The* $10.00 *item.*

A former attorney-general had requested the prosecuting attorney to come to Columbus and attend a conference relative to a matter involving the county treasurer. It was impossible for the prosecuting attorney to comply with the request because he was then engaged in the trial of a case which would require several days to complete. The matter being urgent, the former attorney general requested that the prosecuting attorney send some one in his place who in turn could report to him the result of the conference. The $10.00 expenditure was made to reimburse the prosecuting attorney's representative on account of expenses incurred by him in making the trip. It being admitted that the trip was made in the furtherance of justice, I am of the opinion that the expenditure was justified.

In concluding, it may not be improper to call attention to State vs. Maharry, 97 O. S., 272, as supporting the doctrine that when public funds have been unlawfully paid out, findings may be made and suits instituted against private persons who re-

ceived and are withholding the same, as well as against the public officers who made the disbursement.

Respectfully,
JOHN G. PRICE,
Attorney-General.

665.

APPROVAL OF LEASE, LAND AT BUCKEYE LAKE TO WILLIAM F. BURDELL.

COLUMBUS, OHIO, September 30, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 25, 1919, in which you enclose lease, in triplicate, for my approval, as follows:

	Valuation.
To William F. Burdell, strip of marsh land along the south shore of Buckeye Lake	$1,000

I have carefully examined said lease, find it correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

666.

APPROVAL OF BOND ISSUE, VILLAGE OF WESTERVILLE, FRANKLIN COUNTY, IN THE SUM OF $11,000.

COLUMBUS, OHIO, September 30, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

Re bonds of the village of Westerville in the amount of $11,000 for the improvement of Main street from Vine street to West street, being 10 bonds of $1,100 each.

GENTLEMEN:—I have examined the transcript of the proceedings of council and other officers of the village of Westerville relating to the above bond issue and find the same regular and in conformity with the provisions of the General Code.

I am of the opinion that said bonds, drawn in accordance with the bond form submitted and executed by the proper county and village officials, will upon delivery constitute valid and binding obligations of the village of Westerville.

Respectfully,
JOHN G. PRICE,
Attorney-General.

667.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN BELMONT, HANCOCK, FAYETTE, TRUMBULL AND PERRY COUNTIES.

COLUMBUS, OHIO, September 30, 1919.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 27, 1919, enclosing for my approval final resolutions on the following improvements:

Barnesville-Hendrysburg Road, I. C. H. No. 101, Section "N," Belmont county.

Lima-Sandusky Road, I. C. H. No. 22, Section "H," Hancock county.

Hillsboro-Washington C. H. Road, I. C. H. No. 259, Section "P," Fayette county.

Warren-Sharon Road, I. C. H. No. 329, Section "S," Trumbull county.

Zanesville-New Lexington Road, I. C. H. No. 350, Section "E-2," Perry county.

I have carefully examined said resolutions, find them correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon in accordance with section 1218 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

668.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN COSHOCTON, TUSCARAWAS AND WYANDOT COUNTIES.

COLUMBUS, OHIO, October 3, 1919.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of September 30, 1919, enclosing for my approval final resolutions on the following improvements:

Coshocton-New Comerstown Road, I. C. H. No. 407, Section "C," Coshocton county.

Canton-Canal Dover Road, I. C. H. No. 70, Section "D," Tuscarawas county.

Fostoria-Carey Road, I. C. H. No. 268, Section "A," Wyandot county.

I have carefully examined said resolutions, find them correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon in accordance with section 1218 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

669.

SCHOOLS—COUNTY BOARD OF EDUCATION—WITHOUT AUTHORITY TO PURCHASE WAGONS FOR CONVEYANCE OF CHILDREN.

Under existing law county boards of education are without authority to purchase wagons for the conveyance of school children, such conveyances to remain the property of the county board and to be assigned by the county board to various school districts within the county district.

COLUMBUS, OHIO, October 3, 1919.

HON. W. B. BARTELS, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter of recent date in which you request the opinion of this department upon the following question:

> "Would it be possible for a county board of education to make use of funds raised under sections 5653, 7820 and 7873, of Ohio General Code, to purchase wagons for the conveyance of school children? The said wagons would remain the property of the county board of education but said board would assign them for use to the various school districts whenever and wherever needed."

Section 5653, which you cite, reads as follows:

> "After paying all horse, sheep, cattle, swine, mule and goat claims at the December session of the county commissioners, if there remain more than one thousand dollars of the dog and kennel fund arising from the registration of dogs and dog kennels for such year the excess at such December session shall be transferred and disposed of as follows: In a county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, which has one or more agents appointed in pursuance of law, all such excess as the county commissioners deem necessary for the uses and purposes of such society by order of the commissioners and upon the warrant of the county auditor shall be paid to the treasurer of such society, and any surplus not so transferred shall be transferred to the county board of education fund at the direction of the county commissioners."

Section 7820 G. C. reads as follows:

> "The clerk of the board of county school examiners shall promptly collect all fees from applicants at each examination and pay them into the county treasury monthly. He shall file with the county auditor a written statement of the amount and the number of applicants male and female, examined during the month. All money thus received, shall be set apart by the auditor to the credit of the county board of education fund."

Section 7873 G. C. reads as follows:

> "If the board of a district does 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 it to the credit of the county board of educa-

tion fund. The teachers of the schools of such district in such case, shall be entitled to the advantages of the county institute, subject to the provisions of sections seventy-eight hundred and sixty-nine, and seventy-eight hundred and seventy. The clerk of the board shall make the report of the institute required by section 7874."

It will be noted from the above sections that the funds which you indicate are those arising from the dog tax fund, a part of which is turned over to the county board of education fund, the fees from the teachers' examinations and the moneys that should be paid into the county board of education fund by the district treasurer of a school district, where such district does not provide for a teachers' institute in any year, but this latter provision would hardly apply in your case unless a city in your county school district makes such payments into the county board of education fund. Nowhere in these sections, under which provisions the county board of education fund is created, does there occur any authority for a county board of education to purchase wagons for the conveyance of school children. Attention, therefore, must be directed to sections of the statute which might give the county board of education authority to spend this fund or a portion of it. This fund can be spent only as indicated in the statutes and for the purposes which the statutes mention, and nowhere in the statutes is there any provision made for the county board of education to purchase vehicles to be loaned to local boards of education.

The county board of education is directed by the statute to provide transportation in a given case (section 7731), but such case is that a local board of education must have neglected or refused to provide transportation for its pupils.

Your question is whether the county board of education having a surplus of funds at its disposal, could purchase wagons for the conveyance of school children at any time, the said wagons to remain the property of the county board of education and to be assigned by such county board to the various school districts whenever and wherever needed. The law contemplates that transportation of pupils, when furnished, must be furnished by local boards of education and the only occasion that could arise wherein the county board of education could legally be interested in the transportation of pupils would be in cases like that covered by section 7731 G. C., supra, that is, where the district had failed through neglect or refusal to furnish transportation to the school children within their district, and upon this section of the statutes attention is invited to Opinion No. 909, appearing at page 12, Vol. 1, Opinions of the Attorney-General, 1918, wherein the following language occurs:

"The above section of the General Code places the duty of providing transportation, that is, of providing the means of transportation, in the rural and village boards of education. It is the duty, therefore, that the boards in the first instance have a right to exercise and cannot be interfered with unless in the exercise of such right or duty the board grossly abuses the discretion placed in it or acts in a fraudulent manner."

Until such a contingency existed the county board of education, under existing law, would be without authority to make an expenditure for transportation of school children, because boards of education can do only those things which are authorized by statute, either direct or by implied authority.

A search of the statutes shows that the county board of education fund can be drawn upon for the following purposes, as indicated in the sections herewith given:

Section 4734 G. C., as amended in 108 O. L., provides for the payment of the

members of the county board of education at $3.00 per day of attendance and an allowance of ten cents a mile one way.

Section 4737 G. C. provides for the publication by the county board of education of courses of study.

Section 4743 G. C. provides for the payment of the compensation of the district superintendents by the county board of education.

Section 4744-1 G. C., as amended in 108 O. L., provides for the payment of the county superintendent's salary and certain of his expenses, including an allowance for a stenographer and clerk, by the county board of education.

Section 4744-3 G. C. provides for the contingent expenses of a county board of education.

Section 4744-3a permits the payment of the cost of printing supplies needed by the board of education of the county and the cost of its educational meetings.

Section 4729 G. C. provides for the payment of the expenses of the district presidents at their annual meeting in choosing a member of the county board, the same being three dollars per day for attendance, with ten cents mileage one way. (108 O. L.)

Section 7642 G. C. provides for the purchase of books for a public library by any board of education under certain circumstances.

Section 7654-1 provides for the establishment of county normal schools and joint county normal schools and the payment of certain expenses in the maintenance of the same, from the county board of education fund.

Section 7654-3 provides for the employment of a director of county normal schools that may be established.

Section 7654-5 G. C. provides for the salary of the director so chosen and also for the payment of assistant instructors from the contingent fund of the county board of education.

Section 7731 G. C. provides for the transportation of pupils in a district where the local board of education has neglected or refused to do so.

Section 7860 G. C. makes provision for the cost of the county teachers' institute, held annually, the same to be paid from the county board of education fund.

Section 7870 G. C. permits of the payment to superintendents for attendance at county teachers' institutes under certain circumstances.

It will be seen that nowhere in any of the above sections, providing for the expenditure of the county board of education fund, is there any provision that a county board of education may use its funds for the purchase of vehicles, and it is therefore the opinion of the Attorney-General that under existing law county boards of education are without authority to purchase wagons for the conveyance of school children, such conveyances to remain the property of the county board and to be assigned by the county board to the various school districts within the county school district.

Respectfully,
JOHN G. PRICE,
Attorney-General.

670.

SCHOOLS—SALARIES PAID TO TEACHERS OTHER THAN SALARIES MENTIONED IN SCHEDULE, SECTION 7595-1 G. C.—SUCH SCHOOL DISTRICT NOT ENTITLED TO STATE AID.

Where a school district pays salaries to teachers other than the salaries mentioned in the schedule appearing in section 7595-1 G. C., such school is not entitled to state aid to weak school districts.

COLUMBUS, OHIO, October 3, 1919.

HON. JOHN E. BLAKE, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—Acknowledgment is made of your letter of recent date in which you request the opinion of this department on the following statement of facts:

> "A board of education levies and collects the maximum legal levy of five mills and places two-thirds of the same in the tuition fund, which is used exclusively for tuition fund purposes. Under these conditions does the following state of facts bar these districts from state aid? One or perhaps more of the teachers are paid a sum in advance of $80.00 per month, but such additional sum is paid solely from the contingent fund of the district in which such teacher is teaching and said tuition fund is not drawn upon in any manner for such advance."

Section 7595 G. C., as amended in 107 O. L., 623, reads as follows:

> "No person shall be employed to teach in any public school in Ohio for less than fifty dollars a month. When a school district has not sufficient money to pay its teachers such salaries as are provided in section 7595-1 of the General Code, for eight months of the year, after the board of education of such district has made the maximum legal school levy, at least two-thirds of which shall be for the tuition fund, then such school district may receive from the state treasurer sufficient money to make up the deficit."

Section 7595-1 G. C. was also amended in 107 O. L., 623, and reads as follows:

> "Only such school districts which pay salaries as follows shall be eligible to receive state aid: Elementary teachers without previous teaching experience in the state, fifty dollars a month; elementary teachers having at least one year's professional training, fifty-five dollars a month; elementary teachers who have completed the full two years' course in any normal school, teachers' college or university approved by the superintendent of public instruction, sixty dollars per month; high school teachers not to exceed an average of eighty dollars per month in each high school."

Attention is invited to the language of the first sentence of section 7595-1 G. C., which says:

> "Only such school districts which pay salaries as follows shall be eligible to receive state aid: * * * high school teachers not to exceed an average of eighty dollars per month in each high school."

It will thus be seen that the figures mentioned in section 7595-1 G. C. are fifty

dollars per month, fifty-five dollars per month and sixty dollars per month in the elementary schools, depending upon the experience and training of the teacher. Section 7595-1 G. C. must be read in conjunction with section 7595 G. C. and the sole matter under discussion in both sections is the subject of teaching and not upon any other employment. It is presumed, therefore, that the salaries indicated therein for teachers is for teaching, and your statement of facts indicates that the salary paid the teacher in question was also for teaching, but that it was in excess of eighty dollars per month. It will thus be seen that an examination of the two sections in question indicates that in order to receive state aid a school district must pay the scale of wages mentioned in section 7595-1 G. C. for teaching and only such school districts which do pay the scale indicated shall be eligible to receive state aid. The maximum indicated in such section which was the law until the Freeman act went into effect on August 18, 1919, was fifty dollars per month for elementary teachers and a maximum of eighty dollars per month for high school teachers, construed in the case of the latter as being an average of eighty dollars per month for all teachers in any high school. Your statement of facts indicates that the teacher in question was paid more than the schedule of salaries carried in section 7595-1 G. C., and therefore the district in question which did not comply with the schedule required for state aid is not entitled to receive such state aid.

It is therefore the opinion of the Attorney-General that where a school district pays salaries to teachers other than the salaries mentioned in the schedule appearing in section 7595-1, such school is not entitled to state aid to weak school districts.

Respectfully,
JOHN G. PRICE,
Attorney-General.

671.

MUNICIPAL CIVIL SERVICE COMMISSION—PUBLICATION OF NOTICE OF EXAMINATIONS—SECTIONS 486-10 AND 486-19 G. C. SUBJECT TO PROVISIONS OF SECTIONS 4228, 4229 AND 6251 G. C.

1. *Publication of the notice of municipal civil service examinations under sections* 486-10 *and* 486-19 *are subject to the statutory provisions of sections* 4228 *and* 4229 *of the General Code.*

2. *Publication of the notice of municipal civil service examinations under sections* 486-10 *and* 486-19 *are subject to the statutory provisions of section* 6251 *of the General Code.*

COLUMBUS, OHIO, October 4, 1919.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion of this department as follows:

> "In advertising notices of competitive civil service examination by a municipal civil service commission under authority of section 486-10 of the General Code,
>
> 1. Is such publication subject to the statutory provisions of sections 4228 and 4229 of the General Code?

2. Is such publication subject to the statutory provisions of section 6251 of the General Code?"

Sections 486-1 et seq., 4228, 4229 and 6251 are pertinent to your inquiry.

Section 486-1, as amended in 106 O. L., 406, relating to definitions under the civil service act, provides in part:

"7. The term 'commission' shall signify either the state civil service commission of Ohio or the civil service commission of any municipality."

As to the powers and duties of the commission, section 486-7 in part provides that it shall,

"First: Prescribe, amend and enforce administrative rules for the purpose of carrying out and making effectual the provisions of this act."

Section 486-9 in part provides:

"As soon as practicable after the taking effect of this act, the commission shall put into effect rules for * * * examinations."

Under the head of "examinations" section 486-10 in part is:

"The state commission shall have control of all examinations, except as otherwise provided in this act. * * * Reasonable notice * * * of every competitive examination * * * shall be given by the commission. Written or printed notices of every examination for the state classified service shall be sent by the commission * * * to the city clerk of each municipality * * * and such notices, promptly upon receipt by them, shall be posted in conspicuous public places * * * in the city hall of the municipality, * * *. Such notices shall be posted in a conspicuous place in the office of the commission for at least two weeks before any examination."

But for the definition heretofore quoted, and but for section 486-19, this section would appear to apply to and affect only examinations held by the state commission, but section 486-19 gives the municipal commission power to prescribe, amend and enforce rules not inconsistent with the provision of this act, and further provides:

"Said municipal commission shall have and exercise all other powers and perform all other duties with respect to the civil service of such city and city school district, as herein prescribed, and confered upon the state civil service commission with respect to the civil service of the state; and all authority granted to the state commission with respect to the service under its jurisdiction shall, except as otherwise provided, in this act, be held to grant the same authority to the municipal commission with respect to the service under its jurisdiction."

It is to be noted that the municipal commission is charged with the same duties and entrusted with the same powers with respect to the municipal service as are charged and granted to the state commission with respect to the state service.

Consideration of section 486-10, in connection with the other statutes cited, establishes these three propositions:

1. Notice of the examination is "required by law."

2. The method and duration of the publication of such notice is not "specifically directed by statute."

3. The notice is a "municipal notice."

The quotations contained in the statement of these three propositions are made as quotations with reference to the provisions of sections 4228, 4229 and 6251, which may be introduced at this time.

Section 4229, as amended in 106 O. L., 493, in part provides:

> "Unless *otherwise specifically directed by statute,* all municipal * * notices * * * *required by law* * * * to be published shall be published as follows:"

Then follows the requirement that the notices shall be published in certain newspapers and other requirements which are not material to the question under discussion.

Section 4229, referring to the notices in section 4228, provides that such notices shall be published for a period "not less than two nor more than four consecutive weeks;"

Section 6251, relating rather to the rates for legal advertising, in part provides that newspapers may charge

> "for the publication of * * * notices * * * required to be published by a public officer of the * * * city, except where the rate is otherwise fixed by law, to wit:" (Then follows the rate for each square or fraction of square, with additional charge for tabular or rule work.)

As pointed out before, the notice of examination is required by law, the method and duration of its publication is not specifically directed by statute, and the notice is a municipal notice, bringing it clearly within the provisions of sections 4228 and 4229 and sections 6251, unless because of the indefinite provision in section 486-10, requiring only "reasonable notice," the method and duration of publication could be said to be exclusively entrusted to the discretion of the commission. This part of section 486-10, however, is reconcilable with the other sections by construing it to mean that the discretion of the commission should be exercised in determining for what period the publication shall run between the minimum and maximum time required by law. Certainly, however, it can be said that it is not "specifically directed" by section 486-10 and this would make 4228 applicable.

Consistent with these conclusions, your questions are specifically answered as follows:

1. Publication of the notice of municipal civil service commission examinations under sections 486-10 and 486-19 are subject to the statutory provisions of section 4228 and 4229 of the General Code.

2. Publication of the notice of municipal civil service commission examinations under sections 486-10 and 486-19 are subject to the statutory provisions of section 6251 of the General Code.

Respectfully,
JOHN G. PRICE,
Attorney-General.

672.

DITCHES—COUNTY COMMISSIONERS CONTROL CLEANING, REPAIR AND REPLACEMENT OF COUNTY AND TOWNSHIP DITCHES—SEE AMENDED SENATE BILL NO. 100, 108 O. L., 926.

Under amended Senate Bill No. 100, in effect October 10, 1919, county commissioners are given control of the matter of cleaning, repair and replacement of ditches, without regard to whether the ditch was constructed originally by the county or township.

COLUMBUS, OHIO, October 4, 1919.

HON. CARROLL A. STUBBS, *Prosecuting Attorney, Celina, Ohio.*

DEAR SIR:—Your letter is received submitting for opinion in connection with amended Senate bill No. 100, in effect October 10, 1919, two questions as follows:

> "1. May ditches originally constructed by township trustees be repaired by the county commissioners under sections 64-67 inclusive?
> 2. May ditches originally constructed by township trustees be repaired by township trustees under sections 64-67 inclusive?"

The purpose of said bill and its comprehensive character are indicated by its title:

> "An Act to codify, consolidate, and clarify the ditch laws of the state according to the report of the commission appointed therefor, under an act passed March 21, 1917 (O. L. 107 V. 611), to amend sections 3001, 6564, 6565 of the General Code and to repeal all sections of the General Code superseded by, or in conflict with such reported codified consolidation."

It is unnecessary for present purposes to go into detail as to the provisions of this act. Such provisions, in great part, are devoted to proceedings for original construction of ditches under the direction of the board of county commissioners or if that board is a petitioner, then under the direction of the common pleas court, upon application filed with the county auditor. Nowhere in the act do we find that the township trustees have any jurisdiction in ditch proceedings, although such trustees, in common with private individuals and others, may petition for the improvement (Sec. 2), and where a part of the cost of the improvement is apportioned to the township by the board of commissioners or common pleas court, the trustees are to make a levy on the grand duplicate of the township of a tax sufficient to pay such apportionment (Sec. 52). In the matter of what may be termed private ditches, the trustees are given certain minor duties (Sec. 68). On the other hand, we find that the act repeals the entire series of sections relating to township ditches (Secs. 6603 et seq.), which heretofore have been constructed under the direction of the township trustees.

The foregoing brief references serve to make plain the policy of sections 64 to 67, inclusive, relating to cleaning, repair and replacement of ditches.

Section 64 reads:

> "In all cases, except as herein provided, when cleaning, repair, or replacement is found by the county commissioners to be necessary upon any improvement, before the same shall be done, the county engineer, upon the order of the county commissioners, shall make an estimate of the

probable cost and expense of material and labor therefor, and report the same to the county commissioners in writing. When such report shows the probable cost to be less than three hundred dollars in the aggregate, the same at the discretion of the county commissioners, may be let by contract made by the engineer with the approval of the county commissioners without public bidding and without petition or other proceedings. But if the estimate of said cost and expense in its entirety exceeds the sum of three hundred dollars except in case of an emergency, the same shall be done by public letting of contract as provided for the original construction of improvements under this chapter."

Section 65 relates to emergency repairs, and section 66 relates to repairs whereof the cost does not exceed twenty-five dollars. Section 67 reads:

"The actual cost of the cleaning, repair, or replacement of any improvement constructed after the passage of this act shall be distributed and charged to the lands, including township and county, originally assessed for the construction of the same, in the ratio of such assessment, and the auditor shall add such amount to the taxes otherwise levied on such lands and certify the same to the county treasurer to be collected as are other taxes with the next semi-annual installment. When such taxes are paid they shall be credited to the general ditch improvement fund in this act provided.

The actual cost of the cleaning, repair, or replacement of any drainage improvement constructed prior to the passage of this act, of which there is a record of the assessment of the original cost according to benefits and the lands on which it was assessed, shall be distributed and charged to such lands in the manner provided herein for the cost of cleaning, repair and replacement of improvements constructed since the passage hereof. But if no such record has been preserved, or such a record as will accurately disclose such facts, then such cost shall be assessed according to benefits as on the construction of an original improvement, and by like proceedings, and after notice, placed by the auditor on the tax duplicate; but in all cases there shall be a right of appeal by any interested party as is provided from assessment on an original improvement."

The expression "except as herein provided' appearing in section 64, evidently refers to the cases covered by sections 65 and 66. Hence, by the express terms of sections 64 and 67, the county commissioners are vested with control in the matter of repairs to ditches, without regard to whether the same were constructed originally by the county or by the township, a policy in line with the general tenor of the act. Repairs affecting lands in more than one county are similarly left to the commissioners of the interested counties (Sec. 89).

Your first question is therefore answered in the affirmative and your second in the negative.

Very respectfully,

JOHN G. PRICE,

Attorney-General.

673.

APPROVAL, COPY OF SYNOPSIS, PROPOSED BILL OF THE OHIO CHIROPRACTIC ASSOCIATION.

COLUMBUS, OHIO, October 4, 1919.

DR. RUSSELL H. SKEELS, 157 *Wilbur Avenue, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter dated September 29, 1919, in which you enclosed a copy of the bill which the Ohio Chiropractic Association proposes to submit by initiation.

By virtue of section 5175-290 G. C. you ask that the Attorney-General approve a synopsis thereof.

I have examined the proposed bill which you have submitted and I hereby certify that the following synopsis is a truthful statement of the contents and purposes of said proposed bill:

> "A bill to establish a Chiropractic Board to examine and license practitioners of Chiropractic; to define Chiropractic; to prescribe qualifications of practitioners; to provide for the revocation of licenses; and to repeal all acts and parts of acts in conflict with the provisions of the proposed bill."

Respectfully,

JOHN G. PRICE,

Attorney-General.

674.

INHERITANCE TAX LAW—PARAGRAPH 7 OF SECTION 5332 G. C. NOT APPLICABLE TO REMAINDERS VESTING PRIOR TO JUNE 5, 1919—SEE ALSO OPINION NO. 493, DATED JULY 18, 1919.

Supplementary to Opinion No. 493, paragraph 7 of section 5332 of the inheritance tax law of 1919 has no application to remainders vesting prior to June 5, 1919.

COLUMBUS, OHIO, October 4, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Certain paragraphs of the opinion of July 18, 1919 (No. 493), addressed to the Commission relative to the application of the inheritance tax act of June 5, 1919, to unsettled estates seem to require qualification, or at least amplification. In dealing in that opinion with the general effect of the law passing comment was made respecting the effect of paragraph 7 of section 5332, by which a tax is levied upon successions.

> "7. When any property shall pass subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person, institution or corporation, on the extinction and determination of such charge, estate or interest, shall be deemed a succession taxable under the provisions of this subdivision of this chapter, in the same manner as if the person, institution or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived. Such tax shall be upon the excess of the actual mar-

ket value of such property over and above the exemptions made and at the rates prescribed in this subdivision of this chapter."

The following is quoted from that opinion:

"Paragraph seven begins likewise with the word 'when' (as indeed do all the paragraphs of section 5332) and makes the increase accruing to the ultimate taker of an estate, which passes subject to a charge, estate or interest, determinable by the death of a person on the extinction and determination of such charge, estate or interest, an independent succession. That is to say, the entire estate or interest of the ultimate taker is not taxed by this paragraph, but merely the increase accruing to him at the death of the holder of the life estate or other intervening estate determinable by death In such cases the ultimate taker will undoubtedly have received a vested estate in the first instance, the succession to which has presumably once been taxed. This is not to be taxed again by virtue of paragraph seven, but to the extent that the determination of the intermediate estate or charge enhances or increases his interest, and to that extent only, he is deemed, for the purposes of the act, to receive a new and independent succession which is made taxable because it is to the extent of the increase a proprietary interest devolving upon him by the death of another person, though in this instance not the person whose will created the intervening estate or charge.

Without going more deeply into these two paragraphs of the section, it is sufficient to state that under either of them successions take place subsequently to the death of the original decedent. All such successions to direct relatives of the original decedent and to such collateral relatives of such original decedent, if any, against whose interests a tax did not accrue under the collateral inheritance tax law, are subject to the provisions of the act in question, though the death of the original decedent may have taken place prior to June 5, 1919.

Right here another question is presented, upon which this opinion will not pass definitely, viz., whether or not the 'succession' upon which a specific tax is imposed by paragraph seven of section 5332 G. C., as amended, is subject to that tax, even though the original succession by will (which, as has been observed, is an independent succession for the purposes of the new act) became subject to the collateral inheritance tax by the death of the testator prior to June 5, 1919."

It occurs to me that in order that this opinion may not be misunderstood or misapplied it will be necessary to "go more deeply into" paragraph 7 and its comparison with paragraph 4 which was considered together with it. The Commission will observe that no distinction is drawn in the former opinion as between the application of paragraph 7 to estates in remainder which had vested in right prior to June 5, 1919, and those arising by virtue of a death occurring prior to that date but contingent in character. This distinction should be drawn.

In the first place, paragraphs 4 and 7, as the opinion quoted points out, deal with similar subject-matters, namely, successions taking place subsequently to the death of the original decedent. They are the only paragraphs of the section which do deal with such subject-matters. Being thus so closely in *pari materia,* any differences which may exist between them are significant and should be given full weight. The following difference between the two paragraphs should therefore be pointed out:

Paragraph 4 describes the taxable succession as occurring "whenever

any person or corporation shall exercise a power of appointment derived from any disposition of property *heretofore* or *hereafter* made," etc.

It is thus clear, not only that the taxable succession occurs when the power of appointment is exercised without reference to the date of the death of the donor of the power, but also that the paragraph is to apply whether that death occurred "heretofore or hereafter." Paragraph 7 on the other hand, not only omits the significant words "heretofore or hereafter" found in paragraph 4, but further conditions the taxable succession to which it relates as follows:

"When any property shall pass subject to any charge, estate or interest," etc.

That is to say, this paragraph does not merely say that all increases accruing to any person, institution or corporation on the extinction of prior estates, charges or interests shall be deemed taxable successions; but, on the other hand, it distinctly says that the accrual of such an increase shall be deemed a taxable succession under certain circumstances only, namely, "when any property *shall* pass subject to any charge, estate or interest."

In other words, this paragraph is expressly prospective in its scope, while in a sense at least paragraph 4 is fully as expressly retrospective (though not necessarily in any invidious constitutional sense). Under the one paragraph the mere exercise of any power of appointment is enough to form the predicate of the accrual of the tax; under the other the accrual of an increase is not of itself enough for such purpose, for there must be in the first instance the passing of property, which must take place after the act becomes effective.

But in addition to these significant differences between paragraphs 4 and 7, what might be termed the history of said paragraph 7 is entitled to some weight. The inheritance tax act of 1919 is closely modeled after the New York law on the subject of inheritance taxation. Provisions corresponding to paragraph 7 of section 5332 of our law and appearing in the legislation of New York may be cited as follows:

N. Y. St. 1899, Chap. 76, amending N. Y. St 1896, Chap. 908, Sec. 230;

"* * * When property is transferred subject to any charge, determinable by the death of any person, the increase of benefit accruing on the determination of such charge is a transfer of property taxable under the statute, as though the person beneficially entitled thereto had then acquired such interest or increase of benefit. * * *

All estates upon remainder or reversion, which vested prior to June 30, 1885, but which will not come into actual possession or enjoyment until after the passage of this act shall be appraised and taxed as soon as the person or corporation beneficially interested therein shall be entitled to the actual possession or enjoyment thereof."

The last sentence in the above quotation was evidently aimed at making the first sentence thereof, and perhaps other provisions of the law, applicable to vested remainders after life estates which had not yet terminated. This provision was held unconstitutional.

In re: Pell, 171 N. Y. 48; 57 L. R. A. 540.

In the act of 1909 (Article 10 of the Tax Law, Chap. 62, Par. 230, as amended N. Y. St. 1911, Chap. 800, Id. 1916, Chap. 550) occurs the following paragraph:

"Where any property shall, *after the passage of this chapter*, be transferred subject to any charge, estate or interest, determinable by the

death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived."

In this provision is seen a careful effort to avoid the consequence pointed out in the decision last cited.

The Ohio statute omits the phrase "after the passage of this chapter," but in view of the framework of the whole section as previously discussed, this omission is not material, and in view of the otherwise close similarity between the two provisions they should receive, on familiar principles, the same construction.

Again, there is a third reason for the result which must be reached on the question under consideration. In the former opinion referred to brief reference was made to the general rule as to the *interpretation of inheritance tax laws*, to the effect that they are interpreted as wholly prospective unless the contrary intention clearly appears. In the paragraph under consideration the language is prospective. The inferences to be drawn from other related provisions favor a wholly prospective interpretation and therefore there is nothing to oppose the operation of the general rule referred to.

For the foregoing reasons, then, and by way of supplement to the opinion previously given and herein referred to, the commission is advised that in the opinion of this department paragraph 7 of section 5332 of the inheritance tax law of 1919 has no application to remainders vesting prior to June 5, 1919.

Respectfully,
JOHN G. PRICE,
Attorney-General.

675.

COUNTY AGRICULTURAL AGENT—COUNTY COMMISSIONERS NOT AUTHORIZED TO ISSUE BONDS TO PROVIDE SALARY FOR SUCH AGENT.

County commissioners are not authorized to issue bonds to provide for salary of the county agricultural agents for a fiscal year in which no levy has been made for such purpose and no account thereof taken in the budget, for the reason that inability to meet such obligation, under the circumstances, should not properly be said to arise from the limits of taxation.

COLUMBUS, OHIO, October 4, 1919.

HON. H. W. KUNTZ, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—You recently requested my consideration of the state of facts submitted as follows:

"Some time during the month of March last, the county commissioners agreed to pay fifteen hundred dollars of the salary of the farm agent in Muskingum county, who is employed by the Ohio State University for the year commencing July 1, 1919, and ending July 1, 1920. The

commisioners did this without counseling me, and there are no funds available to pay the county's share, to-wit, the sum of fifteen hundred dollars.

The budget commission has made a levy of twenty-three hundred dollars for the salary of a farm agent, but the same will not be available until March, 1920. There is no way to meet the demand of the Ohio State University for seven hundred and fifty dollars for the remainder of this year, unless the commissioners borrow this amount in anticipation of the collection of taxes as provided for in the budget.

I am willing that the commissioners borrow this amount of money if the same is approved by the Attorney-General. Please let me hear from you."

The statutes governing in the matter of employment of agricultural agents are sections 9921-2 et seq. G. C., and the authority of the county commissioners to act under these statutes, in a case where no provision has been made for payment of the county agent's salary by special levy and appropriation therefor, was considered in a recent opinion rendered to Hon. R. A. Kerr, prosecuting attorney, Troy, Ohio, under date of July 21, 1919, and being Opinion No. 502. In this opinion it was determined that certain of the provisions of the statutes providing for the employment of agricultural agents were obviously inconsistent with certain of the more general provisions of the statutes governing the incurring of obligations and making of appropriations by the county commissioners, and to that extent were held to supersede the more general provisions of other statutes.

It is observed from your communication that during the month of March last, the county commissioners undertook to co-operate with the state in the employment of a farm agent for Muskingum county, but that there are no funds available to meet the county's share of the salary of such agent, and your question is whether the commissioners are authorized to issue bonds to provide funds therefor.

It was held in the previous opinion referred to that the commissioners might make appropriation from available funds in the general fund or contingent fund of the county, for meeting the expense incident to the farm agent work, notwithstanding no special levy had been made therefor.

It is not stated definitely in your communication whether the matter could be taken care of in your county under the rule thus announced in the previous opinion, it only being made to appear that the movement to provide for the farm agent work in your county was instituted last March by the action of the county commissioners, while the actual employment of the agent was to date from July 1; so that it is apparent that funds could not be provided by special levy in the interim, or in fact, as pointed out in your letter, prior to March of 1920.

However, in the event other funds may be drawn upon, as above suggested, the matter may be arranged accordingly; otherwise I am of the opinion there are no means provided for presently meeting the obligation arising by way of current salary of the agent.

While the provisions of section 5660 G. C., requiring the auditor's certificate of available funds, before the incurring of any obligation, may be dispensed with for the reasons pointed out in the previous opinion, a copy of which I am enclosing for your information as to the questions therein discussed, yet the provisions of section 5656 G. C., which must be looked to for authority to issue bonds, in my opinion can not be met in the instant case. That section provides:

"Section 5656.—The trustees of a township, the board of education of a school district and the commissioners of a county, for the purpose of extending the time of payment of any indebtedness, which from its limits

of taxation such township, district or county is unable to pay at maturity, may borrow money or issue the bonds thereof, so as to change, but not increase the indebtedness in the amounts, for the length of time and at the rate of interest that said trustees, board or commissioners deem proper, not to exceed the rate of six per cent per annum, payable annually or semi-annually."

It is noted that the authority for issuing bonds is here limited to necessities arising from an inability to meet obligations on account of the limits of taxation, and it is considered that unless the needs for the salary of the farm agent were taken into consideration in the budget, upon which levies were made for the current year, then it could not be said that the lack of the required funds is in fact due to the limits of taxation, but on the contrary, to the entirely independent fact that no account was taken of the matter which now gives rise to the necessity for funds.

In this respect the provision of section 5656 G. C. is narrower than the provision of section 3916 G. C., relating to the issuance of bonds by municipalities, in that authority is there provided for issuance of bonds "when it appears to the council for the best interests of the corporation," in addition to the case provided in section 5656 G. C.

Having arrived at the conclusion that the salary of the farm agent may be provided for out of funds in the general county fund, or the contingent fund, if such funds are at hand, and unappropriated, but that the issuance of bonds to meet such salary is not authorized where the necessities to be provided for were not taken into consideration at all in the levy for the year in which the expenditure is sought to be made, for the reason that on such state of facts it would not appear that the limits of the particular fund now sought to be made available, it might not be inappropriate to call attention to the discussion of the question as found in an opinion of my predecessor reported at page 1112 of the Opinions of the Attorney-General for 1917, wherein the conditions entering into a determination of existence of available funds was considered. Without here reciting at length the trend of discussion in said opinion, it may be said that funds which can be applied for the purposes herein questioned, when no special levy and appropriation has been provided for the purpose, must be the proceeds of levies or unexpended balances not already specifically applied to other purposes by the terms of the budget and the previous appropriations.

It is also to be noted that in the opinion referred to, my predecessor took the position that a consideration of the provisions of section 9921-2 G. C., as well as section 5660 requires the conclusion that funds must be found available in the treasury for the purpose before the obligation to co-operate with the state in the employment of a farm agent may be undertaken. This conclusion is rested primarily upon the construction of provisions of said sections as constituting a condition upon which the arrangement with the trustees of the Ohio State University shall be inaugurated, and it is said:

"From the provisions of this section it seems that the raising of not less than $1,000.00 and the assurance that a like amount will be raised for the second year must take place before the project is entered upon."

And in the same connection, the provisions of section 5660 are cited as requiring the certificate of the auditor that the money required for the payment of the obligation is in the treasury to the credit of the fund from which it is to be drawn, before the obligation may be undertaken.

It is, however, found that in a later opinion of my predecessor reported at

page 690 of the Opinions of the Attorney-General for 1918 a very similar question was considered, and here it was pointed out that:

> "It is apparent from a consideration of these provisions that the act of the county commissioners which binds the county to co-operate with the Ohio State University in its extension service is that described in section 9921-2, as follows:
>
> 'To secure this aid from the state, the board of county commissioners of any county shall agree to the employment of an agricultural agent approved by the dean of the college of agriculture of the Ohio State University.'"

And then referring to the requirement of the same section that the county commissioners

> "raise at least one thousand dollars for the support of an agricultural agent for one year, and * * * give satisfactory assurance to the trustees of the Ohio State University that a like sum shall be raised for a second year," * * *

the writer of the opinion says that the last provision quoted seems to give to this initial action the effect of binding the county commissioners to make annual appropriations, and is a case of an agreement expressly authorized by statute and involving the expenditure of moneys in a future year or years.

Referring to section 5660 it is said:

> "This being the case, it is difficult to see how section 5660 of the General Code can apply. * * * The latter statute, being inconsistent with the earlier one, must prevail, and to the extent of such inconsistency must be regarded as constituting an exception to the general rule laid down in the earlier law.
>
> The scope of the exception is such that the county commissioners may, in my opinion, enter into the agreement authorized by section 9921-2 of the General Code, whether they have any money in the treasury which can then be appropriated or not.

So that it is to be noted that the observations of the two opinions referred to are not in all respects entirely in accord, and as said in previous considerations of the question, I am inclined to agree with the observations of the latter opinion of my predecessor, and regard the general purport and policy of the act providing for the employment of farm agents to authorize a more summary procedure than would be proper under the provisions of earlier sections of the statutes relating to appropriations and the incurring of obligations by county commissioners, and in such respect to supersede said earlier statutes.

I am not certain that the provisions for co-operation by the state with a county that shall raise at least a thousand dollars and give assurance that a like sum shall be raised for a second year is to be construed as the essence of the condition for inauguration of the co-operation in the sense that a technical application of the provision for "raising" the first thousand dollars shall be observed.

Since the undertaking of the county to raise the like sum for a second year is accepted under the statute, I am of the opinion that controlling force is not to be given to the technical significance of the phrase "raise at least one thousand dollars for one year."

But where the commissioners enter into the arrangement with the trustees of the college of agriculture, agreeing to the employment of an agent approved by the dean of said college, and satisfying the trustees of their making proper and adequate provision for meeting their share of the salary of the agent, the spirit

of the statute is complied with, and the obligation may be made to accrue at a time when the commissioners can provide for meeting same, where such arrangement is adopted by all parties thereto.

I have departed somewhat from the specific question relative to issuance of bonds, which has been answered above, but the further discussion perhaps will clarify to some extent the practical working out of steps which enter into the procedure which may have to be considered in your case.

Respectfully,
JOHN G. PRICE,
Attorney-General.

676.

SCHOOLS—DISTRICT DESIRING STATE AID NOT PERMITTED TO USE PART OF TUITION FUND FOR PAYMENT OF TRANSPORTATION OF PUPILS.

A school district desiring to be considered for state aid under the provisions of section 7595-1 G. C., is not permitted to use any part of the tuition fund of such district for the payment of transportation of pupils to and from school.

COLUMBUS, OHIO, October 4, 1919.

HON. CHARLES G. WHITE, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion upon the following statement of facts:

> "Is it possible for a board of education in which the schools are centralized to pay the persons hauling school children to and from school out of the tuition fund and still receive state aid? If the board only proportions one third of the taxes received to the contingent fund they do not have sufficient to pay the drivers, and as the new law only allows those receiving state aid to give one third to this fund, this board is in a bad way unless they can be allowed to pay the drivers out of the tuition fund and at the same time it is almost impossible for them to carry on their schools without state aid.
>
> The first resolution centralizing the schools was adopted by the county board on March 15, 1915, but did not take effect for thirty days thereafter.
>
> My own opinion was that the new law lately passed by our legislature fixes absolutely the only sources for which the tuition fund can be used, and this not coming under the same, this school cannot receive state aid."

Your last paragraph indicates that the question at hand comes under the new law covering the matter of state aid to weak school districts, that act being House bill 406 and commonly called the Freeman act. This act became law on August 18, 1919, and amends sections 7594-1 G. C., 7595-1, 7595-2, 7595-3, 7595-4, 7595-5 and 7730 G. C. You ask if it is possible for a board of education in which the schools are centralized to pay the person hauling school children to and from school out of the tuition fund and *still receive state aid.*

Section 7595-1 G. C. provides the requirement necessary for a school district to make application for state aid, among which requirements are that it shall place two-thirds of its tax levy in the tuition fund, that it shall pay its teachers the scale

of salaries indicated, shall maintain its schools for eight months in each year and then follows sub paragraph 5 of the section, which reads as follows:

> "5. It shall not transfer or cause to be transferred to any other fund, any moneys that may be in the tuition fund, nor shall it expend any moneys that may be in the tuition fund except for the following purposes:
> (a) Payment of salaries of teachers.
> (b) Payment of expenses for attending institute.
> (c) Payment of temporary loans incurred to meet current expenses in anticipation of revenue which would accrue to the tuition fund.
> (d) That part of tuition payable to other school districts which represent the expense of teachers' salaries as computed pursuant to section 7736.
> (e) Salaries of principals or superintendents, or additional salaries paid teachers as compensation for duties performed as principals or superintendents. Provided, however, that if additional salaries are paid as compensation for duties performed by teachers as principals or superintendents, the state superintendent of public instruction shall first certify that such additional duties are required and performed."

The above items constitute the only purposes for which the tuition fund may be used and there can be no transfers of money from the tuition fund to any other fund if the district desires to come within the class that is entitled to state aid to weak school districts. The matter of transportation of school pupils is not mentioned in the above list and hence the tuition fund could not be used for that purpose in a district which desired to receive state aid under the provisions of section 7595-1, G. C.

It is therefore the opinion of the Attorney-General that a school district desiring to be considered for state aid under the provisions of section 7595-1 G. C., is not permitted to use any part of the tuition fund of such district for the payment of transportation of pupils to and from school.

Respectfully,
JOHN G. PRICE,
Attorney-General.

677.

POOR RELIEF—HOW TOWNSHIP TRUSTEES MAY OBTAIN REIMBURSEMENT FOR EXPENSE OF SUCH RELIEF WHERE PERSON TO WHOM RELIEF IS GIVEN HAS LEGAL SETTLEMENT IN ADJOINING COUNTY.

1. *Sections* 3482 *and* 3483 *G. C. provide the method whereby township trustees giving public relief to a person having a legal settlement in an adjoining county may obtain reimbursement for the expense of such relief.*

2. *Unless the provisions of said sections, including the provisions as to notice, are strictly complied with, no recovery can be had.*

COLUMBUS, OHIO, October 4, 1919.

HON. HARRY M. RANKIN, *Prosecuting Attorney, Washington C. H., Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication asking for my opinion on the following statement of facts:

"The township trustees of Wayne township, Fayette county, Ohio, were recently called upon to give assistance to the head of a family, living in their township, suffering with typhoid fever. He and his family had not gained a residence in Fayette, having recently moved to this county from X township in an adjoining county, in which township they had gained a residence before removing to Fayette county. Immediately after it was ascertained that the family was in need, the clerk of Wayne township, under the direction of the trustees, notified the trustees of X township of the facts, with the information that he was not in condition to be moved to the county of his residence, and that they intended to look to them for all charges and expenses incurred. This party was treated by a physician and considerable expense was incurred. The trustees of X township refuse to pay these expenses. Can payment be enforced against the township or county of the residence of this man, and if so how?"

Various sections of the General Code, relating to the subject of poor relief, have recently been amended (H. B. 150, effective August 14, 1919), but it appearing that your query relates to some date prior to June 26, 1919, the law in effect at that time will be taken as the basis of this opinion.

Section 3481 G. C., prior to its recent amendment, read in part as follows:

"When complaint is made to the township trustees * * * that a person therein requires public relief or support, one or more of such officers * * * shall visit the person needing relief, forthwith, to ascertain * * in what township and county in this state he is legally settled."

Section 3482 G. C., prior to amendment, read:

"When it has been so ascertained that a person requiring relief has a legal settlement in some other county of the state, such trustees or officers shall immediately notify the infirmary directors of the county in which the person is found, who, if his health permits, shall immediately remove the person to the infirmary of the county of his legal settlement. If such person refuses to be removed, on the complaint being made by one of the infirmary directors, the probate judge of the county in which the person is found shall issue a warrant for such removal, and the county wherein the legal settlement of the person is, shall pay all expenses of such removal and the necessary charges for relief and in case of death the expense of burial if a written notice is given the infirmary directors thereof within twenty days after such legal settlement has been ascertained."

Section 3483 G. C., prior to amendment, read:

"Upon refusal or failure to pay such expenses, such infirmary directors may be compelled so to do by a civil action against them by the board of infirmary directors of the county from which such person is removed, in the court of common pleas of the county to which such removal is made. If such notice is not given within twenty days after such directors ascertain such person's residence, and within ninety days after such relief has been afforded, the directors of the infirmary where such person belongs shall not be liable for charges or expenditures accruing prior to such notice."

It will be noticed that the sections just quoted speak of "infirmary directors,"

the legislature having omitted to make said sections conform to the change wrought on January 1, 1913, when all boards of infirmary directors were abolished and their powers were transferred to county commissioners. 102 O. L. 433.

Speaking of such change, the Attorney-General in 1913 observed (1913 Atty. Gen. Annual Report, Vol. II, p. 1078):

> "These statutes present the difficulty of not having been conformed to the law abolishing infirmary directors. There should be no difficulty, however, in reading the words 'county commissioners' where words 'infirmary directors' now stand."

Section 3484 G. C. also sets forth the steps to be taken for the removal of indigent persons to their own counties. This section, however, applies only to the trustees of a township in a county in the state *in which there is no county infirmary.*" According to my information, Fayette county has a county infirmary.

Your statement of facts says that the person receiving the relief had, at the time the same was furnished, no legal settlement in Fayette county, but did have at such time a legal settlement in X township, in an adjoining county. This being true, it would follow, by virtue of the provisions of section 3479 G. C., that such person had also, at the time he received the relief, a legal settlement in said adjoining county.

It thus appears that sections 3482 and 3483 G. C. hereinabove quoted, were the sections available to the trustees furnishing the relief mentioned in your letter, in case they intended to secure reimbursement for the expense of such relief. It would seem from your statement of facts, however, that the provisions of said sections were not complied with in this, that the county commissioners of Fayette county (being the legal successors of the "infirmary directors," mentioned in sections 3482 and 3483 G. C.) were not notified of the necessitous condition of the person in question. On the contrary, your statement shows that the only notice given was a notice to the trustees of X township in the adjoining county. Such a notice was not provided for by any statute and could not, in my judgment, be regarded as a legal substitute for the notice required to be given the county commissioners, as successors of the infirmary directors.

Under former statutes, now repealed, an action might be maintained by one township against another for expenses incurred in furnishing relief to a pauper having a legal settlement in the latter township. Construing such a statute, our Supreme Court, in the case of Trustees of Millcreek vs. Trustees of Miami, 10 Ohio Rep. 375-376, said:

> "* * * before one township can recover of another for expenses incurred in support of one of its paupers, the township seeking to recover must have *strictly complied with the requisitions of the law.*"

Referring to your letter, I advise you that under the principle just stated the trustees of Wayne township, Fayette county, have no power to enforce payment of the bill in question, as against either the township trustees of X township, or the county commissioners of the adjoining county, the fact being, as I understand your letter, that the county commissioners of said adjoining county were not given written notice of the expense within twenty days after the legal settlement of the person in question was ascertained, as required by section 3482 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

678.

TAXES AND TAXATION—COUNTY TREASURER—COUNTY AUDITOR—INTEREST AND PENALTY CHARGES FOR TAXES COLLECTED—NO AUTHORITY TO REMIT—LIABILITY—INTEREST AND PENALTY ON TAXES ERRONEOUSLY MADE—HOW CORRECTED.

Under original section 5743 General Code prior to its repeal, 107 O. L. 740, it was the duty of the county auditor, on the presentation of a receipt for taxes actually collected but not credited on the duplicate, to proceed to collect from the treasurer who gave the receipt the penalty and interest as well as the simple taxes for which the receipt was given. The receipt itself operated as a discharge of the taxpayer and of the collecting treasurer, and the liability was imposed by law upon the treasurer who gave the receipt. The auditor has no authority to remit the interest and penalty and his action in attempting to do so is of no legal effect. The auditor would be liable as for neglect of duty in failing to enforce such penal provision, but upon no other theory.

Under the corresponding section of the act referred to, therein numbered 5726, a corresponding liability still rests upon the treasurer who made the collection, but it is limited to his common law liability for the taxes actually received by him and not accounted for. There is therefore no charge for interest and penalty, so that the question of the auditor's right to "remit" such interest and penalty does not arise.

In case a collecting treasurer fails to credit a payment of the first half of the taxes on real estate actually made, whereby a penalty is entered on the duplicate as for non-payment of such tax, there is no statutory method of relieving the taxpayer from such charge. The charge itself, however, is a cloud on the title to real estate erroneously and unlawfully created and capable of being relieved against in a court of equity. Under these circumstances, the statutes authorizing corrections of the tax duplicate should be liberally construed to permit the correction of the duplicate so as to make it conform to the facts.

COLUMBUS, OHIO, October 4, 1919.

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

GENTLEMEN:—I beg to acknowledge the receipt of your letter of recent date requesting the opinion of this department, as follows:

> "We would like your legal construction of section 5743, General Code, as it stood prior to its repeal, (107 O. L. 740), and its practical re-enactment as section 5726, (107 O. L. 740), as to the interest and penalty chargeable to the treasurer who failed to mark taxes "Paid," that were paid.
>
> Question 1. Was the auditor under the old law, or the auditor under said section as it was re-enacted, legally permitted to remit the interest and penalty thereon, and what is the auditor's responsibility if he does remit same?
>
> Question 2. In an instance where a person paid the tax and the treasurer failed to mark same paid at the December collection and the auditor assessed a penalty against said apparent delinquency because of the treasurer's failure to credit the payment and the taxpayer presents his receipts, showing that said taxes had been paid and the treasurer refuses to accept same, how is the taxpayer to be relieved of said charge of interest and penalty so erroneously made against him?"

Section 5743 G. C. prior to its repeal provided as follows:

> "When any tract of land or town lot is returned delinquent for the non-payment of taxes and placed on the duplicate of the succeeding year, and the owner or person, liable to pay taxes therefor, produces the receipt of the treasurer for such taxes of the preceding year, the county auditor or treasurer shall not make a deduction from the duplicate of such tax, interest, or penalty, but it shall be chargeable to the treasurer, as if such receipt had not been produced. The treasurer shall receive such receipt in discharge of the tax for the year that is returned delinquent, with the interest and penalty; and the auditor of the county shall credit such treasurer with the amount, and shall forthwith collect such tax, interest, or penalty from the treasurer who gave such receipt. The prosecuting attorney shall attend to any such suit so commenced by the auditor."

Under this section the answer to your first question is clear. The auditor was without authority to remit the interest and penalty, and it was his mandatory duty to collect the interest and penalty as well as the tax from the treasurer who gave the erroneous receipt. His attempted remission would be a mere nullity. The auditor would lay himself open to no direct pecuniary responsibility for attempting to make such a remission, as his act would not be binding upon himself nor upon his successor in office. Should any auditor neglect to perform his duty in this respect he would be guilty of non-feasance only and subject to such penalties as might be visited upon him for such non-feasance. Possibly limitations would run against the action of which the old section speaks. This question is not free from doubt, as the amount when collected is apportionable to the state and other treasuries in the same manner as the original tax itself. Only in the event that it should be held that the running of limitations against the cause of action possessed by the auditor under this section would make it impossible for the treasurer's liability to be enforced, would any question arise as to the pecuniary liability of the auditor. If liable at all he would be liable on the theory of neglect of duty; that is, he would be accountable as a trustee for the public, who by his neglect has caused the public to suffer a loss.

The corresponding section of the act found in 107 Ohio Laws, 740, and therein numbered section 5726, is as follows:

> "When any tract of land, city or town lot is returned delinquent for non-payment of taxes or assessments, and placed on the duplicate of the succeeding year, the owner or person liable to pay taxes therefor produces the receipt of the treasurer for such taxes and assessments of the preceding year, the county auditor or treasurer shall not make the deduction from the duplicate, of such taxes, assessments, penalty and interest but it shall be chargeable to the treasurer as if such receipt had not been produced. The treasurer shall receive such receipt in discharge of the tax or assessment for the year it is returned delinquent, with the penalty and interest and the auditor of the county shall credit such treasurer with the amount and shall forthwith collect such taxes."

Striking changes are made in this section as compared with the old section. The latter provided that the auditor should "forthwith collect such tax, *interest or penalty from the treasurer who gave such receipt;*" the new section merely says that the auditor "shall forthwith collect such taxes." Two changes are made:

> (1) It is no longer expressly required that the collection shall be made from the treasurer;

(2) It is no longer expressly required that the collection that is made shall include the interest and penalty.

The significance of these changes will be dealt with in their order.

In the first place, both section 5743 and section 5726 provide that the taxes, penalty and interest "shall be chargeable to the treasurer as if such receipt had not been produced." That is to say, the delinquent land tax is charged on the duplicate as a charge against the treasurer for which he must settle with the auditor. Inasmuch as it is further provided in both the sections that the treasurer shall receive the receipt in discharge of the tax or assessment with the penalty and interest, it is clear that the treasurer is without authority to collect the tax from anybody. This last provision makes it clear also that the auditor cannot collect the tax from the taxpayer, as his liability for the tax, penalty and interest is discharged by the production of the receipt. Without the last provision of each of the sections, therefore, it would follow that the treasurer charged with the collection of the delinquent tax by the duplicate in his office would be liable for the taxes, assessments, penalty and interest erroneously returned delinquent and charged for collection. The old section, however, went on to provide that the auditor should collect the taxes, interest and penalty, not necessarily from the treasurer whose duty it would be to settle on the duplicate on which the mistake occurred, but from the treasurer who gave the receipt. There might have been a change in the treasurer's office between the giving of the receipt and the return of the tract as delinquent and the placing of it on the duplicate for the succeeding year. The real offender would, of course, be the treasurer who gave the receipt without giving proper credit on the tax list. Such treasurer would be the one to be pursued by the auditor under the original section.

As the section stands after its amendment, however, it provides that the taxes, assessments, penalty and interest shall be chargeable to the treasurer as if the receipt had not been produced; that is to say, the treasurer having the duplicate in his possession as a basis of a semi-annual settlement with the auditor is charged with the items appearing on the duplicate and must settle for them. The new section then goes on to provide that the auditor shall collect the tax. In the absence of the provision found in the former section making it the duty of the auditor to collect the tax from the treasurer who gave the receipt, it might be argued that the collection is to be made from the treasurer charged with the collection of the taxes erroneously carried on the duplicate. This conclusion, however, cannot be reached because the new section, as well as the old, specifically provides that "the auditor of the county shall credit *such treasurer* (i. e., the treasurer whose duty it is to receive the receipt in discharge of the taxes, penalty, etc.) with the amount." This discharges the collecting treasurer.

We have it, then, that either the new section, in so far as it provides that the auditor shall proceed to collect the tax, is entirely meaningless because of its omission to provide that such collection shall be made from the treasurer who gave the receipt, or that, despite the textual amendment which has been made, the section still means substantially what it formerly meant in this respect.

In choosing between these conclusions we must deal with certain presumptions that the law affords in aid of the interpretation of statutes. One of them is that the legislature is not presumed to have done a vain thing, and the other is that a change in language is supposed to be actuated by an intent to change the substance of the meaning of the amended law.

Of these two presumptions the former would seem to be the stronger one, and if there were no other point to be considered, this fact alone should dictate, it would seem, the choice between the two possible constructions.

However, there is another point which must be considered here, lying in the fact that the new section authorizes the collection of "such taxes" only, instead of "the tax, interest or penalty" as was authorized by the former section. There can be no doubt whatever that the legislature did intend to change the law on the subject of what should be collected. This is clear because the formula "taxes, assessments, interest and penalty" is used repeatedly in the amended section in the earlier parts thereof, so that when the form of expression is changed to "taxes" only it is impossible to escape the conclusion that the legislature did not intend that term to include the other things that had previously been mentioned.

It is therefore the opinion of this department that the only thing which can be "collected" from anybody by the auditor is the simple taxes. The policy of the section, it may be observed here by way of parenthetical remark, would dictate also the recovery of the assessments, and this may possibly be its meaning in spite of the point last alluded to; but at any rate no warrant is found in the section as it at present exists for the recovery of any penalty or interest from anybody by proceedings initiated by the county auditor.

The point just settled establishes the fact that a real change in the meaning of the last clause of the section has been made. Inasmuch as this fact appears, the intent to make such change may be assigned as the reason for the amendment of the text, so that it would not be a violent thing to hold that collection should still be made from the person from whom it was required to be made by the former section.

From another point of view it is manifest that the imposition of the duty to collect upon the auditor, without designation of the person from whom collection should be made, would, without more, point out the treasurer who gave the receipt as the person from whom the collection should be made. A statutory direction to an officer to collect something can mean nothing except that the collection shall be made from such person as would according to the principles of the common law be liable therefor. What then has happened in the transaction with which the section deals?

One treasurer charged with the collection of a certain sum of money as simple taxes (and assessments), but charged with no penalty or interest, has actually collected such taxes without marking them "paid" on the duplicate, whereby penalties are added, etc. As a necessary consequence of such an omission of duty on his part the treasurer is not required to settle with the county auditor or his successor for this tax which is actually collected but which is shown by the record not to have been collected. Therefore, the money which was actually collected but not accounted for remains in his pocket. Upon the plainest principles of law such collecting treasurer is therefore liable to the public as for money had and received for the use of the public.

Now by reason of the formal charges on the duplicate the treasurer who receives the delinquent duplicate stands charged, in the first instance, with the collection of the tax which has actually been collected, and the taxpayer who has actually paid it stands charged with its payment. But the section provides a method whereby what might be termed the record charges against these two persons may be expunged. Such extinction of the record charge leaves only the common law liability in existence.

But when any person is liable to the public for money had and received legislation is required in order to point out the particular agent or officer of the public who shall enforce such liability. I need do no more than call to the attention of the bureau the statutes authorizing the law officers of a county or municipality to sue and collect moneys due the public, and to the act under which the Bureau of Inspection and Supervision of Public Offices itself operates, as evidence of the

necessity of such legislation. This necessity is supplied in the present case by the provision that the auditor shall make the collection.

Still another observation may not be out of place here. The liability imposed by the former statute was not that for money had and received; it was rather in the nature of a penalty, in that the county treasurer who made the collection was to account for and pay over not only what he actually received but also a penalty thereon, which represented a sum of money which he did not receive. As previously stated, this feature of the former law is done away with and the liability of the collecting treasurer is now limited to accounting for what he actually received. It would seem that interest at the legal rate should be collected, but as no opinion is invited on this point none is expressed.

Coming now to your specific question, it is answered by the statement that the county auditor is not authorized to "remit" the interest and penalty as a duplicate charge against the treasurer who gave the receipt. At the same time he is not authorized to collect any interest and penalty from such treasurer. In point of fact, no interest and penalty is due; it is charged off the books under the express authority of the statute as a liability of the collecting treasurer. Therefore, the question which you submit does not even arise, and when the collecting treasurer has been properly credited with the amount of the taxes, interest and penalty charged on his duplicate in accordance with the presentation of the receipt for the payment of the tax, no charge for interest and penalty exists and there is nothing to remit.

Your second question is not covered by the sections in question, nor by any other express provision of law. You ask how the taxpayer is to be relieved of the charge of interest and penalty erroneously made against him in the case concerning which you inquire. Such charge constitutes an apparent cloud upon his title. Undoubtedly a court of equity would, under the circumstances, entertain jurisdiction of a case to enjoin any proceedings to collect the tax, interest and penalty when the taxes had been paid, and to remove the cloud from the title. The cloud could only be removed from the title in theory by expunging the record; that is to say, under the old chancery practice the decree of the court would have been that the county auditor should correct the tax list and duplicate by striking out the erroneous charge. What these county officers could be compelled to do by process of court, it would seem that they may lawfully do though no statute directly authorizes it. Section 2588 et seq. G. C. authorizes the correction of clerical errors on the tax list and duplicate. These sections, which will not be quoted, may not be quite broad enough to include the correction of an error of this sort. But upon the general principles which have just been mentioned it is believed that the taxpayer may be relieved of the cloud upon the title to his land without the sanction of any express statute and in accordance with the almost certain result of any steps that he might take to protect his interest.

In this connection it may be observed that the rule just stated would be the rule to be applied in the cases covered by what is now section 5726 G. C. if that section had not been enacted. The purpose of the section was, as previously pointed out, to penalize the treasurer for the mistake by charging him with the interest and penalty, and to relieve the taxpayer directly by making his receipt operate as a discharge of the record charge against his property.

Respectfully,

JOHN G. PRICE,

Attorney-General.

679.

APPROVAL, CONTRACT OF EMPLOYMENT OF HARRY C. HOLBROOK, ARCHITECT FOR CONSTRUCTION OF BUILDINGS ON STATE GAME PROPAGATION FARM NEAR WELLINGTON, OHIO.

COLUMBUS, OHIO, October 7, 1919.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent communication transmitting, for the approval of this department, employment contract (in triplicate) between your department and Mr. Harry C. Holbrook. It is noted that this agreement provides for the employment of Mr. Holbrook as architect in the construction of suitable buildings on the state game propagation farm near Wellington, Ohio.

Sections 1433 and 1438 G. C. clothe the secretary of agriculture with authority to provide for game propagation. The latter section, relating to the authority of such secretary, in part provides:

> "and, so far as funds are provided therefor, shall adopt and carry into effect such measures as he deems necessary in the performance of his duties."

Section 1433 G. C., relating to the use and disposition of hunters' license fees, provides that:

> "At least fifty per cent of the money arising from all such licenses shall be expended by the secretary for the purchase and propagation of game birds and game animals to be used in re-stocking sections where a scarcity of such birds and game animals exist, for establishing and purchasing and otherwise acquiring title to land for game preserves, * * *."

These sections, in connection with others of the fish and game laws, contain ample authority for the establishment of game propagation farms "so far as funds are provided therefor," as provided in section 1438 (supra). That such funds are provided for this purpose is evidenced by the certificate of the auditor of state, herewith transmitted.

Consideration of the form and matter of the agreement and the laws pertinent thereto convince this department that the agreement is in conformity to law and the same is therefore hereby approved.

Respectfully,
JOHN G. PRICE,
Attorney-General.

680.

APPROVAL OF FINAL RESOLUTIONS FOR ELEVEN ROAD IMPROVEMENTS IN CUYAHOGA COUNTY.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, October 8, 1919.

681.

APPROVAL OF FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN CUYAHOGA, DELAWARE AND MAHONING COUNTIES.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, October 8, 1919.

682.

APPROVAL OF BOND ISSUE OF VILLAGE OF EAST COLUMBUS IN THE SUM OF $50,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, October 9, 1919.

683.

HUGHES HEALTH ACT—HOUSE BILL NO. 211, 108 O. L., 236—SUPPLEMENTAL TO OPINION NO. 610, DATED SEPTEMBER 9, 1919—COUNTY BUDGET COMMISSION CANNOT FIX AMOUNT TO BE SEGREGATED FROM GENERAL REVENUES FOR DISTRICT HEALTH PURPOSES—AMOUNT TO BE RETAINED FROM LOCAL DISTRIBUTION—LOCAL LEVIES FOR GENERAL HEALTH PURPOSES WITHIN TEN MILL LIMITATION OF SMITH ONE PER CENT LAW.

Supplementary to Opinion No. 610, the budget commission of a county has nothing whatever to do with the fixing of the amount to be segregated from general revenues for district health purposes. Such amount is to be retained from local distribution produced by levies made through the agency of the budget commission, but is itself not the subject of direct levy of taxes.

Except as provided in section 5649-4 G. C., all local levies for general health purposes are within the ten mill limitation of the Smith one per cent law.

COLUMBUS, OHIO, October 11, 1919.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Acknowledging the receipt of your letter of October 1, beg to enclose herewith a copy of the opinion of this department addressed to Hon. John L. Cable, prosecuting attorney, Lima, Ohio, under date of September 9, 1919, which contains a direct answer to your third question and furnishes a principle by which all your other questions may be answered.

As you state them, these questions which relate to the interpretation of House bill No. 211 are as follows:

(1) Can a levy be made at this time for the purposes of said health board?

(2) Has the budget commission any control over the amount to be levied?

(3) Would the county auditor be justified in retaining at each semi-annual distribution from the funds of each political subdivision a sufficient amount to pay its proportionment even though no specific levy had been made for same in that subdivision?

(4) Is there any provision of law that would place a levy for the general health purposes outside of the ten mill limitation?"

The questions themselves are based on the fact that the request of the county health board was not filed with the budget commission until after it had completed its work in the adjustment of tax rates.

In the enclosed opinion this department held, as stated, that it is the duty of the county auditor to retain at each semi-annual distribution from the funds of each political subdivision in a county health district a sufficient amount to pay its apportionment, even though no specific levy has been made to meet such apportionment in that subdivision, provided that a distribution is to be made to the subdivision of moneys for general revenue purposes. This answers your third question. The whole opinion was based upon the premise, also stated therein, that the health bill does not in anywise disturb the machinery for levying taxes by local subdivisions, and it was pointed out that the county health board, as such, is not a levying body. These points dispose in part of your other questions. Thus, they answer fully your fourth question by leading to the result that the levies for general health purposes (as distinguished from the emergency health levies specifically exempted by section 5649-4 of the General Code from the limitations with which that act deals) are subject to all the limitations of the Smith one per cent law.

It also answers in a way your first and second questions by the statement that the action of the district health board is not intended to ripen into a technical tax levy at all.

In fact, the budget commission has nothing whatever to do with the raising of money for the purposes of a general health district, as such, except with respect to its control over the levies for health and general revenue purposes by the constituent townships and municipalities of the district. The revision of the budget of the district health board under section 25 of the bill is to be made by the district advisory council. This consists of the chairman of the trustees of each township and the mayor of each municipality in the district (see section 3). A budget that is approved by the district advisory council is certified directly to the county auditor, without any action whatsoever on the part of the budget commission. The budget filed with the county auditor after the budget commission had completed its work, as stated by you, therefore is properly filed, and it is not of any significance that the budget commission has so completed its work.

Respectfully,

JOHN G. PRICE,

Attorney-General.

684.

INHERITANCE TAX—VALIDITY OF PAYMENTS MADE BY BUILDING AND LOAN ASSOCIATIONS TO SURVIVORS ON JOINT DEPOSITS OR JOINT STOCK DEPOSIT ACCOUNTS—LIABILITY FOR SAID TAX.

Section 5348-2 of the new inheritance tax law does not affect the validity of payments made by building and loan associations to survivors on joint deposits or joint stock deposit accounts; but if the tax commission's consent to the payment is not obtained and a sufficient amount is not retained to pay the inheritance tax, the building and loan association is liable for the tax that should have been so retained.

What, if any, defenses are available to building and loan associations as against an action to enforce such liability, not decided.

COLUMBUS, OHIO, October 11, 1919.

HON. FRANK F. MCGUIRE, *Inspector, Building and Loan Associations, Columbus, Ohio.*

DEAR SIR:—I have your letter of recent date requesting the opinion of this department "as to the status of stockholders in building and loan associations on joint and survivorship accounts" and also as to the duties and liabilities of building and loan associations in so far as they may be affected by the inheritance tax law which became effective June 5, 1919.

In this connection you refer to "the provisions of the building and loan laws relating to joint accounts, i. e., G. C. 9648," and you ask "to what extent the powers therein granted are restricted by the new law."

Section 9648 G. C. provides in part that:

> "When such deposits or stock deposits are made to the joint account of two or more persons, whether adults or minors, with a joint order to the corporation that such deposits or any part thereof are to be payable on the order of any one or more of such joint depositors, and to continue to be so payable notwithstanding the death or incapacity of one or more of the persons making them, such account shall be payable to any one or more of such survivors or survivor or order notwithstanding such death or incapacity. No recovery shall be had against such corporation for amounts so paid and charged to such account."

The inheritance tax law contains the following provision:

> "Section 5348-2.—No corporation organized or existing under the laws of this state, shall transfer on its books or issue a new certificate for any share or shares of its capital stock belonging to or standing in the name of a decedent or in trust for a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, without the written consent of the tax commission of Ohio. No safe deposit company, trust company, corporation, bank or other institution, person or persons, having in possession or in control or custody, in whole or in part, securities, deposits, assets or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interest in, such safe deposit company, trust company, corporation, bank or other institution, shall deliver or transfer the same to any person what-

soever whether in a representative capacity or not, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay any taxes or interest which would thereafter be assessed thereon under this subdivision of this chapter, and unless notice of the time and place of such delivery or transfer be served upon the tax commission of Ohio and the county auditor at least ten days prior to such delivery or transfer; but the tax commission of Ohio may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons, from the obligation to give such notice or to retain such portion. The tax commission or the county auditor, personally or by representatives, may examine such securities, deposits or other assets at the time of such delivery or otherwise. Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons, liable for the amount of the taxes and interest due under this subdivision of this chapter on the succession to such securities, deposits, assets or property. Such liability may be enforced by action brought by the county treasurer in the name of the state in any court of competent jurisdiction."

The first sentence of section 5348-2 G. C. has no application to the question submitted by you, because it relates to transfer of shares of stock or the issuance of new shares.

Section 9648 G. C. relates to the payment of deposits or stock deposits. Its provision is that joint account deposits or stock deposits shall "continue to be so payable (on the order of any one or more of such joint depositors) notwithstanding the death or incapacity of one or more of the persons making them;" and it is further provided that "such account shall be payable to any one or more of such survivors or survivor or order notwithstanding such death or incapacity." It is further provided that: "No recovery shall be had against such corporation for amounts so paid and charged to such account."

So far from repealing or limiting the general effect of these provisions, section 5348-2 G. C. assumes that joint accounts payable to the survivor or his order are legal. In fact section 5348-2 must be read in connection with paragraph 5 of section 5332. This is the section which imposes the inheritance tax upon various forms of what are called "successions" and it is as follows:

"Section 5332.—* * *

5. Whenever property is held by two or more persons jointly, so that upon the death of one of them the survivor or survivors have a right to to the immediate ownership or possession and enjoyment of the whole property, the accrual of such right by the death of one of them shall be deemed a succession taxable under the provisions of this subdivision of this chapter in the same manner as if the enhanced value of the whole property belonged absolutely to the deceased person, and had been by him bequeathed to the survivor or survivors by will. * * *."

Under section 9648 G. C., upon the death of one of the joint depositors "the survivor or survivors" would "have a right to the immediate ownership or possession and enjoyment of the whole property" (deposit). In other words, section 9648 G. C. expressly authorizes joint deposits payable to the survivor, and prevents the ownership of an undivided half interest in the fund from vesting in the personal representatives of the decedent. That is to say, the section establishes

a true joint ownership with the incident or survicorship in the whole. And the enhancement of value thus accruing to the survivor or survivors is taxed as a "succession" by the inheritance tax law, not on the theory that it is illegal or to be penalized—because the inheritance tax law is not enacted on that theory at all—but merely as an excise tax upon the enjoyment of a privilege which is conceded to be lawful and consistent with public policy.

There is, therefore, nothing fundamentally inconsistent between the law allowing joint accounts and the law taxing the accrual of additional rights of survivors by the death of one of the joint depositors. The one makes such accrual lawful; the other taxes it.

Section 5348-2 G. C. is merely a means of collecting the tax in such cases. It imposes no absolute limitation on the right of the building and loan association to act under section 9648 G. C. It merely provides that if the institution permits the survivor to draw out the joint account without retaining a sufficient sum to pay the tax payable on account of such joint account, (not the whole tax on the general estate of the decedent) the institution shall lay itself liable to a penalty recoverable in a civil action brought by the county treasurer, the penalty being the amount of the taxes due on account of the "succession" arising by virtue of the accrual of such right of survivorship.

Possibly, in an action to recover such amount, good faith and want of knowledge of the fact of death would be matters of defense. No opinion is expressed on this point.

It is at least clear that if a building and loan association has notice of the death of one of two or more joint depositors, however informally such notice may have been acquired, and with such notice pays out the entire deposit to the survivor or survivors, without the consent of the tax commission and without retaining a sufficient sum to pay the taxes, it would thereby render itself liable for such taxes as might be due, considering the amount of the deposit and its enhancement in value to the survivor and the relationship of the survivor to the decedent, and in an action to recover such taxes it would be without any defense as against the suit of the county treasurer.

This liability does not in anywise impair the validity of the payment made by the building and loan association. Section 5348-2 G. C. contains a prohibition, to be sure, but it also stipulates exactly what shall be the consequences of violation of this prohibition. Therefore, the second sentence of the section is not to be taken as an implied amendment of section 9648 G. C., making invalid, as between the parties, what may have been done under the latter section when one of the joint depositors has died, but merely as a regulation, designed as it is to insure the collection of the public revenues.

In conclusion then, it is the opinion of this department that a payment made to a survivor of two or more joint depositors by a building and loan association is perfectly valid as between the association, the payee and the personal representatives of the survivor—indeed, as among all private parties concerned, by virtue of section 9648 G. C.; and that if the entire amount of the deposit is paid out on the order of the survivor or survivors, without the consent of the tax commission and without the retention of a sufficient amount to pay the taxes due on account of the succession, the only result will be to render the building and loan association liable for the amount of taxes that should have been paid on that behalf, which liability can be enforced only in an action brought by the county treasurer in the name of the state. Whether in such an action good faith and want of knowledge of the death of the decedent would be a defense to the building and loan association is a question which is suggested but not decided at this time. It follows that what you describe as "the status of stockholders in building and loan associations

on joint and survivorship accounts" is not affected at all by the inheritance tax law; that the powers granted in section 9648 G. C. are not in anywise restricted as powers by that law; but that building and loan associations have certain duties to perform in connection with the inheritance tax law, failure to discharge which will subject them to liabilities thereunder.

Respectfully,
JOHN G. PRICE,
Attorney-General.

685.

MUNICIPAL CORPORATION—COUNCIL MAY PROVIDE FUNDS TO PERSONS FURNISHING EVIDENCE OF LOCAL OPTION VIOLATIONS FROM FINES AND FORFEITED RECOGNIZANCES IN SUCH CASES—MARSHAL OF VILLAGE NOT ENTITLED TO RECEIVE EXTRA COMPENSATION FOR SUCH SERVICES.

1. *It is competent for the council of a municipal corporation to provide for the payment of a stipulated portion of funds arising from fines and forfeited recognizances in prosecutions under the local option laws to persons furnishing evidence of the violation of such laws in pursuance of section* 13247.

2. *The marshal of such village, however, being charged by law with the enforcement of the penal statutes of the state within his jurisdiction and the apprehension and bringing to justice of violators thereof, is not entitled to receive rewards or compensation for services incident to his office on the ground of public policy, and is disqualified from receiving compensation from such fines and forfeitures for furnishing evidence of such violations of the law.*

COLUMBUS, OHIO, October 11, 1919.

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

GENTLEMEN:—You recently requested my opinion as follows:

"We are calling your attention to section 13247 of the General Code and to court decision in the case of Powell vs. Ashville, 11 O. N. P. (n. s.) 369.

Statement of Facts

The council of a village passes an ordinance setting aside forty per cent of fines and forfeitures from collections for violation of local option laws to pay persons furnishing evidence resulting in conviction for violation of local option laws. Such moneys are paid out to persons merely for furnishing evidence, among others the marshal of the village.

1. Is there any authority of law for council to provide a certain portion of such fines and forfeitures to be paid persons promiscuously for furnishing evidence?

2. If such be legal could the village marshal legally be paid portion of such money in addition to his compensation for furnishing evidence?"

Section 13247, to which you refer, is as follows:

"Fines and forfeited bonds collected under this subdivision of this chapter, except as provided in section thirteen thousand two hundred and

thirty-one, if enforced in the county court, shall be paid into the county treasury, and if enforced in municipal courts, shall be paid into the treasury of the municipal corporation in which the cause was tried. Such funds paid into the treasury of the municipal corporation shall be applied as the council thereof may direct."

The case of Powell vs. Ashville, 11 O. N. P. (n. s.) 369, to which you refer, involved an attack on an ordinance of the village of Ashville, which provided for payments of a percentage of fines and forfeited bonds coming into the treasury in pursuance of local option statutes, for the services of detectives, secret service officers and attorneys in securing evidence and making prosecutions for the violation of the local option laws. The attack upon the ordinance was not sustained by the court, and it was held that it is within the discretion of council of the village to provide that a percentage of all fines and forfeited bonds which may be paid into the village treasury by violators of the local option statutes shall be applied for the purposes above indicated. It was contended that the ordinance in question was illegal and void and in contravention of the just public policy of the state of Ohio, but the court said:

"Under section 13247 of the General Code said council is authorized, if it so desired, to expend the whole of the fines collected by said village under said prosecutions, for services of detectives and attorneys, and the plaintiff as a taxpayer could not complain."

It was further said:

"It is presumed that the legislature of this state declares the policy of the state through its enactments."

It has further been said in Gilmore vs. Lewis, 12 Ohio, 281, that promises of reward should be regarded with a favorable eye, so long as the administration of criminal justice is necessary to secure the peace and safety of society and are frequently the only hope of remuneration for a meritorious service rendered to the commonwealth.

It was the obvious policy of the statute to place it within the power of the council of municipal corporations to apply the funds, or such part thereof as they may determine, arising from fines and forfeited bonds under the local option laws, to such purposes as that body shall determine, and it cannot be said that its application in the direction of securing a more vigilant enforcement of the law, is a misapplication of such funds, and your first question is, therefore, answered in the affirmative.

Your second question, however, involves an entirely different consideration.

It is the duty of the village marshal, as of other police officers generally, to enforce the penal laws, and public policy forbids that such officer shall be permitted to demand or receive for the performance of his purely legal duty any fee or reward other than that established or allowed by law as compensation for his official action, otherwise the tendency would be to foster delinquency in the performance of the duty, with the hope of a reward or compensation being offered. By statute the marshal is made the conservator of the peace and required to arrest all disorderly persons in the corporations and pursue and arrest persons fleeing from justice into any part of the state, etc.

Section 4386 is as follows:

"He shall suppress all riots, disturbances and breaches of the peace

and to that end may call upon the citizens to aid him. He shall arrest all disorderly persons in the corporation and pursue and arrest any person fleeing from justice in any part of the state. He shall arrest any person in the act of committing any offense against the laws of the state or the ordinances of the corporation, and forthwith bring such person before the mayor or other competent authority for examination or trial and he shall receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states."

In this respect the village marshal is a police officer with similar functions and duties to those of sheriffs and constables.

In Somerset Bank vs. Edmund, 76 O. S., 396, it was said:

"1. Public policy and sound morals alike forbid that a public officer should demand or receive for services performed by him in the discharge of official duty, any other or further remuneration or reward than that prescribed and allowed by law.

2. The office of constable is not an office created for the private emolument of the holder. Every constable is a conservator of the peace, and it is his duty, within his jurisdiction, 'to apprehend and bring to justice all felons and disturbers and violators of the criminal laws of the state,' without other reward or compensation therefor than such as is fixed and allowed by law.

3. A constable who, within his jurisdiction, arrests a person who has committed a felony, will, in making the arrest, be presumed and held to act in his official capacity, whether such arrest be made by him under, or without a warrant. And the law will not permit him to claim that an arrest made pursuant to official duty, was made by him in his individual capacity as a private citizen."

Such has been the holding since the early case of Gilmore vs. Lewis, 12 Ohio 281, where it is said, after approving the practice of rewarding the vigilance of private citizens in the ferreting out of crime and bringing the offenders to public justice:

"But public officers, on whom is cast this duty, from whom it requires exertion, and to whom it affords adequate compensation, occupy different ground. * * * A promise to pay them extra compensation is absolutely void, under the statutes of Ohio. Such promise could not be enforced at common law, being against sound policy, and, *quasi*, extortion. English judges have declared that such claims by them are novel in courts of justice, and that actions founded on such promises are scandalous and shameful."

In Brown vs. Commissioners, 2 O. C. C., 381, it was said:

"It is contrary to public policy and the law of this state, and generally of other states, that an officer be paid a reward for the performance of an act which his duty as such officer requires him to perform."

While the cases reviewed in the main involve the payment of rewards to officers for making arrests, and your inquiry in the main relates to the furnishing of evidence, yet I am inclined to think, it being the duty of the officer as a conservator of the peace to ferret out and apprehend persons guilty of violations of penal

laws, that the furnishing of such evidence as he may acquire in connection therewith is but incident to his official duty and in line with what was said by the court in the case of Somerset Bank vs. Edmund, supra, where the fact that the arrest was made without warrant and in the alleged private capacity of the constable was disposed of by the observation that his general authority as a peace officer was the only authority required to justify the arrests made.

Your second question is, therefore, answered in the negative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

686.

STATE INSPECTOR OF PLUMBING—PREMIUM ON SURETY BOND FOR SAID OFFICIAL INDIVIDUAL OBLIGATION.

There being no general or special statutory provision which may be invoked as authority for payment out of public funds, of premiums on a surety bond given by the state inspector of plumbing, it follows that such premiums as are incurred in the giving of the statutory bond are the individual obligation of the official giving the bond.

COLUMBUS, OHIO, October 11, 1919.

HON. ALLEN W. FREEMAN, *Commissioner, State Board of Health, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication relative to the requirement for an official bond given by the state inspector of plumbing, and inquiring whether the premium for a surety bond should be paid out of public funds appropriated to the state department of health.

It is noted that the statute requiring such bond is as follows:

> "Section 1261-7.—Within ten days after his appointment the said inspector shall give a bond payable to the state of Ohio, for the faithful performance of his duties, in the sum of five thousand dollars. Said bond when approved by the Attorney-General shall be deposited with the secretary of state and kept in his office."

While this and numerous similar statutes impose requirements for official bonds to be given by incumbents of state offices and positions, it is noteworthy that there is no provision, either general or special, which might be invoked as authority for payment out of the public funds, of premiums on the surety bond of the state inspector of plumbing; and in accordance with the general practice, where surety bonds are provided by officials the premium charges incurred are to be treated as the individual obligation of the official required to provide the bond.

The section above quoted provides that "said inspector shall *give* a bond," and you are advised that if in the "giving" of such bond to meet the approval provided for in the statute, expense by way of premiums is entailed, the same must be regarded as the obligation of the official incurring same in the absence of authorization for charging it against the public funds.

Respectfully,
JOHN G. PRICE,
Attorney-General.

687.

COLLATERAL INHERITANCE TAX—ACCRUED PRIOR TO JUNE 5, 1919—PROCEEDINGS FOR COLLECTION COMMENCED AFTER SAID DATE—WHAT STATUTES GOVERN.

Where a collateral inheritance tax accrued prior to June 5, 1919, proceedings for its assessment and collection, though not commenced until after that date, are governed by the statutes as they were in force before that date.

COLUMBUS, OHIO, October 11, 1919.

HON. W. J. BISSMAN, *Probate Judge, Mansfield, Ohio.*

DEAR SIR:—Replying to your letter of September 22, in which you state that a decedent died December 16, 1905, giving to his wife a life interest in all his property and after her death the property to be divided into three parts and distributed equally between a church, a Sunday school and a distant relative; and in which you further state that the wife died in May, 1919, and that the property has been sold and is now ready for distribution, beg to advise that all proceedings for the settlement of the inheritance taxes, if any, on account of this estate should be had under the old law.

I call your attention to the schedule section of the new law, therein numbered section 4, which provides in part that:

> "This act shall not affect * * * the right to collect any such tax" (collateral inheritance taxes under the original sections hereby amended) "which has accrued prior to the approval of this act, nor the rights or duties of any officer with respect to the assessment and collection of such collateral inheritance taxes; * * *."

This provision of itself answers your question, and shows that not only are the taxes to be imposed according to the rates, etc., fixed by the old law, but that the machinery of collecting the tax is to be that provided by the repealed sections.

You also inquire from what date the tax, if any, should be figured and what discount should be allowed. I find it impossible to answer these questions without more definite information as to the provisions of the will, as the answers thereto depend upon whether the taxable interests were vested as of the death of the testator, or as of some other date.

Respectfully,
JOHN G. PRICE,
Attorney-General.

688.

INHERITANCE TAX—SECURITIES CANNOT BE REMOVED FROM SAFE DEPOSIT BOX BY PERSONAL REPRESENTATIVES OF DECEASED RENTER OF BOX—LIABILITY FOR FAILURE TO COMPLY WITH SECTION 5348-2 G. C.

Under section 5348-2 G. C. a safe deposit company or bank renting a safe deposit box cannot allow the personal representatives of a deceased renter of the box to take securities like coupon bonds from the box without incurring the liability

mentioned in section 5348-2, unless the further provisions of that section are complied with.

COLUMBUS, OHIO, October 11, 1919.

HON. J. ARTER WEAVER, *Probate Judge, Bryan, Ohio.*

DEAR SIR:—I acknowledge the receipt of your letter of October 3 requesting the opinion of this department, as follows:

> "I ask your opinion as to what interpretation can be given the words 'Assets or property belonging to or standing in the name of a decedent,' which words are found in paragraph two of section 5348-2 of the inheritance tax law.
>
> The reason for asking this, is that I can see where the decedent might leave no estate except coupon Liberty Bonds, etc., which would be transferred by simple delivery, and said securities would be in a safety deposit box in a bank or safe deposit company, which bank or safe deposit company did not have any jurisdiction over, except the safe keeping of same."

You evidently have in mind a specific question arising under the section named, and this opinion will be limited to answering that specific question, as it would hardly be within the bounds of propriety for this department to undertake a comprehensive "interpretation" of the phrase mentioned.

The specific question which you have in mind may be put as follows:

> What is the duty of a bank or safe deposit company with respect to coupon bonds and other similar securities which may be in a safe deposit box rented by such bank or company to a decedent?

Section 5348-2 provides, in part, as follows:

> "No safe deposit company, trust company, * * * bank or other institution, person or persons, having in possession or in control or custody, in whole or in part, securities, deposits, assets or property belonging to or standing in the name of a decedent * * * shall deliver or transfer the same to any person whatsoever whether in a representative capacity or not, * * * without retaining a sufficient portion or amount thereof to pay any taxes or interest which would thereafter be assessed thereon under this subdivision of this chapter, and unless notice of the time and place of such delivery or transfer be served upon the tax commission of Ohio and the county auditor at least ten days prior to such delivery or transfer; but the tax commission of Ohio may consent in writing to such delivery or transfer, and such consent shall relieve such safe deposit company, trust company * * *, bank or other institution, person or persons, from the obligation to give such notice or to retain such portion. The tax commission or the county auditor, personally or by representatives, may examine such securities, deposits or other assets at the time of such delivery or otherwise. Failure to comply with the provisions of this section shall render such safe deposit company, trust company, * * * bank or other institution, person or persons, liable for the amount of the taxes and interest due under this subdivision of this chapter on the succession to such securities, deposits, assets or property. Such liability may be enforced by action brought by the county treasurer in the name of the state in any court of competent jurisdiction."

Coupon bonds certainly come within the scope of the clause "securities, deposits, assets or property." The relation of the safe deposit company or bank renting a safe deposit box to the contents of that box certainly amounts to partial custody, if not more. The contention that the relation of such companies to their customers is that of landlord and tenant, having no custody or control of the contents of such a box, was successfully made in *People* vs. *Mercantile Safe Deposit Co.,* 143 N. Y. Supp. 849; but this contention was overruled in *National Safe Deposit Co.* vs. *Stead,* 250 Ill. 584; which was affirmed by the Supreme Court of the United States in 232 U. S. 58. These cases all arose under statutes practically identical with section 5348-2 of the General Code of Ohio.

Since the decision of the Supreme Court it is stated by Messrs. Gleason and Otis in their work on Inheritance Taxation, p. 253, that:

> "Safe deposit companies throughout the Union have acquiesced with the demands of the state for a right to inspect the contents of safe deposit boxes of decedents."

In other words, it would seem, at least under the ordinary arrangement existing between a safe deposit company or bank and the renters of its safe deposit boxes, that the decision of the Supreme Court of the United States is final and conclusive. This decision followed the New York decision to the contrary, and the statement from the text of Messrs. Gleason and Otis is some evidence of the manner in which the Supreme Court decision was regarded as determining the law of New York.

Aside from these considerations it is very clear that the statute at least attempts to reach transactions of this sort. Nothing could be clearer than this when regard is had to the language above quoted. For example, it is provided that:

> "No safe deposit company * * * having in * * * custody * * * in part securities * * * belonging to * * * a decedent * * * shall deliver * * * the same to any person whatsoever."

The General Assembly could have been thinking of nothing except safe deposit boxes and bonds and other like securities when it employed this language.

It is therefore the opinion of this department that under section 5348-2 G. C. a safe deposit company or bank renting a safe deposit box cannot allow the personal representatives of a deceased renter of the box to take securities like coupon bonds from the box without incurring the liability mentioned in section 5348-2, unless the further provisions of that section are complied with.

Respectfully,
JOHN G. PRICE,
Attorney-General.

689.

ROADS AND HIGHWAYS—"MAINTENANCE AND REPAIR" BY TOWNSHIP TRUSTEES AS PROVIDED IN SECTION 3373 G. C. DOES NOT INCLUDE "IMPROVING" OR "RESURFACING" AS THOSE TERMS ARE USED IN SECTION 3298-5 G. C.—WHEN SECTION 3298-15f G. C. GOVERNS IN LETTING OF CONTRACT BY TOWNSHIP TRUSTEES.

1. *"Maintenance and repair" by township trustees as mentioned in section* 3373 *G. C. does not include "improving" or "resurfacing" as those terms are used in section* 3298-5 *G. C.*

2. *Section* 3298-15f *G. C. to the exclusion of section* 3373 *governs in the matter of letting a contract growing out of a resolution passed by township trustees in accordance with section* 3298-5 *G. C.*

COLUMBUS, OHIO, October 11, 1919.

HON. CHESTER A. MECK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—The receipt is acknowledged of your letter reading as follows:

> "I would like your opinion in regard to the following matter:
>
> Section 3298-5 of the General Code provides as follows:
>
> 'The township trustees may without the presentation of a petition, take the necessary steps to construct, reconstruct, resurface or improve a public road or part thereof * * *.'
>
> Section 3373 of the General Code provides:
>
> 'In the maintenance and repair of roads the township trustees may proceed either by contract or force account.'
>
> It is now a question with me as to what is included under the terms, 'Maintenance and repair.' Does that include the improving of public roads or the resurfacing of a public road as provided in section 3298-5? In other words, suppose a resolution was passed unanimously under section 3298-5 G. C. and the different steps were taken to 'resurface and improve' a public road and assessments were made against the real estate abutting upon said improvement and money was borrowed on a bond issue, could this money simply be put in the road funds of the township and used by the township trustees without letting the contract by competitive bidding, for the reason that it was for the 'maintenance and repair' of roads and that section 3373 gives them the right to let it without competitive bidding?"

Said section 3298-5 reads:

> "The township trustees may, without the presentation of a petition, take the necessary steps to construct, reconstruct, resurface, or improve a public road, or part thereof, as hereinbefore provided, upon the passage of a resolution by unanimous vote declaring the necessity therefor. The cost and expenses thereof may be paid in any one of the methods provided in section 3298-13 of the General Code, as may be determined by the township trustees in said resolution."

Said section 3373 opens with the provision quoted by you, "in the maintenance and repair of roads, the township trustees may proceed either by contract or force account," and then goes on to make provision for letting of contract if the trustees decide to proceed upon contract, and also to make provision as to the manner of force account work if the trustees elect to pursue the force account method.

The answer to your question is found in a consideration of the context of said two sections. The first of them, section 3298-5, is a part of a series (3298-1 to 3298-15n) authorizing township trustees "to construct, reconstruct, resurface or improve any public road * * * under their jurisdiction," and providing a complete proceeding in conformity with which the authority so granted may be exercised. Included in such proceedings are the matters of petition, making of plans, hearing of claims for damages, apportionment of cost as between township and landowners, assessment of property, levying of tax for township's share, issuing of bonds in anticipation of collection of such tax, and letting of contract on competitive bids after insertion of notice in newspapers. The words, "without the presentation of a petition" as used in section 3298-5, do not have reference to a proceeding separate from that which has just been described; they are intended to confer on the trustees, in the absence of a petition, authority to undertake the proceeding described. That such is the intent of the statute plainly appears from its use of the words "as hereinbefore provided," which can only refer to the several sections immediately preceding section 3298-5—said several sections having reference to general power in the trustees to proceed with the improvement and to the first step to be taken when a petition is filed; and further, plainly appears by reference to the next following section, which recites that the trustees "shall determine by resolution by unanimous vote, if acting without petition, and by a majority vote if acting on a petition, the route and termini of such road, the kind and extent of the improvement," etc.

Section 3373 is part of an entirely different series of statutes, namely, sections 3370 to 3376, providing for the maintenance, repair and dragging of roads in their township by township trustees. For that purpose, provisions quite extensive in character are made, including the provision above quoted giving the option to the trustees of proceeding by contract or force account. We find in the above mentioned series of statutes (3298-1 to 3298-15n) of which section 3298-5 is a part, a distinction between improvement work that is done under authority of that series of sections, and improvement work that is done under sections 3370 to 3376; for in section 3298-15d the following language appears:

> "* * * For the purpose of providing by taxation a fund for the payment of the township's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, resurfacing or improving roads under the provisions of section 3298-1 to 3298-15n inclusive of the General Code and for the purpose of maintaining, repairing or dragging any public road, or roads, or part thereof, under their jurisdiction in the manner provided in sections 3370 to 3376 inclusive of the General Code, the board of trustees of any township is hereby authorized to levy annually a tax not exceeding three mills upon each dollar of the taxable property of said township."

An evident reference to the work contemplated by sections 3370 to 3376, as distinguished from sections 3298-1 to 3298-15n, may also be found in section 3298-18, which reads in part as follows:

> "Sec. 3298-18. After the annual estimate for each township has been filed with the trustees of the township by the county surveyor they may increase or reduce the amount of any of the items contained in said estimate and at their first meeting after said estimate is filed they shall make their levies for the purpose set forth in the estimate and for the purpose of creating a fund for dragging, maintenance and repair of roads, upon all the taxable property of the township outside of any incorporated village or city, or part thereof therein situated, not exceeding in the aggregate two mills in any one year upon each dollar of the valuation of such taxable property. * * *"

Clearly, then, in this situation, the two sections you have in mind are not to be taken as *in pari materia*, but are to be read, section 3298-5 as relating to construction, reconstruction, resurfacing or improvement in the sense of a fully planned and definite construction having permanency as its object, and section 3373 as relating to maintenance and repair in the sense of keeping a highway in condition for travel. Instances may arise, of course, wherein adequate maintenance and repair involve in some degree both reconstruction and resurfacing; hence, the views herein expressed will not be understood as implying that section 3373 and its accompanying sections are to be construed as excluding reconstruction and resurfacing to the extent necessary in the proper maintenance or repair of a highway as directed in said last named sections.

Your inquiry is therefore answered by the statement that "maintenance and repair" as mentioned in section 3373 G. C., does not include "improving" or "resurfacing" in the sense in which those words are used in section 3298-5 G. C., and that if a resolution is adopted under said section 3298-5 for improvement or resurfacing, the work must be done upon contract as provided in section 3298-15f G. C. and not under the optional plan mentioned in section 3373 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

690.

COUNTY SURVEYOR—EXPENSES—AMENDMENT OF SECTION 7181 G. C. DOES NOT REPEAL BY IMPLICATION PROVISIONS OF SECTION 2786 G. C.—EXPENSES OF TAX MAP ASSISTANTS—"REASONABLE AND NECESSARY EXPENSES" USED IN SECTION 2786 G. C. PERMITS ALLOWANCE FOR BOARD, LODGING AND AUTOMOBILE HIRE.

1. *The amendment of section* 7181 *G. C., appearing in* 107 *O. L.* 110, *does not repeal by implication the provision of section* 2786 *G. C. for the allowance to the county surveyor of his reasonable and necessary expenses incurred in the performance of his official duties.*

2. *Tax map assistants employed under authority of sections* 5551 *and* 5552 *G. C. are not assistants or deputies within the meaning of the provision of section* 2786 *G. C. for the allowance of expenses to assistants and deputies of the county surveyor.*

3. *The expression "reasonable and necessary expenses" used in section* 2786 *G. C. permits of the allowance of board, lodging and automobile hire. Attention called to section* 7200 *G. C.*, 107 *O. L.*, 115.

COLUMBUS, OHIO, October 11, 1919.

HON. CHARLES L. FLORY, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—Your letter is received, submitting for opinion three questions, of which the first is as follows:

> "1. Is the county surveyor entitled to the expenses provided for by section 2786, General Code, in view of the last amendment of section 7181, General Code, found in volume 107, page 110, Ohio laws?'

Section 2786 G. C. reads:

> "The county 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, with all necessary cases and other suitable articles, at the expense of the county. Such office shall also be furnished with all tools, instruments, books, blanks and stationery necessary for the proper discharge of the official duties of the county surveyor. The cost and expense of such equipment shall be allowed and paid from the general fund of the county upon the approval of the county commissioners. The county surveyor and each assistant and deputy shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties."

Section 7181 G. C. (as amended, 107 O. L. 110), reads in part:

"The county surveyor shall give his entire time and attention to the duties of his office and shall receive an annual salary to be computed as follows: * * * Such salary shall be paid monthly out of the general county fund upon the warrant of the county auditor and shall be instead of all fees, costs, per diem or other allowances, and all other perquisites of whatever kind or description which any county surveyor may collect or receive. The county surveyor shall be the county tax map draftsman, but shall receive no additional compensation for performing the duties of such position. When the county surveyor performs service in connection with ditches or drainage works under the provisions of sections 6442 to 6822, inclusive, of the General Code of Ohio, he shall charge and collect the per diem allowances or other fees therein provided for, and shall pay all such allowances and fees monthly into the county treasury to the credit of the general county fund The county surveyor shall do likewise when he performs services under the provisions of sections 2807 to 2814, inclusive, of the General Code of Ohio."

Before its amendment, the pertinent language of section 7181, which at that time designated the county surveyor as county highway superintendent, was as follows (106 O. L. 612):

"The salary above provided for shall cover all services rendered by the county highway superintendent to the state, county and townships."

With reference to the statute in its form as last quoted, it was held by this department, among other things, in an opinion of September 20, 1915 (Opin. of Atty. Gen. for 1915, Vol II, p 1785), as follows: (Syll.)

"Annual salary provided by section 138 of the Cass highway bill, G. C., 7181, does not cover services rendered by county surveyor in making tax maps under provisions of sections 5551 and 5552, G. C.

* * * * * * * *

Salary provided for in section 138 of the Cass highway bill, G. C., 7181, does not cover services to private individuals under sections 2807 to 2814, G. C., nor does said salary cover the services of county surveyor in the location and construction of ditches where the cost of such ditches, including the engineering expense thereon, is assessed against and paid by the owners of land specially benefited.

* * * * * * * * *"

Plainly, then, the purpose of the legislature in amending said section was to provide, in as positive terms as might aptly be employed, that the various fees which the county surveyor might receive, in addition to the salary provided by said section,

should no longer be retained by him, but should be paid into the county treasury; and in order that no room should remain for doubt as to that purpose, the legislature at the same time enacted the following (107 O. L. 142):

> "Section 6956-4. The words 'county highway superintendent' found in any section of the General Code of Ohio not herein amended or repealed shall after the taking effect of this act be read 'county surveyor.' "

Since the legislature did not, when amending section 7181, expressly amend or repeal section 2786, and has not since expressly changed the latter section in any way, we are left to a consideration of the question whether said amendment of section 7181 has the effect of an implied amendment or repeal of section 2786, in so far as this last named section relates to expenses of the county surveyor.

The Ohio rule as to repeals by implication is thus stated by the supreme court in Railway Co. vs. Pace, 68 O. S. 200, at p. 205 of the opinion:

> "But repeals by implication are not favored, and this court has said in the case of Dodge vs. Gridley, 10 Ohio 178: 'Where two affirmative statutes exist, one is not to be construed to repeal the other by implication, unless they can be reconciled by no mode of interpretation.' "

It is felt that as to the two statutes now under discussion there is no such inconsistency in their terms as within the rule just stated indicates an intention to repeal section 2786 in so far as relating to expenses of the surveyor. However, that point need not be discussed in detail, because we have a much broader basis of interpretation on which the statutes are readily reconciled. It will be noted that the amendment of section 7181 was enacted as part of the so-called White-Mulcahy highway act. In that same act there were important amendments to the two sections immediately following section 2786, which said two sections relate respectively to the fixing of an annual allowance for the conduct of the surveyor's office, and to the appointment, compensation, etc., of deputy surveyors. There was also an amendment in the same act to section 2784 in the matter of surveyor's bond, as well as amendments to certain related sections immediately following section 7181.

In view of the fact that these substantial changes were being made as to the duties and powers of the surveyor, and that the legislature was dealing in a comprehensive way with the office of county surveyor, it is certainly to be presumed that had the legislature intended any change in related section 2786, it would have so indicated by express action. In other words, the fact that the legislature, when dealing with the subject, amended statutes closely related to section 2786, and did not amend that section, furnishes ample circumstantial evidence of an affirmative intent to allow said section to stand in full force and effect.

Your second question is:

> "2. Is the tax map assistant to the county surveyor appointed under section 5552, General Code, an 'assistant' or 'deputy' within the meaning of that portion of section 2786, General Code, which entitles an assistant or deputy to expenses incurred in the performance of his duties?"

This question of course proceeds upon the assumption that said section 2786 has not been repealed by implication in so far as it relates to the expenses of assistants and deputies to the county surveyor. That such assumption is correct, is clearly shown by the fact that in amending section 7181, as noted in the discussion of your first inquiry, the legislature made no mention of assistants and deputies, so that upon

no basis could it be claimed that there is an implied repeal of section 2786 in the matter of expenses of deputies and assistants.

Section 5551 G. C. authorizes the county commissioners to appoint the county surveyor as tax map draughtsman, and then goes on to enumerate the duties of the surveyor in that connection, the surveyor being empowered to employ necessary assistants, not exceeding four. Then follows the section referred to by you, reading as follows:

> "Section 5552. The board of county commissioners shall fix the salary of the draughtsman at not to exceed two thousand dollars per year. They shall likewise fix the number of assistants not to exceed four, and fix the salary of such assistants at not to exceed fifteen hundred dollars per year. The salaries of the draughtsman and assistants shall be paid out of the county treasury in the manner as the salary of other county officers are paid."

Of course this section must be read in conjunction with above quoted section 7181, and as so read the two sections were the subject of an opinion of this department of date June 7, 1917 (Opinions of Attorney-General, Vol. I, p. 949, 1917), wherein it was held:

> "Under the new highway act, which becomes effective on June 25, 1917, the assistants to the county surveyor as tax map draftsmen must be furnished and paid under the provisions of sections 5551 and 5552 G. C., the provisions of the new act having no effect upon this matter."

Supplementary to this last mentioned opinion, there appears an opinion of this department dated July 24, 1917 (Opinion of Attorney-General for 1917, Vol. II, p. 1264), wherein it was held, among other things:

> "When the county surveyor acts as tax map draftsman, his deputies are provided and paid under the provisions of sections 5551 and 5552 G. C."

In a memorandum accompanying your inquiries, you indicate a belief that the views of this department, as expressed in said two opinions, lead to the conclusion that the assistants employed in accordance with sections 5551 and 5552 are assistants within the meaning of section 2786 G. C., allowing payment of the expenses of assistants to the county surveyor. However, it is believed that your impression is erroneous. It has already been seen that in the opinion of July 24, 1917, it was held that deputies were paid in accordance with the provisions of sections 5551 and 5552 G. C. It was also said in the course of the same opinion: (p. 1265)

> "The duties he performs as tax map draftsman are not performed as county surveyor, but as county tax map draftsman; that is, virtually, two positions are held by the same person, namely, county surveyor and county tax map draftsman.
>
> In so far as his deputies are concerned for this position, the provisions of sections 5551 and 5552 G. C. will control. If he needs a deputy in the performance of these duties, the county commissioners may fix the number and pay of the same, which is paid out of the county treasury, as other county officers are paid."

While the distinction thus made as between the duties of the county surveyor and the tax map draughtsman seems somewhat artificial, in view of the mandate of

section 7181, that the "county surveyor shall be the county tax map draughtsman," yet it must be borne in mind that the legislature, when so amending section 7181 G. C., saw fit to leave untouched sections 5551 and 5552, although, as has been above noted, the legislature in connection with said amendment expressly abolished the distinction between "county surveyor" and "county highway superintendent;" and it must also be borne in mind that in the earlier forms of sections 5551 and 5552 no reference was made to the county surveyor, but to the employment of "an expert draughtsman" (See 89 O. L. 220; 94 O. L. 558). Hence, there is ample reason for the distinction in question, if resort thereto be necessary in order to give effect to the several sections involved; for it is well to keep in mind the principle above referred to, that repeals by implication are not favored and are not accomplished, if the statutes can be fairly reconciled.

It follows from the above that inasmuch as the assistants provided for by sections 5551 and 5552 are assistants to the county surveyor in his capacity as tax map draughtsman, such assistants do not come within the terms of the last sentence of section 2786, reading:

> "The county surveyor and each assistant and deputy shall be allowed his reasonable and necessary expenses incurred in the performance of his official duties."

Your third question is:

> "Is an assistant or deputy entitled to board, lodging and automobile hire as a part of the expenses provided for by section 2786, General Code?"

This question was substantially answered as to board and lodging, in an opinion of this department of date January 16, 1912 (Annual Report of Attorney-General for 1912, Vol. I, p. 145). The statutory language construed in that opinion was "necessary actual expenses," and the conclusion reached with respect to such language was that it permitted the inclusion of such items as meals and lodging. It is believed that the same conclusion applies to the words "reasonable and necessary expenses," now appearing in section 2786.

The matter of hiring an automobile by the county surveyor was passed upon in an opinion of this department of date August 24, 1915 (Opinions of Attorney-General for 1915, Vol. II, p. 1592), wherein it was held that by virtue of section 2786 the surveyor might hire an automobile when necessary in the discharge of his official duties. Of course the same is true of deputies and assistants, since section 2786 makes no distinction between them and the surveyor in the matter of expenses.

Your attention is called to section 7200 G. C. (107 O. L. 115), which provides in part:

> "The county commissioners may also at their discretion purchase, hire or lease automobiles, motorcycles or other conveyances and maintain the same for the use of the county surveyor and his assistants when on official business."

This language of course does not have a direct bearing on your inquiry, because it relates to a rather comprehensive plan for an established "transportation system" to be provided on the initiative and within the discretion of the commissioners. However, it is thought proper to make mention of the section as a matter of information in connection with your third inquiry.

In conformity with the foregoing, your first and third questions are answered in the affirmative and your second question in the negative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

691.

WEIGHTS AND MEASURES—SALE OF COMMODITIES "BY THE BASKET" NOT PROHIBITED BY SECTION 13128 G. C., 108 O. L., 556.

The sale of commodities "by the basket" is not prohibited by section 13128 *G. C.,* 108 *O. L.,* 556.

COLUMBUS, OHIO, October 11, 1919.

HON. G. G. ROETZEL, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—Your letter of recent date inquiring whether section 13128 G. C. (108 O. L., 556), prohibits the selling of commodities "by the basket" without having the net weight stamped on the basket, was duly received.

The section as amended reads as follows:

> "Whoever puts up or packs goods or articles sold by weight or count into a sack, bag, barrel, case or package, or whoever puts up or fills a bottle, barrel, keg, drum, can or other container with any commodity sold or offered for sale by liquid measure, shall mark thereon in plain figures and letters the exact quantity of the contents thereof in terms of weight, measure or numerical count; provided, however, that reasonable tolerances and variations and also exemptions as to small packages shall be established by rules made by the secretary of agriculture and shall conform to those of the federal law, and provided, further, that this act shall not apply to such packages, or containers, weighed, put up, packed or filled in the presence of the customer.
>
> Whoever, with intent to defraud, transfers a brand, mark or stamp placed upon a case or package by a manufacturer to another case or package, or with like intent, repacks a case or package so marked, branded or stamped, with goods or articles of quality inferior to those of such manufacturer shall be deemed guilty of a violation of this section.
>
> Any article or commodity packed or sold by weight shall be sold by net weight only, and no wood, paper, burlap, cord, paraffin or other substance used for wrapping or packing, shall be included as a part of the weight of such commodity sold.
>
> Provided, however, that nothing in this section shall prohibit making a reasonable separate charge for any wrapper or container used in packing or preparing such article or commodity for sale, if such be agreed to by the purchasers of said article or commodity at time of sale. Any person, firm, company, corporation or agent, who fails to comply with any provision of this act, shall be fined not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500.00)."

The foregoing section, it will be observed, applies only to goods or articles sold by "weight" or "count," and not to goods sold by the "basket." There is no statute fixing, either expressly or by implication, the size of baskets as such, or prescribing the number of pounds that must be packed in a basket, such as section 6415 G. C.

which fixes the interior dimensions and capacities of the peck, half-peck, quarter-peck, quart and pint measures, and section 6418 G. C. which prescribes the number of pounds of several different commodities that must be contained in a bushel.

Section 6418-1 G. C. (enacted originally in 102 O. L., 42), and as amended in 103 O. L., 136, and providing that certain articles therein mentioned shall be sold by avoirdupois weight or numerical count, unless otherwise agreed in writing, may also be referred to. The amendatory section was held unconstitutional in re Steube, 91 O. S., 135, and while no mention was made of the original enactment, nevertheless the decision is equally applicable thereto, because the objectionable provision of the amendatory section, namely, the one requiring an agreement in writing before a sale other than by weight or count can be made, also appears in the original section.

You are therefore advised that it is not unlawful under section 13128 G. C. to sell commodities "by the basket" without having the net weight of the commodity stamped thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

692.

APPROVAL OF BOND ISSUE OF MONROE TOWNSHIP RURAL SCHOOL DISTRICT, LOGAN COUNTY, OHIO, IN SUM OF $15,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, October 11, 1919.

693.

APPROVAL OF BOND ISSUE, WEST LIBERTY VILLAGE SCHOOL DISTRICT, LOGAN COUNTY, OHIO, IN SUM OF $5,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, October 11, 1919.

694.

APPROVAL OF BOND ISSUE OF WEST LIBERTY VILLAGE SCHOOL DISTRICT, LOGAN COUNTY, OHIO, IN SUM OF $90,000.

Industrial Commission of Ohio, Columbus, Ohio

COLUMBUS, OHIO, October 11, 1919.

695.

APPROVAL OF LEASE TO S. L. WILGUS FOR CONSTRUCTING DOCK LANDING AT INDIAN LAKE, OHIO, VALUATION BEING $500.00.

COLUMBUS, OHIO, October 11, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of this date transmitting for my approval lease in triplicate form to S. L. Wilgus of Russels Point, Ohio, covering permission to construct and maintain a board walk and dock landing along the water front of Indian Lake, valuation fixed being $500.00.

I see no objection to the execution of the lease recited in your letter, and I am therefore returning the triplicate copies with my approval.

However, I think it would be well for you to write to Mr. Wilgus when forwarding the lease that the state assumes no responsibility whatever in the matter of litigation now pending between Mr. Wilgus and Mr. Tarr.

Respectfully,
JOHN G. PRICE,
Attorney-General.

696.

DISAPPROVAL BOND ISSUE, ROAD IMPROVEMENT IN MERCER COUNTY, OHIO, IN THE SUM OF $39,000.

COLUMBUS, OHIO, October 16, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE—Bonds of Mercer county, for the improvement of Wooster road, in the amount of $39,000.

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript reveals that the county commissioners failed to publish, for the required length of time before the hearing of objections to said improvement, the notice required by section 6912 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing was held June 14, 1919; the notice was published in the "Mercer County Standard" on June 6th and June 13th of the same year. Two full weeks, or fourteen days, should have intervened between the first publication and the date of the hearing.

In the case of *Fenner* vs. *City of Cincinnati*, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held: (quoting from the syllabus)

"Where a statute provides that municipal bonds can only be issued 'After advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or

twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22nd and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same Report, p. 342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that the notice of the hearing of July 28, 1919, upon the schedule of estimated assessments was published on the 18th and 25th days of July in the "Mercer County Standard." Section 6922 G. C. requires this notice to be published "once each week for two consecutive weeks." For the reasons stated in the preceding paragraph I do not believe the notice given meets the requirements of section 6922 G. C.

(3) The resolution of February 3, 1919, fails to determine the kind of the improvement, and this omission is not cured by any subsequent resolution of the county commissioners.

For the several reasons set forth above, I am of the opinion that the bonds above described are not valid obligations of Mercer county, and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

697.

DISAPPROVAL OF BOND ISSUE FOR ROAD IMPROVEMENT, MERCER COUNTY, OHIO, IN THE SUM OF $6,600.

COLUMBUS, OHIO, October 16, 1919.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

RE—Bonds of Mercer county, for the improvement of Crone road, in the amount of $6,600.

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript reveals that the county commissioners failed to publish, for the required length of time before the hearing of objections to said improvement, the notice required by section 6912 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing was held July 12, 1919; the notice was published in the "Celina Democrat" on July 4th and July 11th of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of the hearing.

In the case of *Fenner* vs. *City of Cincinnati*, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held (quoting from the syllabus):

> "Where a statute provides that municipal bonds can only be issued 'After advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same Report, p. 342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that the notice of the hearing of July 28, 1919, upon the schedule of estimated assessments was published on the 18th and 25th days of July in the "Mercer County Standard." Section 6922 G. C. requires this notice to be published "once each week for two consecutive weeks." For the reasons stated in the preceding paragraph I do not believe the notice given meets the requirements of section 6922 G. C.

(3) The resolution of June 6, 1919, fails to determine the kind of the improvement, and this omission is not cured by any subsequent resolution of the county commissioners.

For the several reasons set forth above, I am of the opinion that the bonds above described are not valid obligations of Mercer county, and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

698.

DISAPPROVAL BOND ISSUE, ROAD IMPROVEMENT IN MERCER COUNTY, OHIO, IN THE SUM OF $13,200.00.

COLUMBUS, OHIO, October 16, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE:—Bonds of Mercer county, for the improvement of Hoenning Road, in the amount of $13,200.00.

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript reveals that the county commissioners failed to publish, for the required length of time before the hearing of objections to said improvement, the notice required by section 6912 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing was held July 11, 1919; the notice was published in the "Celina Democrat" on July 4th and July 11th of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of the hearing.

In the case of *Fenner* vs. *City of Cincinnati*, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held: (Quoting from the syllabus.)

> "Where a statute provides that municipal bonds can only be issued 'after advertising the same for sale once each week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same Report, p. 342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that the notice of the hearing of July 31, 1919, upon the schedule of estimated assessments was published on the 18th and 25th days of July in the "Mercer County Standard." Section 6922 G. C. requires this notice to be published "once each week for two consecutive weeks." For the reasons stated in the preceding paragraph I do not believe the notice given meets the requirements of section 6922 G. C.

(3) The resolution of April 25, 1919, fails to determine the kind of the improvement, and this ommission is not cured by any subsequent resolution of the county commissioners.

For the several reasons set forth above, I am of the opinion that the bonds above described are not valid obligations of Mercer county, and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

699.

DISAPPROVAL BOND ISSUE, ROAD IMPROVEMENT MERCER COUNTY, OHIO, IN THE SUM OF $3,900.00.

COLUMBUS, OHIO, October 16, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:

RE:—Bonds of Mercer county, for the improvement of Malick road, in the amount of $3,900.00.

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript reveals that the county commissioners failed to publish, for the required length of time before the hearing of objections to said improvement, the notice required by section 6912 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing was held June 28, 1919; the notice was published in the "Mercer County Standard" on June 20th and June 27th of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of the hearing.

In the case of *Fenner* vs. *City of Cincinnati*, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held (quoting from the syllabus):

> "Where a statute provides that municipal bonds can only be issued 'after advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same report, p. 342). The Supreme Court of Ohio on October 15, 1901, in Case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the Supreme Court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that the notice of the hearing of July 16, 1919, upon the schedule of estimated assessments was published on the 4th and 11th days of July in the "Celina Democrat." Section 6922 G. C. requires this notice to be published once each week for two consecutive weeks." For the reasons stated in the preceding paragraph I do not believe the notice given meets the requirements of section 6922 G. C.

(3) The resolution of June 6, 1919, fails to determine the kind of improvement and this omission is not cured by any subsequent resolution of the county commissioners.

For the several reasons set forth above, I am of the opinion that the bonds above

described are not valid obligations of Mercer county, and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

700.

DISAPPROVAL BOND ISSUE, ROAD IMPROVEMENT IN MERCER COUNTY, OHIO, IN THE SUM OF $7,600.

COLUMBUS, OHIO, October 16, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE—Bonds of Mercer county, for the improvement of Dellinger Road, in the amount of $7,600.

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript reveals that the county commissioners failed to publish, for the required length of time before the hearing of objections to said improvement, the notice required by section 6912 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing was held June 14, 1919; the notice was published in the "Mercer County Standard" on June 6th and June 13th of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of the hearing.

In the case of *Fenner vs. City of Cincinnati*, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held: (quoting from the syllabus)

> "Where a statute provides that municipal bonds can only be issued 'after advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same report, p. 342). The Supreme Court of Ohio on October 15, 1901, in Case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the Supreme Court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that the notice of the hearing of July 12, 1919, upon the schedule of estimated assessments was published on the 4th and 11th days of July in the "Mercer County Standard." Section 6922 G. C. requires this notice to be published "once each week for two consecutive weeks." For the reasons stated in the pre-

ceding paragraph I do not believe the notice given meets the requirements of section 6922 G. C.

(3) The resolution of April 11, 1919, fails to determine the kind of the improvement, and this omission is not cured by any subsequent resolution of the county commissioners.

For the several reasons set forth above, I am of the opinion that the bonds above described are not valid obligations of Mercer county, and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

701.

DISAPPROVAL BOND ISSUE, ROAD IMPROVEMENT IN MERCER COUNTY, OHIO, IN THE SUM OF $15,500.

COLUMBUS, OHIO, October 16, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE—Bonds of Mercer county, for the improvement of Will Road, in the amount of $15,500.

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript reveals that the county commissioners failed to publish, for the required length of time before the hearing of objections to said improvement, the notice required by section 6912 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing was held June 29, 1919; the notice was published in the "Mercer County Standard" on June 20th and 27th of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of the hearing.

In the case of *Fenner vs. City of Cincinnati*, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held: (quoting from the syllabus)

> "Where a statute provides that municipal bonds can only be issued 'after advertising the same for sale once each week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same report, p. 342.) The Supreme Court of Ohio on October 15, 1901, in Case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the Supreme Court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there

required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that the notice of the hearing of July 16, 1919, upon the schedule of estimated assessments was published on the 4th and 11th days of July in the "Celina Democrat." Section 6922 G. C. requires this notice to be published "once each week for two consecutive weeks." For the reasons stated in the preceding paragraph I do not believe the notice given meets the requirements of section 6922 G. C.

(3) The resolution of June 13, 1919, fails to determine the kind of the improvement, and this omission is not cured by any subsequent resolution of the county commissioners.

For the several reasons set forth above, I am of the opinion that the bonds above described are not valid obligations of Mercer county, and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

702.

DISAPPROVAL BOND ISSUE, ROAD IMPROVEMENT IN MERCER COUNTY, OHIO, IN THE SUM OF $19,300.

COLUMBUS, OHIO, October 16, 1919.

Industrial Commission of Ohio, Columbus Ohio.

GENTLEMEN:—

RE—Bonds of Mercer county, for the improvement of Watkins road, in the amount of $19,300.

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript reveals that the county commissioners failed to publish, for the required length of time before the hearing of objections to said improvement, the notice required by section 6912 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing was held June 28, 1919; the notice was published in the "Mercer County Standard" on June 20th and June 27th of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of the hearing.

In the case of *Fenner vs. City of Cincinnati*, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held: (quoting from the syllabus)

> "Where a statute provides that municipal bonds can only be issued 'after advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks, or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22nd and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (See same Report, p 342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judg-

ment of Judge Smith rendered in special term. Therefore the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that the notice of the hearing of July 17, 1919, upon the schedule of estimated assessments was published on the 4th and 11th days of July in the "Celina Democrat." Section 6922 G. C. requires this notice to be published "once each week for two consecutive weeks." For the reasons stated in the preceding paragraph I do not believe the notice given meets the requirements of section 6922 G. C.

(3) The resolution of April 11, 1919, fails to determine the kind of the improvement, and this omission is not cured by any subsequent resolution of the county commissioners.

For the several reasons set forth above, I am of the opinion that the bonds above described are not valid obligations of Mercer county, and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

703.

DISAPPROVAL BOND ISSUE, ROAD IMPROVEMENT IN MERCER COUNTY OHIO, IN THE SUM OF $6,600.

COLUMBUS, OHIO, October 16, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE—Bonds of Mercer county, for the improvement of Homan road, in the amount of $6,600.

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript reveals that the county commissioners failed to publish, for the required length of time before the hearing of objections to said improvement, the notice required by section 6912 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing was held June 28, 1919; the notice was published in the "Mercer County Standard" on June 20th and June 27th of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of the hearing.

In the case of *Fenner vs. City of Cincinnati*, 8 N. P. 340, Judge Smith, of the superior court of Cincinnai, in special term, held: (quoting from the syllabus)

> "Where a statute provides that municipal bonds can only be issued 'After advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22nd and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same Report, p. 342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that the notice of the hearing of July 17, 1919, upon the schedule of estimated assessments was published on the 4th and 11th days of July in the "Celina Democrat." Section 6922 G. C. requires this notice to be published "once each week for two consecutive weeks." For the reasons stated in the preceding paragraph I do not believe the notice given meets the requirements of section 6922 G. C.

(3) The resolution of June 13, 1919, fails to determine the kind of the improvement, and this omission is not cured by any subsequent resolution of the county commissioners.

For the several reasons set forth above, I am of the opinion that the bonds above described are not valid obligations of Mercer County, and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

704.

DISAPPROVAL BOND ISSUE, ROAD IMPROVEMENT IN MERCER COUNTY, OHIO, IN THE SUM OF $2,000.

COLUMBUS, OHIO, October 16, 1919.

Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:—

RE—Bonds of Mercer county, for the improvement of Jones road, in the amount of $2,000.

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript reveals that the county commissioners failed to publish, for the required length of time before the hearing of objections to said improvement, the notice required by section 6912 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing was held July 11, 1919; the notice was published in the "Celina Democrat" on July 4th and July 11th of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of the hearing.

In the case of *Fenner* vs. *City of Cincinnati*, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held: (quoting from the syllabus)

> "Where a statute provides that municipal bonds can only be issued 'After advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied

with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (See same Report, p. 342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that the notice of the hearing of July 31st, 1919, upon the schedule of estimated assessments was published on the 18th and 25th days of July in the "Mercer County Standard." Section 6922 G. C. requires this notice to be published "once each week for two consecutive weeks." For the reasons stated in the preceding paragraph I do not believe the notice given meets the requirements of section 6922 G. C.

(3) The resolution of April 25, 1919, fails to determine the kind of the improvement, and this omission is not cured by any subsequent resolution of the county commissioners.

For the several reasons set forth above, I am of the opinion that the bonds above described are not valid obligations of Mercer county, and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

705.

PRIMARIES—NOMINATIONS OF CANDIDATES FOR MEMBERS OF BOARD OF EDUCATION SHALL BE HELD IN EACH COUNTY ON SECOND TUESDAY IN AUGUST OF ODD NUMBERED YEARS—APPLICABLE TO CHARTER CITIES—HOW NOMINATIONS ARE MADE WHERE NO NOMINATING PETITION OR DECLARATION OF CANDIDACY HAS BEEN FILED.

1. *Primaries to nominate candidates for a member of a board of education shall be held in each county at the usual polling places on the second Tuesday in August of the odd numbered years under the provisions of sections* 4963 *and* 4969-1 *G. C., and the provisions of such sections apply in a charter city for the nomination of members of boards of education.*

2. *Where nominations are sought to be made at any primary election, and for which no nominating petition or declaration of candidacy has been filed within the time prescribed, if a person's name appears on at least eight per cent of all the ballots voted at such primary election, then such person shall be considered as being duly nominated and his name should be placed upon the ballot for the following November election.*

COLUMBUS, OHIO, October 17, 1919.

HON. LOUIS H. CAPELLE, *Prosecuting Attorney, Cincinnati, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of a letter from your office signed by Mr. Charles W. Baker, assistant prosecuting attorney, which reads as follows:

"I am enclosing to you copies of two letters received from the board of deputy state supervisors and inspectors of elections, together with a request for an opinion from our office. I enclose also copy of ballot used at the primary. This ballot was of the type furnished by the secretary of state for use in the election. In view of the fact that the board of elections has acted upon an opinion of Mr. Hildebrant, secretary of state in 1915, we feel that it is a matter that the Attorney-General of Ohio should pass upon.

While the statement of facts appears very fully in Mr. H.'s letter, nevertheless we wish to say that the primary ballots contain no names. The other candidates, aside from Mr. F. were nominated by petition. Mr. F.'s name was written in at the time of the primary without any nomination petitions being filed and without any party designation. The numbers of the statutes of the General Code appear very fully in Mr. H.'s letter."

Due to the importance of the question submitted, and in order to take notice of all the facts bearing upon the case, the letters of the clerk of the board of deputy state supervisors of elections of Hamilton county to the prosecuting attorney of that county, and the protest against the candidacy of Mr. F., as made by Mr. S. H. under date of October 1st to the board of elections of Hamilton county, are herewith given in full:

"October 2, 1919.

Hon. Louis H. Capelle, Prosecuting Attorney, Cincinnati, Ohio.

My dear Sir:—.

I am directed by the board of deputy state supervisors to transmit to you herewith a copy of letter received from S. H. and to request an opinion from you on the same.

I might add for your information that in 1915, Charles Q. Hildebrant, secretary of state, rendered a verbal opinion to the board at that time directing them to print a blank ballot for members of board of education for the Cincinnati school district when no petitions had been filed for these offices. We have followed that opinion since and in the recent primary election, held August 12, 1919, J. G. F.'s name was written on the blank ballot in excess of the 8 per cent required by section 4984-1. We therefore concluded that he was nominated and have ordered the printer to print his name on the ballot for the coming November election.

I may also add that the specifications under which these ballots are being printed, call for them to be delivered at the office of this board by the third day of October. This is done in order to meet the requirements of the absent voter's law which make it necessary to have the ballots on hand at least thirty days before the election.

Respectfully submitted,
(Signed) S. A. B.....
Clerk."

"Cincinnati, Ohio, October 1, 1919.

The Board of Elections, Cincinnati, Ohio.

GENTLEMEN:—

Addressing myself to you purely in my private capacity as an elector and taxpayer will say that I understand that you are contemplating placing Mr. F.'s name on the non-partisan ballot for members of the school board or board of education for the Cincinnati school district. As an elector and taxpayer I wish to protest against such action on your part and to request that this course be not followed without first securing the opinion of the prosecuting attorney as to the legality of such action.

This protest is based upon the view which I entertain to the effect that Mr. F. has not been properly nominated for such office. I am advised that Mr. F. has filed no nominating petitions. Nor was he a party candidate nominated at either the republican or democratic primaries. Those who are supporting his candidacy claim his nomination by reason of the votes he received, from all voting at the primaries, upon a ballot which did not purport to be either a republican primary ballot or that of any other party, and which was used indiscriminately by republicans, democrats, and all others voting at the election. In this respect his case differs very materially from that of Dr. C., several years ago, as Dr. C. was nominated by writing in his name upon the republican primary ballot, and he, therefore, became the republican candidate, nominated at a republican primary.

I do not believe that I need call your attention to the fact that the primary election is designed for the nomination of 'party candidates' (G. C. 4949) and that the candidates so nominated thereby become the candidates of 'the party nominating them' (C. G. 4985). Further, only such 'parties' may hold primaries as shall have cast the required percentage of votes at the preceding general election (G. C. 4949). There would seem to be no such thing as a non-partisan primary. This alone would seem to be sufficient to exclude Mr. F. but there is another and even stronger reason for not printing his name on the ballot.

When the laws regulating the size and election of the members of boards of education in city districts were amended in 1914, see 104 Ohio Laws, the legislature amended section 4997 of the General Code to read that all nominations *'shall* be by petition' instead of reading that such nominations 'may be by petition.' This change of the word 'may' to 'shall' leaves no room for doubt as to the legislative intent, but if there were room for such doubt it would be removed by the provisions of section 4999 to the effect that nominations for 'all other offices' might be by petition. In other words, members of the boards of education *shall* be nominated by petition while the nominations of all *other* offices may be by petition or by primary.

As I have already said, I suggest that you obtain an opinion upon this matter before the final ballots are prepared since such action would undoubtedly avoid injunction proceedings and the delay incident thereto.

Yours very truly,

(Signed) S. H."

The board of education of the city school district of Cincinnati is elected under the provisions of section 4698 to section 4997, as provided in senate bill 95, as passed by the general assembly of Ohio on April 28, 1913, and filed in the office of the secretary of state May 2, 1913, and effective as a law ninety days after the latter date (103 O. L., 279). In this act section 4997 G. C. reads as follows:

"Nominations of candidates for the office of member of the board of education shall be made by nominating papers signed in the aggregate for each candidate by not less than twenty-five qualified electors of the school district, of either sex, in village districts and in city school districts by not less than two per cent. of the electors voting at the next preceding general school election in such city school districts."

In the General Code the above numbered section is followed by section 4998, which reads as follows:

"When nominations of candidates for member of the board of education

have been made by nomination papers filed with the board of deputy state supervisors, as herein provided, such board of deputy state supervisors shall publish on two different days prior to the election a list of the names of such candidates in two newspapers of opposite politics in the school district, if there is such printed and published therein. If no newspaper is printed in such school district, the board shall post such list in at least five public places therein. (R. S. section 3897a.)"

By the same general assembly which enacted section 4997 G. C., as given above, there was enacted section 4999 G. C., but in another bill which appears in 103 O. L., p. 844, said section reading as follows:

"Nominations of candidates for other offices, may be made by petition, signed for each candidate by qualified electors of the state or the district, or county, for which such candidates are nominated, not less in number than one for each one hundred persons who voted at the next preceding general election in the state, district or county."

In order to show that sections 4997 and 4999 G. C. do not entirely dovetail into each other, attention is invited to the fact that in section 4997 G. C. relative to the nominations for the office of member of the board of education in city districts, the requirement is "not less than two per cent of the electors voting," and based upon the next preceding general school election, that is, the election held in the year in which school board members were last elected and two per cent to be upon the basis of those who voted for school officers, it is noted that section 4999, providing for nominations by petition for other offices, says that such nominations *may* be made by petition, while section 4997 G. C. uses the word "shall" instead of "may" in the matter of nominating candidates for board of education.

Section 4999 G. C. says the number signing the petitions for other offices shall not be less in number than one for each one hundred persons, that is, one per cent, and that this shall be based upon the next preceding general election in the state, thus showing there is a wide divergence in both the language and the results of the two sections enumerated.

Commenting upon this section, the Attorney-General, in Opinion 596, rendered September 6, 1917, appearing at page 1676 of the Opinions of the Attorney-General for that year, Vol. 2, says:

"Candidates for members of boards of education shall be nominated as provided by section 4997 G. C., in which section it is provided that nominations of candidates for office of members of boards of education shall be made by nominating papers signed in the aggregate for each candidate by not less than twenty-five qualified electors of the school district, of either sex.

Such nomination papers shall be filed with the board of deputy state supervisors of elections as provided by section 5004 G. C., which reads in part as follows:

'Certificates of nomination and nomination papers of candidates shall be filed as follows: * * * For * * * members of the board of education, with the board of deputy state supervisors of the county, not less than sixty days previous to the date of election; * * *.'

Section 5032 G. C. provides that the names of candidates for members of the board of education of a school district, however nominated, shall be placed on one independent and separate ballot without any designation whatever except for member of board of education and the number of members to be elected.

Section 5018-1 G. C. provides that where the names of several persons are grouped together upon the ballots as candidates for the same office, the ballot shall contain, immediately above the names of such candidates, the words 'Vote for not more than ———.' The blank space shall be filled with the number representing the persons who may lawfully be elected to such office.

In your case the word 'three' will be written in the blank space.

Section 4998 G. C. provides that when nominations of candidates for members of the board of education have been made by nomination papers filed with the board of deputy state supervisors, then the board of deputy state supervisors shall publish, on two different days prior to the election, a list of the names of such candidates in two newspapers of opposite politics in the school district, if there be such printed and published therein, and if no newspaper is printed in such district, the board shall post such list in at least five public places therein.

Section 4839 G. C. provides that all elections for members of boards of education shall be held on the first Tuesday after the first Monday in November of odd numbered years; and section 4839 G. C. provides that the clerk of each board of education shall publish a notice of all such elections in a newspaper of general circulation in the district, or post written notices thereof in five public places in the district at least ten days before the holding of such election, and that such notices shall specify the time and place of election and the number of members of the board of education to be elected and the term for which they are elected."

It would seem, therefore, that in view of prior holdings of this department, and it must be admitted that the language of section 4997 G. C. is plain as to the manner and method of nominating candidates for member of the board of education, this is the only method by which members of the board of education can be nominated and placed upon the ballot, and yet we have the following language in section 4963 G. C., occurring in the chapter under the title of Primary Elections:

"Primaries under this chapter to nominate candidates for members of the house of representatives in the congress of the United States * * * shall be held in each county at the usual polling places on the second Tuesday in August of the even numbered years; and primaries under this chapter to nominate candidates for township and municipal officers, justices of the peace and *members of boards of education* shall be held in each county at the usual polling places on the second Tuesday in August of the odd numbered years; provided, however, that in a municipality organized under any of the provisions of sections 3515-1 to 3515-71, both inclusive of the General Code, primaries under this chapter to nominate candidates for all offices not provided for in the plan of government under which such municipality is organized shall be held in such municipality at the usual polling places on the same day on which primary elections are held to nominate the officers of such municipality provided for in its plan of government. * * *." (107 O. L., p. 400).

It will be noted that the above section, which appears as a section under the chapter on primary elections in the General Code, provides for the nomination of members of boards of education in each county at the usual polling places in the odd numbered years and that the same shall also be true in charter cities, of which Cincinnati is one, unless such charter provides that members of the board of education shall be nominated and elected at some other time, which cannot be true because the matter of

school elections comes entirely within the statutes of the state and is not an office "provided for in the plan of government" in charter cities.

An examination of section 4963, as amended in 107 O. L., 400, shows that this same language relative to primaries for member of the board of education occurs in section 4963 prior to March 31, 1917, when Senate Bill 218 was filed in the office of the secretary of state, thus being an enactment by the legislature just preceding the present general assembly. Senate Bill 218, passed by the general assembly March 21, 1917, contained but one single section, which was upon the subject of primaries, and is section 4963 G. C., supra, as it now reads.

We thus have the language of section 4997, passed in 103 O. L., 279, and the language here given relative to primaries occurring in section 4963 G. C., as passed in 107 O. L., 400. Thus four years after the small school board law was passed by the legislature of 1913, we have the enactment of the legislature of 1917, providing for the primaries for the nomination of members of the board of education in the uneven years.

Section 4997 G. C. occurs in the General Code under the chapter called Nomination of Candidates (Chapter 7), the first section of which reads as follows:

> "Section 4992: Except as provided by the preceding chapter of this title, nominations of candidates for public office may be made as herein provided." (103 O. L., 343).

The preceding chapter referred to is chapter 6, bearing the title of Primary Elections and in such chapter occurs section 4963 G. C., supra, providing for the holding of primaries for members of boards of education in each county in the odd numbered years. Attention is also invited to the following language in the same chapter on primary elections:

> "Section 4969-1: In case of declarations of candidacy for candidates for public office in a * * * school district situated in more than one county, such declarations shall be filed as above limited with the board of deputy state supervisors of the county containing the majority population of such * * * school district, which board shall certify the same forthwith to the board or boards of the county or counties containing the other parts of such * * * school district. * * * When such board or boards of the county or counties containing the other part or parts of such * * * * district shall have canvassed the returns of the primary in such * * * district received by them they shall certify the result to the board of the county containing such majority population which board shall ascertain and *declare the result of the primary* and shall forthwith certify the name or names of the successful candidate or candidates to the boards of such other counties to be placed on the official ballot at the election." (106 O. L., 545).

It will be noted that section 4969-1 was enacted in 106 O. L., and is thus a later statement by the legislature than is section 4997, appearing in 103 O. L., 279.

In addition to the language of sections 4963 and 4969-1 G. C., as here quoted, appearing in chapter 6 under the title of Primary Elections, there appears the following section in such chapter:

> "Sec. 4984-1. That in the event of any office for which nominations are sought to be made at any primary election, and for which no nominating petitions or declarations of candidacy have been filed within the time prescribed by law by or in behalf of any candidate of a political party, so that

> in so far as such office is concerned, there is a vacancy on the primary ballot to be nominated, no valid nomination shall be made for such office unless the name of the person attempted to be nominated and receiving the highest number of votes for said office, shall have been written on at least eight per cent of all the ballots containing such vacancy, which have been voted at such primary election." (106 O. L., 207.)

You indicate in your statement of facts that Mr. J. F.'s name was written on the blank ballot in excess of the 8 per cent required by section 4984-1, and that no petition had been filed for member of the school board prior to such primary, though section 4963 G. C. provides for the holding of primaries in each county at the usual polling places on the second Tuesday in August of the odd numbered years for the purpose of nominating members of boards of education. The rule of law is that where two sections are in conflict, the one later enacted by the legislature must necessarily be presumed to be the last known intent of the general assembly as to what the law should be. In the case at hand we have the provisions of section 4963 enacted in 104 O. L., and again in 107 O. D., as well as section 4969-1 G. C., enacted in 106 O. L., both of which sections are of very recent enactment, and the former was reenacted several times since 1913, providing for the holding of primaries for the nomination of candidates for members of boards of education in the odd numbered years in each municipality and each county of the state.

Under these circumstances it cannot be said, therefore, that section 4997, passed in 103 O. L., and appearing in the chapter providing for a nomination of candidates by other methods than the primary, is the only method by which candidates for board of education can be nominated. There is a seeming conflict between section 4997 G. C., passed in 103 O. L., and sections 4963 and 4969-1, enacted by later legislation, and both providing for primaries for nominations for candidates for boards of education in the odd numbered years. This is followed by section 4984-1, a very late law passed in 106 O. L., 207, providing that if no nominating petitions have been filed, the people can write in at the primary the name or names of certain persons, and if such persons receive eight per cent of all the ballots voted at such primary, they shall be considered duly nominated and placed upon the ballot for the following election.

Attention is also invited to opinion No. 908, appearing at page 10, Opinions of the Attorney-General for 1918, wherein it is held in the syllabus that:

> "Where * * * the deputy state supervisors of elections * * * placed the name on the ballot (for member of board of education), and at the election the person received the highest number of votes, he was duly elected as a member of said board of education, and irregularities in the making of the nomination would not affect the validity of his election."

The Attorney-General is advised by the office of the secretary of state that for a number of years the secretary of state, being the head of the election machinery in Ohio, has advised the various county boards of elections throughout the state that ballots must be prepared and furnished to the electors in primaries held on the second Tuesday in August in the odd years, for members of boards of education. These instructions from the then secretary of state are based upon section 4963 G. C., which specifically mentions boards of education as being nominated in the primary held in the odd years. Acting upon theses instructions, the board of deputy state supervisors and inspectors of elections of Hamilton county prepared these blank forms of ballots and on the day of the primary, that is August 12, 1919, such ballots were handed to the electors to use along with any other ballots received by them from the election officers on duty in the several precincts of the Cincinnati school district on that day. With your communication and request for an opinion you have submitted

one of these ballots and it has as its heading these words: "Form of Board of Education Primary Ballot." Then follows the number, name of voter, residence and registered number of voter, below which entries appear the words "Republican Board of Education Ticket," with places below for the electors to write in the names of persons if they so desire. Following this, and below the ballot, there are three short paragraphs with instructions, the first of which reads:

> "The above form of ballot is to be used where primaries are held."

On the back of these ballots, copy of which has been furnished this office, appear these words:

> "Official Republican Board of Education Ballot. Primary Election August 12, 1919. (Here print the facsimile signatures of the officers causing the ballots to be printed.)"

In the case at hand it seems that electors in the Cincinnati city school district were handed at the place of election on primary day, by the election officials, forms of ballots similar to the one herein described and bearing the names of recognized political parties. On such ballot there were blamk spaces and no names as regards the city school district of Cincinnati, which carried with it a clear invitation to the electors to write a name or names therein, and in the case at hand that seems to have been just exactly what was done and the name of Mr. J. F. appeared on more than eight per cent of the ballots cast for board of education in such city school district. It seems, however, that there is no question raised but what J. F. did receive eight per cent of the ballots cast by proper computation and that question is not here involved or attacked.

Following this primary and the publication of the returns of such primary, it is entirely possible that the friends of J. F. felt they had nominated him in proper manner because they had cast more than eight per cent of the ballots in the primary of August 12th, and had cast such votes on ballots furnished by the board of elections, with the clear invitation that such ballots were to be used in this manner, and that under these circumstances it would not be necessary to file the petition mentioned in section 4997 G. C., which petition by another statute must be filed at least sixty days before the November election.

It may be said that section 4997 G. C. is a statute speaking specifically as to how the members of boards of education shall be nominated and that section 4963 G. C. speaks but generally about boards of education, and in that event where two statutes were in conflict, the one carrying the specific language would govern. This might be true if the contrast was between but two laws passed on two specific occasions but here we have section 4997 G. C., passed as a part and the closing paragraph of senate bill 95, creating small boards of education in city school districts, filed in the office of the secretary of state May 2, 1913; and by the same general assembly, and six days after May 2, on May 8, 1913, there was filed in the office of the secretary of state house bill 669, an act relating to primary elections, and this act contained section 4963, containing these words:

> "* * * and primaries under this chapter to nominate candidates for township and municipal offices, justices of the peace and *members of boards of education*, shall be held in each county at the usual polling places on the second Tuesday of August of the odd numbered years."

Thus the same legislature (103 O. L.) passed both of these sections and section 4963 G. C. became law after section 4997 G. C. It is important to note, how-

ever, that, following the above action, in passing both of these two sections, section 4997, as first passed in 103 O. L., 279, has not since been amended or changed, but on the other hand, in the following legislature in 104 O. L., page 9, in house bill No. 3, section 4963 was again passed by that legislature February 16, 1914, and contained the words:

> "That members of boards of education shall be nominated in primaries in each county at the usual polling places on the second Tuesday of August of the odd numbered years."

In the following legislature, that is the 81st General Assembly, there was enacted section 4969-1, heretofore referred to, which takes care of primaries in municipalities and school districts which lie in more than one county, and this section, bearing upon the holding of primaries in school districts, was filed in the office of the secretary of state June 5, 1915. In the next legislature, that is the 82nd General Assembly, section 4963 was again enacted in senate bill 218 and again carried the words that primaries to nominate candidates for members of boards of education should be held in each county in the odd numbered years. Thus we have the language of section 4997 enacted once in 103 O. L., and not changed since, while on the other hand section 4963 G. C., providing for primaries for members of boards of education in the odd numbered years, has been re-enacted by necessary amendments made to the section for other offices by the general assemblies which have followed since 1913, as shown in the above history of the legislation. The question therefore arises if it was the clear intent of the general assembly that members of boards of education should not be nominated in primaries, but only by the method provided in section 4997, why did the general assembly carry the words "members of boards of education" in section 4963 G. C., first in 1913, following the enactment of section 4997 G. C., and again in 1914 (104 O. L.), and again in 1917 (107 O. L.)? These successive enactments on the part of each succeeding general assembly, and carrying in each instance provision for the nomination of members of boards of education in primaries in the odd numbered years, and not omitting such words in any of the several re-enactments, would indicate that the legislature did not intend that section 4997 G. C., the petition method of nominating members of boards of education, should be the only method that could be used. Thus these successive re-enactments, carrying the same language in a general statute, would seemingly cause the principle of law, holding that where two statutes are in conflict the one mentioning a specific thing, as against the provisions of a section speaking of the same in a general way, to fail, because the general act in question here has been so many times kept in its original form, providing for the nomination of boards of education in primaries held in the uneven years.

It is a matter of common knowledge that the judicial ballot in Ohio is practically the same as the ballot for members of boards of education, that is, in November when it is used in the election it has a non-partisan character, and neither of the ballots, either judicial or that for a member of a board of education, contains any party designations, and yet candidates for judicial positions enter the primary on the second Tuesday in August and compete with possibly others for their party's endorsement, and they thus become a candidate of that party, at least as far as endorsement is concerned, for that particular judgeship, though on election day in November the ballot on which their names appear for judicial positions has the same non-partisan character in appearance as the ballot for members of boards of education.

There is a seeming conflict between section 4997 G. C., providing the petition plan of nominating candidates for the board of education, such petitions to be filed sixty days before the November election, and section 4963 G. C., which specifically says that primaries shall be held in the odd years for nominating members of boards of education. Yet this seeming conflict existed in 103 Ohio Laws, when both sec-

tions were enacted the same month by the general assembly; it was still in existence in 104 Ohio Laws, when the general assembly enacted section 4991-1, relative to primaries where the school district lies in more than one county; the next legislature (106 O. L.) did not correct section 4963 G. C. to conform to section 4997 G. C., but re-enacted it with members of boards of education specifically mentioned again; the next general assembly (107 O. L.) amended section 4963 G. C., but kept members of boards of education within the primary law by specific mention; the present general assembly (108 O. L.) has not seen fit to change 4963 G. C. Seemingly the successive legislatures since 1913 do not think that the two sections do conflict, that either method of nomination can be used for the board of education. Cities in Ohio are nominating candidates for board of education in the August primary in odd years and to construe that section 4963 G. C., so often re-enacted by late legislatures, is to go out of the law, would create chaotic conditions in those cities. If section 4963 G. C. conflicts with section 4997 the remedy for correcting and getting the legislative intent is in the general assembly.

Based upon the statutes here cited, it is therefore the opinion of the Attorney-General that:

1. Primaries to nominate candidates for a member of a board of education shall be held in each county at the usual polling places on the second Tuesday in August of the odd numbered years, under the provisions of sections 4963 and 4969-1 G. C., and the provisions of such sections apply in a charter city for the nomination of members of boards of education.

2. Where nominations are sought to be made at any primary election, and for which no nominating petition or declaration of candidacy has been filed within the time prescribed, if a person's name appears on at least eight per cent of all the ballots voted at such primary election, then such person shall be considered as being duly nominated and his name should be placed upon the ballot for the following November election.

Respectfully,
JOHN G. PRICE,
Attorney-General.

706.

POSTAGE—COUNTY OFFICES—COUNTY COMMISSIONERS AUTHORIZED TO PROVIDE NECESSARY AMOUNT—SEE SECTION 2419 G. C., 108 O. L., 387—SAID SECTION NOT APPLICABLE TO PURCHASE OF AUTOMOBILE.

1. *Under the provisions of section* 2419 *G. C. as amended in* 108 *O. L.*, 387, *H. B. No.* 524, *county commissioners are authorized to provide such postage as they may deem necessary for the proper and convenient conduct of any of the county offices, and the provisions of this section constitute a substantive authorization for such purchase, and other or independent requirement of the law for the mailing of such documents is not necessary.*

2. *The provision of said section authorizing the commissioners to provide equipment and facilities for use in the administration of the several county offices is held not applicable to the purchase of automobiles, for the reason that special provision is made therefor elsewhere in the statutes.*

COLUMBUS, OHIO, October 17, 1919.

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

GENTLEMEN:—Acknowledgment is made of your inquiry relative to the applica-

tion of the provisions of section 2419 G. C. as recently amended, your inquiry being as follows:

> "We desire to call your attention to the amendment of section 2419 in house bill 524, passed by the legislature April 17, 1919; approved by the governor May 15, 1919; and filed in the office of the secretary of state May 17, 1919, and would ask your written opinion as to whether the postage that this section permits the county commissioners to purchase for the use of county officers must be limited to the mailing of such documents as the law requires to be mailed?
>
> And further, if under the provision for 'equipment,' as used in said section, the county commissioners may purchase an automobile for any of the county officers?"

Section 2419 G. C., to which you call attention, as amended in H. B. 524 (108 O. L.) at the current session of the general assembly, is as follows:

> "Section 2419. A court house, jail, public comfort station, offices for county officers and an infirmary shall be provided by the commissioners when in their judgment they or any of them are needed. Such buildings and offices shall be of such style, dimensions and expenses as the commissioners determine. They shall also provide all the equipment, stationery and postage, as the county commissioners may deem necessary for the proper and convenient conduct of such offices, and such facilities as will result in expeditious and economical administration of the said county offices. They shall provide all rooms, fire and burglar-proof vaults and safes and other means of security in the office of the county treasurer, necessary for the protection of public moneys and property therein."

In considering your question relative to the extent of the authorization to provide postage, I am constrained to observe that the authorization by the terms of the enactment is not limited to postage for mailing of documents elsewhere in the law specifically "required" to be mailed; but on the contrary, this provisions in the amendment of section 2419 G. C. must be regarded as a substantive authorization in itself, obviously intended to vest a discretion in the county commissioners.

True, the statute may not be invoked as authority for incurring expense for postage otherwise than in connection with the official business of the several county offices, but as to matters incident to the administration of the official business of the office, the authority to determine the necessity and propriety of incurring expense by way of postage to be provided for out of public funds is vested in the county commissioners; in other words, the statute authorizes the charge for postage when in a reasonable exercise of judgment and discretion the county commissioners determine same to be necessary "for the proper and convenient conduct of such offices."

You are therefore advised that there is a very wide discretion vested in the county commissioners in the determination of necessity and propriety for incurring expense by way of postage in the administration of the several county offices, and that affirmative exercise of such discretion under and in accord with the provisions of this section of the statute suffices as an authorization for incurring the charge for postage.

Your further inquiry as to the effect and application of the provision of said section relative to "equipment" in relation to the purchase of automobiles for the use of county officers raises a question which challenges a most careful consideration.

In addition to the provision that the county commissioners shall "provide all the equipment * * * as the county commissioners may deem necessary for the proper and convenient conduct of such offices," the scope of the grant is still further augmented

and enlarged by the ensuing language, "and such facilities as will result in expeditious and economical administration of the said county offices." The term "equipment" is one of broad significance and is defined by the new Standard Dictionary as:

> "Whatever constitutes an outfit or preparation for some special purpose."

Webster's Dictionary defines the term "equipment" as:

> "Furniture, habiliments, apparatus."

By the language of the section of the Code under consideration, the commissioners are authorized to provide the equipment they shall deem necessary for the proper and convenient conduct of the county offices, which primarily would appertain to the necessary furnishings, fixtures and provisions in and about the respective offices as would be requisite in the proper conduct of the business to be administered therein, but to the extent that the conduct of such offices may involve activities outside of the walls or location constituting the official place of business, the scope of the authorization to provide equipment would not seem to be exhausted in providing things of the character above noted.

But in addition the purpose and intention to extend the grant of power beyond the mere provision for furnishings and office fixtures, etc., is evidenced by the further authorization to provide "such facilities as will result in expeditious and economical administration of said county offices." This language is broad enough to extend to the entire activities incident to the administration of the several offices, and here again a wide discretion is vested in the county commissioners in the determination of the propriety or necessity of adoption of particular facilities for the expeditious and economical administration of the offices.

The term "facility" is defined by the Standard Dictionary as:

> "Something by which anything is made easier or less difficult; an aid; advantage or convenience."

The term is defined by Webster as:

> "That which promotes the ease of any action or course of conduct; advatage; valuable aid; assistance."

From a consideration alone of the broad language of the statute, it might well be argued that the authorization to the commissioners to "provide all the equipment, * * * (they) may deem necessary for the proper and convenient conduct of such offices, and such facilities as will result in expeditious and economical administration of the said county offices" would empower the commissioners to purchase automobiles when in their judgment the circumstances and conditions warrant.

However, it must be noted that special provision has been made in relation to the subject of purchasing automobiles for the use of county officers, and this fact being considered, it is then to be determined what influence such special provision should have in the construction of the provisions of section 2419, supra.

Section 2412-1 G. C., enacted in 1917, provides for the purchase of automobiles for the use of the county commissioners and county sheriff, in order to facilitate the transaction of the county business, while by section 7200 G. C., also enacted in 1917, the county commissioners are authorized to purchase, hire or lease automobiles, motorcycles or other conveyances for the use of the county surveyor and his assistants when on official business.

In both of said sections last cited certain regulatory provisions are embodied, constituting to some extent a restriction upon the exercise of the power.

For example, under section 2412-1 G. C., the purchase of machines can only be made with the approval of the common pleas court, and both the number of such machines and the amount to be expended therefor are subject to the approval of the court, and certain provisions are made, in this and the second section above mentioned, relative to the lettering of the machines and the use to which they may be devoted. So that such legislation is in the nature of a special or specific provision for the procuring and the use of automobiles by county officers, while the application of section 2419 G. C., under consideration, to the matter of the purchase of automobiles, would be referable to its broad and general terms.

In Columbus vs. Kauffman, 8 O. N. P. 231, it was said:

> "General statutes are read as silently excluding from their operation the cases which have been provided for by special laws."

In Railway vs. Elyria, 14 O. C. C. (N. S.) 364, the court, in considering the question of authority of the village to enter into certain contracts by virtue of a provision of the general statutes, said:

> "Such contracts are authorized under certain circumstances by the other sections referred to. Having legislated particularly upon the subject, the general power granted by the legislature should not be amplified by judicial interpretation, '*expressio unius est exclusio alterius*'."

In City of Cincinnati vs. Connor, 55 O. S. 82, the court said:

> "It is an equally well established rule, that the provisions of a statute are to be construed in connection with all laws in *pari materia*, and especially with reference to the system of legislation of which they form a part, and so that all the provisions may, if possible, have operation according to their plain import."

In consideration of the rule announced by the decisions cited, and in view of the special legislation empowering county commissioners to purchase automobiles only for particular county officers and under stated conditions and regulations, it is held that the general provisions of section 2419 G. C. must be construed with due reference to the special provisions and therefore must be held not to include the subject of automobiles as an object of the legislation

Respectfully,
JOHN G. PRICE,
Attorney-General.

707.

TAXES AND TAXATION—SENATE BILL NO. 187—WHERE ELECTORS VOTED AN ADDITIONAL LEVY FOR SCHOOL PURPOSES UNDER PROVISIONS OF SAID ACT ON AUGUST 12, 1919—ON TAX DUPLICATE FOR YEAR 1919—ATTACH TO TERRITORY TRANSFERRED PRIOR TO AUGUST 12th.

Where a levy of an additional tax for school purposes was voted by the people of a school district on August 12, 1919, *under the provisions of Senate Bill No.* 187 *such levy*

will attach on the tax duplicate for the year 1919, *and such levy will attach to territory transferred prior to August* 12 *to a school district in which such special school election was held.*

COLUMBUS, OHIO, October 17, 1919.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

> "Territory is transferred from one school district to another between April 13, 1919, and August 12, 1919. Since this transfer from one tax unit to another was made subsequent to April 13, the time at which the tax rate was fixed, will a two-mill levy by vote of the people on August 12, 1919, attach for the present year to the territory transferred?"

In your query you refer to the two mill levy by vote of the people on August 12, 1919, provision for which vote is found in Senate Bill No. 187, passed by the general assembly as an emergency act and filed in the office of the secretary of state on July 7, 1919. You inquire as to whether the two mill levy voted by the people on August 12 will attach for the present year to the territory transferred, and indicate that such transfer was made between April 13, 1919, and August 12, 1919, the latter date being the date of the election.

Attention is invited to section 3 of Senate Bill No. 187, providing for the two mill levy for school purposes, such section reading as follows:

> "If a majority of the electors voting on the proposition so submitted vote in favor thereof, upon the certification and canvass of such result it shall be lawful for such board of education to levy taxes on the duplicate made up in the year 1919 at the aggregate rate so authorized for such purposes in addition to all other taxes for like purposes. Such levy shall be certified to the county auditor, who shall place it on the tax duplicate; it shall not be subject to any limitation on tax rates now in force, and shall not be subject to the control of the budget commission, nor shall such budget commission reduce the amount of all other levies made by any board below the amount allowed such board for the preceding year."

It is noted in the above section that the board of education shall levy taxes on the duplicate made up in the year 1919 and that such levy shall be certified to the county auditor, who shall place it on the tax duplicate; that is, the tax duplicate of 1919.

Attention is also invited to the notice of special election which is carried in Senate Bill No. 187, such notice saying that the election is to determine whether an additional tax levy shall be made for the year 1919, and this is followed in section 2, showing the form of the ballot that the people shall vote directly on the question of an additional levy for the year 1919 for school purposes.

It is understood from personal conferences that your question refers to a case where the territory transferred between April 13 and August 12, 1919, was territory legally transferred to a school district in which a special election for taxation purposes was held on August 12, under Senate Bill No. 187.

Answering your question, it is the opinion of the Attorney-General that where a levy of an additional tax for school purposes was voted by the people of a school district on August 12, 1919, under the provisions of Senate Bill No. 187 such levy will attach on the tax duplicate for the year 1919, and such levy will attach to territory transfererd prior to August 12 to a school district in which such special school election was helld.

Respectfully,
JOHN G. PRICE,
Attorney-General.

708.

APPROVAL FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN AUGLAIZE, TRUMBULL AND JEFFERSON COUNTIES.

COLUMBUS, OHIO, October 17, 1919.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

709.

MOTOR VEHICLES—FORFEITURE OF DEPOSIT FOR VIOLATION OF TRAFFIC STATUTES—FEES OF MAGISTRATE OR ARRESTING OFFICER, HOW PAID—FORFEITURE PAYABLE INTO COUNTY TREASURY—SHERIFF OR CONSTABLE'S FEES WHEN ACCUSED CONVEYED BEFORE MAYOR'S COURT—WHAT FEES ALLOWABLE —CHARGE OF $1.00 FOR USE OF MOTOR CYCLE IN SERVICE OF WARRANT FOR ARREST NOT ALLOWABLE—FEE OF 75c. FOR BRINGING ACCUSED INTO COURT IN EXECUTING MANDATE OF WARRANT NOT ALLOWABLE—OFFICER ENTITLED TO FEE OF 75c. PER DAY FOR ATTENDANCE UPON SESSIONS OF EXAMINING COURT.

In case of forfeiture of the deposit made either with the magistrate or arresting officer by a person charged with violation of the traffic statutes in the chapter relating to motor vehicles, the fees taxable to the officers are not legally payable from the forfeiture, but the amount of the forfeiture, or in case of recovery on recognizance, the amount so recovered must be paid into the county treasury; the legal fees of such officers, however, in such case are payable from the county treasury as provided in section 3016 *G. C.*

Where a sheriff, deputy sheriff or constable makes the arrest of a violator of the traffic regulations aforesaid, and conveys the accused before the mayor's court, such fees as are provided by law for the services rendered by such officers are taxable and payable to them in the mayor's court. Of course, the fees thus accruing to the sheriff and his deputy constitute emoluments of the sheriff's office which must be paid into the county treasury, under the provisions of section 2977.

Only such fees as are specifically provided by law are allowable, and a charge of $1.00 *for the use of a motor cycle in the service of a warrant for arrest may not be allowed as costs.*

Nor may a fee of 75c. *be allowed for bringing the accused into court in executing the mandate of the warrant.*

Under section 3010 *G. C., where the officer is required to be in attendance upon the session of the examining court, in charge of the prisoner, a fee of* 75c. *a day is chargeable.*

COLUMBUS, OHIO, October 17, 1919.

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

GENTLEMEN:—You recently requested my opinion as follows:

"We respectfully request your written opinion upon the following matters:

Whereas sections 12626 and 12627 G. C. allow officer making arrest in motor vehicle speed violations to take the person arrested to an accessible

judicial officer, in consideration of section 13500 G. C. together with Opinion of the Attorney-General, page 202, Annual Reports for 1909-1910, holding that when bail is forfeited no fees may be paid from such forfeitures, we respectfully request:

1. In case of forfeiture can any fees be legally paid anyone under section 12626 or 12627 or other motor vehicle speed laws of such chapter?

2. In case of conviction can fees be paid from the mayor's court to sheriff, deputy sheriff or constable?

3. In case such fees may be allowed can fees other than fees provided by law be taxed; for illustration, a fee of one dollar for use of motor cycle?

4. Under such sections is a fee of 75c. legally taxable and payable for the officer arresting and bringing the person arrested and bringing the person arrested to such magistrate's court?

We are asking these questions in view of a special examination called for by the Toledo Automobile Club of the mayor's court of Maumee, Ohio, and neighboring justices of the peace."

Sections 12626 and 12627 to which you refer, are as follows:

"Sec. 12626. A person taken into custody, because of the violation of any provision of this subdivision of this chapter, shall forthwith be taken before a magistrate or justice of the peace in a city, village or county, and be entitled to an immediate hearing. If such hearing cannot be had, he shall be released from custody on giving his personal undertaking to appear in answer for such violation at such time or place as shall then be indicated, secured by a deposit of a sum equal to the maximum fine for the offense with which he is charged; or, in lieu thereof, if he be the owner, by leaving the motor vehicle. If the person so taken is not the owner, he can leave the motor vehicle with a written consent given at the time by the owner, who must be present, with such judicial officer.

Sec. 12627. If a judicial officer is not accessible, the accused under the next preceding section shall forthwith be released from custody by giving his name and address to the officer making the arrest and depositing with such officer a sum equal to the maximum fine for the offense for which such arrest is made or instead, if he is the owner, by leaving the motor vehicle. If the accused is not the owner, he can leave the motor vehicle with a written consent given at the time by the owner who must be present."

Your first question relates to the authority for payment of fees to the court and the officer for services rendered, in case of forfeiture of the deposit provided for in the two sections quoted.

In case of violation of the traffic regulations embodied in the chapter, of which said sections are a part, in the due course of procedure a charge would be filed before the court or magistrate and a warrant issued or undertaking provided for, and perhaps other steps of the proceeding for which elsewhere fees are provided; and thereafter the proceeding is interrupted by the forfeiture of the deposit by non-appearance of the accused, and upon this state of facts the question is, whether the fees which have accrued are payable.

The inquiry seems to be answered by the provisions of section 3016, which provides:

"In felonies, when the defendant is convicted the costs of the justice of the peace, police judge, or justice, mayor, marshal, chief of police, constable and witnesses, shall be paid from the county treasury and inserted in the

judgment of conviction, so that such costs may be paid to the county from the state treasury. In all cases, when recognizances are taken, forfeited and collected and no conviction is had, such costs shall be paid from the county treasury."

It is understood that the provisions of section 12626 and 12627 authorizing a deposit equal to the maximum fine provided for the offense constitute simply an expeditious means of realizing upon the undertaking; and in fact the deposit is to be regarded as governed by the provisions of law relative to disposition of forfeited undertakings. The statutes provide for payment into the county treasury of all moneys coming into the hands of magistrates in pursuance of proceedings under the criminal statutes of the state.

You are therefore advised that the fees which lawfully accrue on account of proceedings instituted for violation of the chapter regulating traffic upon the highways are payable out of the county treasury in pursuance of section 3016 G. C.

The opinion of the Attorney-General at page 202 of the reports for 1909-1910, to which you call attention, holds:

> "When bail is forfeited on account of the non-appearance of the defendant in a state case, the entire sum recovered thereby must be paid into the county treasury, and the fees of the mayor and chief of police may not be paid out of such sum so forfeited."

I agree with this holding, in that moneys so coming into the hands of the court shall be paid into the treasury and may not be applied directly to the payment of fees, which must be recovered from the county treasury in pursuance of section 3016, supra.

Section 4599 provides with reference to police courts that the clerk "shall immediately pay into the city and county treasury respectively, the amount then collected, or which may have come into his hands from all sources during the preceding month."

Section 4271 G. C. provides with reference to the mayor of a municipality as follows:

> "All fines, penalties and forfeitures collected by him in state cases shall be by him paid over to the county treasury monthly."

Similar provision is made with reference to justices of the peace and other similar officers.

Your second question relates to payment of fees to sheriffs, deputy sheriffs and constables in cases pending before mayor's courts. Section 13500 to which you call attention, provides:

> "The warrant shall be directed to the sheriff or to any constable of the county, or, when it is issued by an officer of a municipal corporation, to the marshal or other police officer thereof and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite the substance of the accusation and command such officer forthwith to take the accused and bring him before the magistrate or court issuing such warrant, or other magistrate of the county having cognizance of the case, to be dealt with according to law."

However, the provisions of sections 12626 and 12627 taken in connection with other provisions of the statutes relative to the duties of sheriffs and constables seem to authorize a different view in relation to procedure under the traffic provisions of the chapter relating to motor vehicles.

By other provisions of the law, which need not be here set forth at length, sheriffs and constables are made conservators of the peace and authorized to arrest persons

found violating the penal statutes of the state or committing breaches of the peace, and in pursuance of such general power, would be fully warranted in taking into custody persons found violating the provisions of the chapter relating to motor vehicles, and in pursuance of the provisions of said sections, would be authorized to convey such persons before an accessible magistrate or justice of the peace in a city, village or county, and having done so, I am of the opinion there is ample authority for the taxing in their favor of such fees as accrue for the services they render in such proceeding.

In other words, while under section 13500 in the initial issuance of the warrant, the same is to be directed to a police officer of the municipal corporation, yet under the provisions of the chapter relating to motor vehicles, any police officer, including sheriffs and constables, is authorized generally to take his prisoner before a court either within or without a municipality, so that there would be no reason here to suppose that the statutory fees that may accrue shall not be payable to such officer as may have performed the service.

You are therefore advised that where services are rendered by a sheriff or constable in a prosecution before a mayor's court for violation of the traffic regulations of the chapter relating to motor vehicles, such statutory fees as accrue for services rendered by him may lawfully be paid. Of course, the fees so accruing to the sheriff or his deputy constitute emoluments of the sheriff's office, which are received and collected for the sole use of the treasury of the county and must be accounted for and paid over to the treasury as provided by section 2977 G. C. et seq.

In answer to your third question, you are advised that no fees or costs are allowable unless specifically authorized by statute, and I know of no provision of law allowing fees such as that mentioned in your inquiry "a fee of $1.00 for use of motorcycle."

Of course, there is provision for allowing to constables, for example, the necessary expense incurred "in transporting and sustaining prisoners, the same to be allowed by the magistrate and paid on his certificate", section 3347. But the fee so provided is not applicable to the service of executing a warrant or even the making of an arrest without warrant, and the mere bringing of the prisoner before the court where no special expense is incurred by way of transporting the prisoner, but only such as is incident to the execution of the warrant.

Your fourth question relates to the authority for payment of a fee of 75 cents to the officer arresting and bringing the person arrested to the magistrate's court, and you ask whether said payment is legal.

You are advised that the fees provided for the service of a warrant are all that may be taxed for the mere arrest and bringing of the accused before the court; the bringing of the accused into court under such circumstances being merely a part or incident of the execution of the warrant.

The question no doubt arises from a consideration of section 3010 G. C., which provides:

> "When required by an examining court to take charge of the defendant or defendants, during the examination of such defendant or defendants upon any charge for the commission of a crime or offense against the laws of the state, sheriffs, marshals and their deputies, constables, and watchman shall be allowed seventy-five cents for rendering such service, to be taxed and paid as other fees of such officers in like cases. When acting as the officer of such examining courts, such officer shall not receive fees for testifying upon such examination."

The fee here provided is for service in attendance upon the examining court when in session for conducting the hearing in the cause, and is not applicable to the mere bringing of the prisoner into court in pursuance of the warrant for his arrest.

And from the purport of the facts which are stated as involved in your inquiry,

and the sections cited relating to the traffic regulations, you are advised that the charge of 75 cents may not legally be allowed to the officer either arresting and bringing the violator of the traffic statutes before the court or taking a deposit from such violator and returning same to the court.

Respectfully,
JOHN G. PRICE,
Attorney-General.

710.

SHERIFF—SERVICE OF WRITS BY MAIL—NOT AUTHORIZED TO TAX MILEAGE FEES AS COSTS IN SUCH CASE—WHEN SERVICE IS MADE BY TELEPHONE, MILEAGE FEES NOT COLLECTIBLE.

1. *In service of writs by mail, as provided in section* 11297-1 *G. C.* (107 *O. L.*, 653) *the sheriff is not authorized to tax and collect mileage fees as costs in the case.*

2. *Where a sheriff instead of making a personal service at the residence of the person named in the writ, or by making a residence service by leaving a copy of such writ at the residence of the person named therein, calls such person to his office by telephone and there serves such writ by handing a copy thereof to such person, such sheriff may not legally tax and collect mileage fees from such office to the residence of the person thus served.*

COLUMBUS, OHIO, October 18, 1919.

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

GENTLEMEN:—Acknowledgment is made of your recent request for the opinion of this department on the questions therein stated.

By personal conference it is learned that the principal questions upon which you desire the opinion of this department relate to the legality of the taxation and collection of mileage fees in cases of service of writs by mail and where the service is actually made in the office of the sheriff, and the other questions stated in your letter are reserved for future consideration at such time as actual cases may arise requiring their consideration and solution.

Your first question may be stated to be where writs are served by mail, as provided in section 11297-1 G. C. by the sheriff mentioned therein, may such sheriff tax and collect mileage fees for serving such writs, and your second question may be stated to be where a sheriff does not make a personal or residence service at the residence of the person named in the writ, but instead telephones to such person to come to his office and there serves such writ upon such person by handing him a copy thereof, may such sheriff legally charge and collect mileage for such service.

Section 11297-1 G. C., as amended in 107 O. L., 653, provides an additional method of service and return of writs where the judges of the courts of common pleas and probate and municipal courts by rule "provide for the service of writs or process by mail, registered or otherwise, and for the service of persons summoned for jury duty by mail registered or otherwise."

This section also provides that when such service by mail is made, the return of the sheriff on such service, properly evidencing the deposit of the writ in the mail, "shall be proof of residence service at the address on the envelope containing such writ or process," subject to the correctness of the address and that such envelope be not returned by the postal authorities undelivered.

This section is silent as to any change in the compensation for service of writs.

Section 2845 G. C. is the general sheriff fee section and in part provides:

"For the services hereinafter specified, *when rendered*, the sheriff shall charge and collect the following fees and no more; * * * Summoning each juror, other than on venire, ten cents; * * * all summons, writs, orders or notices, for the first name, seventy-five cents; * * * in addition for the fee for service and return the sheriff shall be authorized to charge on each summons, writ, * * * a fee of eight cents per mile *going and returning*, provided, that where more than one person is named in such writ, mileage shall be charged for the shortest distance *necessary to be traveled.*"

A fair construction of section 2845 G. C. leads to the conclusion that this section means that the sheriff is "authorized to charge" mileage at the rate of eight cents per mile for the "distance necessary to be traveled."

It is to be noted that in fixing the rate of compensation for the services therein specified, section 2845 G. C. in the first line provides that "* * * when rendered, the sheriff shall charge and collect" the fees therein fixed. In view of the plain terms of this section and keeping in mind the constitutional prohibition against drawing money from the county treasury without authority of law, this department is of the opinion that under sections 2845 and 11297-1 G. C. the sheriff is not legally entitled to charge and collect mileage for a service made by mail under the latter section, and the answer to your first question is in the negative.

The same principle applies to your second question, section 2845 G. C. being applicable to and decisive of this question.

As pointed out in the discussion of your first question, this section contemplates the actual performance of the services therein referred to before the sheriff is authorized to charge and collect mileage fees therein provided for, and no traveling to and from the place of residence of the person named in the writ having been done by the sheriff in such a case, it cannot consistently be claimed that the service in this respect has been "rendered" as required by section 2845.

It therefore follows that your second question is also answered in the negative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

711.

PUBLIC AND SECTARIAN HOSPITAL DISTINGUISHED UNDER PROVISIONS OF SECTION 3138-1 G. C., 108 O. L., 62.

Under the provisions of section 3138-1 G. C. as amended in 1919, house bill No. 65, providing for contribution by county commissioners toward the maintenance of hospitals and the providing of care for the indigent sick and disabled to corporations or associations maintaining such hospitals, provided that no payment of public funds shall be made to sectarian institutions, the test of a public as distinguished from a sectarian use or character of a hospital is a common or equal right, free from discrimination or unreasonable restriction.

COLUMBUS, OHIO, October 18, 1919.

HON. SAMUEL DOERFLER, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication requesting a construction of the provisions of house bill No. 65, in relation to providing public funds by county commissioners for the purpose of aiding in the maintenance of hospital facilities and providing care and treatment for the indigent sick and disabled under

agreement with corporations or associations organized for charitable purposes or for the purpose of maintaining and operating hospitals.

With your communication you enclose a letter received from your board of county commissioners requesting advice in the matter, and setting forth an enumeration of hospitals located in Cuyahoga county, which, it is indicated, are to be considered in connection with the administration of the provisions of said act.

It is also stated, both in your communication, and in the enumeration of hospitals by the commissioners that each and all of said hospitals, in accordance with their charters and by-laws "provide for the relief of the sick of all denominations and sects" without regard to religion, race or sect.

House Bill No. 65 is as follows:

"Section 1. That section 3138-1 of the General Code be amended to read as follows:

Sec. 3138-1. That the board of county commissioners of any county may enter an agreement with one or more corporations or associations, organized for charitable purposes, or with one or more corporations or associations organized for the purpose of maintaining and operating a hospital in any county where such hospital has been established, for the care of the indigent sick and disabled, excepting persons afflicted with pulmonary tuberculosis, upon such terms and conditions as may be agreed upon between said commissioners and such corporations or associations, and said commissioners shall provide for the payment of the amount agreed upon, either in one payment, or installments, or so much from year to year as the parties stipulate. Nothing herein shall authorize the payment of public funds to a sectarian institution.

Section 2. That said original section 3138-1 and section 2502 of the General Code be, and the same are hereby repealed."

Section 3138 G. C. as enacted in House Bill No. 65 embodies practically all of the operative provisions of original section 3138-1 G. C. and 2502 G. C. which sections were repealed by the act.

The provision "nothing herein shall authorize the payment of public funds to a sectarian institution" appeared in identically the same language in section 2502 G. C., but I do not find that this provision of the statute has been the subject of judicial construction.

The granting or enabling provisions of the section in its amended form are very broad and purport to authorize the county commissioners to enter into an agreement for making contribution of funds for the care of the indigent sick and disabled, with corporations or associations organized for charitable purposes, or such as maintain or operate hospitals within the county, and in view of the large number, and in fact, the probable preponderance of hospitals conducted under the auspices of various religious and charitable institutions, it is hardly to be assumed in the first instance that all such were intended to be excluded from the application of the provisions of the statute in question, without regard to the actual terms and conditions of their admission and treatment of patients.

While in its broader signification, the term "sectarian" or "sectarianism" imports any partisanship or school of thought, whether political, philosophical, religious or otherwise, and in this broad application would comprehend adherence to a separate religious denomination, yet such terms are also defined in Webster's dictionary, Standard dictionary and March's Thesaurus in a more limited and special signification, importing a person or institution "that inculcates the particular tenets of a sect; devotion to the interests of a sect or party; undue denominationalism; excessive devotion to the advancement of a particular sect."

Having in mind the apparent intent of and purpose to be accomplished by the law, I am of the opinion that the restraint against payment of public funds to sectarian institutions as embodied in the last provision of the section is to be regarded as applicable to such institutions as are devoted to the teaching, advancement or inculcation of the principles or tenets of a sect; and that such hospitals as admit and treat all patients without regard to sect or religion, and do not engage in the teaching or promulgation of the tenets of any sect or religion or other denomination, are not within the spirit and purpose of the restraint against the contribution of public moneys as provided in the act.

In other words, the test of a public use as distinguished from a sectarian use, is a common or equal right free from discrimination or unreasonable restriction, and when the hospital is maintained and devoted to such public use, so that charity patients are admitted on equal terms without regard to religion or sect, and does not embody in its administration the teaching or inculcation of sectarian principles or doctrine, it is not considered to be disqualified under the provisions of the act to enter into the agreement with the county commissioners for receiving public funds in the operation of its hospital and the treatment of the indigent sick and disabled.

It is believed that this general outline of the construction and application of the provision of the section to which your inquiry is directed will be found sufficient in determining the qualification of such hospitals as may enter into the consideration of the commissioners in accordance with the surrounding facts and character of each particular hospital.

Respectfully,
JOHN G. PRICE,
Attorney-General.

712.

PROSECUTING ATTORNEY—EXPENSE OF AUTOMOBILE IN PERFORMANCE OF OFFICIAL DUTIES—HOW PAYABLE.

Where a prosecuting attorney in the performance of his official duties and in the furtherance of justice incurs expenses in connection with the hire of an automobile or in the purchase of gasoline and oil for his own automobile, such expenses are payable out of the fund provided by section 3004 *G. C., and not otherwise.*

COLUMBUS, OHIO, October 18, 1919.

HON. ALLEN J. SENEY, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—I have your letter of recent date reading in part as follows:

> "Is there any way in which you could figure out that the prosecuting attorney can have the use of an automobile that the county could pay for same without this expense coming from the prosecutor's special fund?
>
> I believe that you have already ruled that when the prosecutor owns a machine, it is perfectly right and proper for him, while on business for the county, to charge the actual expense and upkeep of the machine while so engaged, to the county, but is this paid out of the prosecutor's special fund or does the county pay for it?"

What you speak of as the prosecutor's special fund is that provided for by section 3004 G. C., which in part reads as follows:

"There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, to provide for expense which may be incurred by him in the performance of his official duties and in the furtherance of justice, not otherwise provided for. * * *."

Former opinions of the Attorney-General, on the subject of the payment of expenses incurred by a prosecuting attorney in the use of an automobile, hold:

(1) That a prosecuting attorney may hire an automobile when necessary in the discharge of his official duties and in the furtherance of justice, and may pay the expense of such hire out of the fund provided by section 3004 G. C. (Opin. of Atty. Gen. for 1917, Vol. I, p. 478).

(2) That a prosecuting attorney may be reimbursed for expenditures for gasoline and oil made by him in connection with the operation of his own automobile upon official business, such reimbursement to be made out of the fund provided by section 3004 G. C. (Opin. of Atty.-Gen. for 1918, Vol. I, p. 998).

Each of said opinions goes upon the theory that the expenses in question are properly payable under section 3004 G. C., because they are *"not* otherwise provided for" by statute. Your question—whether such expenses can be paid by the county from some county fund, rather than out of the section 3004 fund—would, if answered in the affirmative, require a finding that such expenses *are* otherwise provided for.

After careful search, I fail to find any statute which will permit the expense of an automobile hired or used by a prosecuting attorney in the course of his official duties, save and except section 3004 G. C.

In 1917 the legislature enacted a measure (now known as sections 2412-1 and 2412-2 G. C.) entitled:

"An act authorizing county commissioners to purchase automobiles or other venicles for the use of county officials in the transaction of public business."

That the real scope of the act is less than that indicated by the title, is apparent from the fact that the purchase is limited, in the body of the act, to automobiles or other vehicles "for the use of the county commissioners and county sheriff."

Replying directly to your question, I advise you that where a prosecuting attorney, in the performance of his official duties and in the furtherance of justice, incurs expenses in connection with the hire of an automobile or in the purchase of gasoline and oil for his own automobile, such expenses are payable out of the fund provided by section 3004 G. C., and not otherwise.

Respectfully,
JOHN G. PRICE,
Attorney-General.

713.

SECURITIES—BLUE SKY LAW—THE WESTERN OIL & SHALE LAND VALIDATING COMPANY OF KANSAS CITY, MISSOURI, AMENABLE TO SAID LAW IN MAKING CONTRACTS WITH PERSONS TO VALIDATE FOR THEM TITLE TO UNITED STATES GOVERNMENT LANDS LOCATED OUTSIDE OF OHIO FOR A CONSIDERATION.

The Western Oil & Shale Land Validating Company of Kansas City, Missouri, proposing to engage in Ohio in the business of making contracts with persons to procure

and validate for them title to United States Government lands located outside of Ohio for a consideration, is amenable to the provisions of the Ohio Blue Sky Law, and required to secure a license as such dealer and procure the issuance of the certificate of the commissioner of securities authorizing the consummation of the proposed transactions prior to its engaging therein.

COLUMBUS, OHIO, October 18, 1919.

HON. P. A. BERRY, *Commissioner of Securities, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for my opinion upon the application of the "Ohio Blue Sky Law" to certain transactions proposed to be conducted in this state by the Western Oil & Shale Land Validating Company of Kansas City, Missouri, and the Oil Development Corporation of Denver, Colorado.

Your inquiry is stated as follows:

> "We are enclosing you a letter submitted to this department by George E. Seney, attorney-at-law, Toledo, Ohio, with attached exhibits, requesting a ruling of this department whether or not said contracts are a security within the meaning of the Ohio Blue Sky Law.
>
> This is entirely a new proposition and we are desirous of having an opinion from your department before passing on same."

With your communication you submit communications from the representative of the companies, and also copies of the proposed contracts sought to be made by the companies in connection with their transactions which are the subject of the inquiry.

Without setting forth in detail the provisions of such contracts, which are lengthy, I find that in substance they import an obligation on the part of the Western Oil & Shale Land Validating Company to secure for the persons with whom they deal, designated in the form of contract as the "subscriber" an oil and shale claim of twenty acres of United States government land, it not being stated in the contract form where such land is located, the Land Validating Company further agrees to pay filing fees, cost of locating, staking, platting, posting notices, filing proof of labor, proof of discovery of oil and all legal expenses, fees and charges in connection with locating the claim, and to make application for a patent for such land and bear the expense incident thereto.

In consideration of the undertakings of the Land Validating Company the subscriber is to pay to said company the sum of $100 upon the execution of the contract, and further agrees to pay the sum of $13.33 annually for four years, which is said to cover assessments and expenses required by the government.

It is noted that a further provision in the contract is to the effect that upon the payment of the $100 the company agrees to execute and deliver a quit-claim deed for all right, title and interest in said twenty acre claim, while in all other provisions of the contract it is apparent that the title to the land which is the subject of the negotiations to be conducted by the Land Validating Company is in the United States government, and it is expressly stated by the attorney for the company, whose communication to your department is among the papers submitted to me, that "the land in question belongs to the United States government."

It is therefore assumed that the latter is the fact, and that the undertaking by the Land Validating Company to execute and deliver the deeds does not correctly disclose the fact as to title to the property, if such statement is intended to import title in the Land Validating Company.

An examination of the agreement to which the Oil Development Corporation proposes to be a party, as evidenced by the documents presented, discloses that such agreement purports to be merely a lease by the subscribers who acquire the government lands to the Oil Development Corporation of their tract of the land for the development and extraction of the oil resources and by-products therefrom.

It appears that this lease is also to be procured by the Western Oil & Shale Land Validating Company as the representative of the Oil Development Corporation in connection with its operations along the lines above set forth by way of procuring subscribers for the land claims and the validation thereof. This abstract of the data furnished me will serve to indicate the character of the activities of the Western Oil & Shale Land Validating Company, which is the subject of consideration in connection with the provisions of the so-called Blue Sky Law.

It might be said at this point that the activities of the Oil Development Corporation as understood from the data at hand, do not constitute an activity regulated by the provisions of the Blue Sky Law, the same merely purporting to consist in the procuring of leases from persons who become owners of tracts of the government land.

Directing attention then to the question of application of the Blue Sky Law to the activities of the Land Validating Company, it is noted that you inquire specifically as to whether the contracts proposed to be entered into by either company is a "security" within the meaning of the Blue Sky Law.

Subject to certain exceptions enumerated in the law, securities are defined as follows:

> "Section 6373-1. Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit,) or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided."

From a consideration of this and other related provisions of the statute, I reach the conclusion that the contracts in question do not constitute "securities" as comprehended within the meaning of the term of the Blue Sky Law.

However, it is provided in section 6373-15 of said act as follows:

> "No person or company, unless licensed in the manner and under the conditions applicable thereto hereinbefore provided for dealers, shall, within this state deal in real estate not located in Ohio of which he is not the actual and bona fide owner and unless the 'commissioner' shall issue his certificate as provided in the following section," * * *.

This provision of the law is held to be applicable to the activities of the Western Oil & Shale Land Validating Company if the real estate involved in their proposed activities is located outside of Ohio, and to require that before conducting their proposed activities they shall procure a license in the manner and under the conditions applicable to dealers as provided in said act, and further, that prior to their engaging in such dealings, the commissioner of securities shall have issued his certificate authorizing same as provided in section 6373-16.

Section 6373-16 provides:

> "Said commissioner shall have power to make such examination of the issuer of the securities, or of the property named in the two next preceding sections, at any time, both before and after the issuance of the certificate hereinafter provided for, as he may deem advisable. * * * And if it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities or other property is not upon grossly unfair terms, and that the

issuer or vendor is solvent, upon the payment of a fee of ten dollars, the commissioner shall issue his certificate to that effect, authorizing such disposal. * * *."

The requirement for license is the same as that applicable to a dealer in securities, and is covered by the provisions of section 6373-1 above quoted, and the following provisions regulating the issuance of such licenses.

The conclusion that the Land Validating Company is amenable to the provisions of the Blue Sky Law is rested upon the provision that no person or company, unless licensed, shall within this state *deal* in real estate not located in Ohio, of which he is not the owner, as found in section 6373-15 supra.

It is noted that counsel for the company suggest that the law would not be applicable, for the reason that the company would not be "selling land" as the land in question belongs to the United States Government, but it is to be noted that the law in fact is only intended to apply to the activities of others than the actual and bona fide owners, and the inquiry is resolved to a determination of whether the proposed activities of the company constitute "dealing in real estate."

"Deal" is defined by Webster's Dictionary as follows:

"To act, as between man and man; to have transactions of any kind with; to manage; to intervene or mediate."

The Century Dictionary defines "deal" as follows:

"Specifically—2. To negotiate or make bargains; traffic or trade; with a person, in articles; as, he deals in pig-iron.

To engage in mutual intercourse or transactions of any kind; have to do with a person or thing, or be concerned in a matter; absolutely or with *with* or *in*.

To intervene as a mediator or middleman.

To distribute to."

The proposed activities of the Land Validating Company clearly come within the recognized significance of the term "deal" as used in the law in relation to real estate, and is clearly within the principle and purpose of the law.

You are therefore advised that said company is amenable to the provisions of the Blue Sky Law before conducting the proposed dealings with reference to the "validation" of land claims, as disclosed by the form of its proposed contracts and the information submitted therewith.

Respectfully,
JOHN G. PRICE
Attorney-General.

714.

BOARD OF EDUCATION—WITHOUT AUTHORITY TO USE SCHOOL FUNDS TO ERECT OR REMODEL A BUILDING FOR USE OF SUPERINTENDENT AND TEACHERS AS RESIDENCE.

A board of education has no authority to use school funds to erect a residence for superintendent and teachers, nor has the board of education a right to remodel one of its old buildings into a residence for superintendent and teachers.

COLUMBUS, OHIO, October 20, 1919.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following two questions:

> "Has a board of education the right to use school funds to erect a residence for superintendent and teachers?
>
> Has a board of education the right to remodel one of its old buildings into a residence for superintendent and teachers?"

In answering either or both of the two questions given, it is necessary to refer to the general powers of the board of education. Pertinent parts of the statutes relative thereto are as follows:

> "Section 4749. The board of education of each school district, organized under the provisions of this title. shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district any grant or devise of land and any donation or bequest of money or other personal property and of exercising such other powers and privileges as are conferred by this title and the laws relating to the public schools of this state."

Section 7620 reads as follows:

> "The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as playgrounds for children or rent suitable schoolrooms, either within or without the district, and provide the necessary apparatus and make all other necessary provisions for the schools under its control. It also shall provide fuel for schools, build and keep in good repair fences enclosing such school houses, when deemed desirable plant shade and ornamental trees on the school grounds, and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

Section 7590 provides in part:

> "Each board of education shall have the management and control of all of the public schools of whatever name or character in the district * * *."

Bearing upon the question of the levying of a tax or the expenditure of money for a purpose other than one strictly connected with the schools themselves, section 7622-7 G. C. provides:

"The board of education of any school district or a municipality may levy annually upon the taxable property of such school district or municipality within the limitations of section 5649-2 of the General Code, not to exceed two-tenths of a mill for a social center fund to be used for social and recreational purposes. (106 O. L., 552.)"

Section 7625 reads in part as follows :—

"When the board of education of any school district determines that for the proper accommodation of the schools of such district it is necessary to purchase a site or sites to erect a schoolhouse or houses, to complete a partially built school house, to enlarge, repair or furnish a schoolhouse, or to purchase real estate for playground for children, or to do any or all of *such* things, * * *, the board * * * shall submit to the electors of the district the question of the issuing of bonds for the amount so estimated. * * *"

Boards of education can do only those things for which there is either direct or implied authority in the statutes, and nowhere in such statutes in this state under existing law is there any provision for a board of education to use school funds to erect a residence for the superintendent and teachers, nor is any provision found for a board of education to remodel one of its old buildings into a residence for superintendent and teachers, unless one can read into the provisions heretofore quoted that such was the intent of the general assembly when these sections, giving general powers to boards of education, were enacted. It will be noted that in all of these sections the prime idea is that the expenditures authorized shall be for school purposes and in the matter of school buildings, that is, buildings which are used by the pupils as public houses, and a residence for superintendent and teachers does not come within such language.

It is therefore the opinion of the Attorney-General that a board of education has no authority to use school funds to erect a residence for superintendent and teachers, nor has a board of education a right to remodel one of its old buildings into a residence for superintendent and teachers.

Respectfully,
JOHN G. PRICE,
Attorney-General.

715.

INHERITANCE TAX—BONDS AND NOTES BELONGING TO STATE OF NON-RESIDENT DECEDENT BUT KEPT IN OHIO, TAXABLE UNDER SAID LAW—WHEN CERTIFICATES OF STOCK IN FOREIGN CORPORATIONS ARE TAXABLE UNDER SAID LAW.

Bonds and notes belonging to the estate of a non-resident decedent, but kept in Ohio for safekeeping or otherwise, are with respect to the succession thereto subject to inheritance tax in Ohio.

The question as to whether or not certificates of stock in foreign corporations so owned and kept are in this respect subject to Ohio taxation is more doubtful, but the taxing officials should hold them taxable until otherwise ruled by the courts.

COLUMBUS, OHIO, October 20, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—In your letter of September 29th you submit certain inquiries as corollary to those submitted in your previous letter of September 15th answered

by opinion of even date herewith. The following points are raised by the commission:

> "1. Are bonds of a municipality situated outside of Ohio subject to inheritance tax in this state when found in a safety deposit box in Ohio where they constitute part of the estate of a decedent who was a resident of a state other than Ohio and other than that in which the municipality issuing the same is situated?
>
> 2. Are promissory notes given by individuals who are non-residents of this state subject to the same tax as above when found in this state and when they constitute part of the estate of a non-resident decedent?
>
> 3. Are certificates of stock issued by a foreign corporation subject to similar tax when found in this state and when they constitute part of the estate of a non-resident decedent? "

In the other opinion referred to the authorities from other states relative to your first question are set forth. In addition to these there is the express holding of Ferris, J., in *Matter of Speers*, 4 N. P., 238. This case arose under the collateral inheritance tax law, which, without attempting a definition of the term, imposed a tax upon "all property within the jurisdiction of this state" in respect of its succession. The facts as stated by the judge were as follows:

> "It is represented that one Elizabeth Speers died testate, a resident of Kentucky, devising by her will her entire estate to various persons in several amounts; that about ninety thousand dollars worth of real estate belonging to said decedent, was located in this county, and that a personal estate of about eighty thousand dollars, *represented by bonds, notes, mortgages and money on deposit in banks of the city of Cincinnati*, was, by the will, directed to be paid to persons who could not have received the same except for the terms of the will."

Further, in the course of the opinion the judge discloses the information "that the bonds, stocks, notes and evidences of debt (were) in the private box of Mrs. Speers, in the vault of the safe deposit company, in Cincinnati, for safe keeping;" and the contention was made by her executors that that fact "did not give any of these values a situs for taxation other than that of the owner, and that the credit in bank was of such a character as to be incapable of a legal situs, apart from the person of the owner." Relying upon the decision in *State* vs. *Dalrymple*, 70 Md. 294, and distinguishing *Orcutt's Appeal*, 97 Pa. St., 179, Judge Ferris came to the following conclusion:

> "The application asking for a direction to the executors to return this property for taxation should be granted and such proceedings will be had in accordance therewith."

This case affords the only available precedent in this state and should be the basis of such administrative rulings as are necessary to raise the questions mentioned by you and bring them before the courts properly for decisions. It is clearly a precedent under the present tax for the reason that the present law is certainly not narrower in its definition of what constitutes "property within this state" than the old law was.

In principle this decision answers your first and second questions in the affirmative.

However, there is one general qualification which must be made; the mere finding of the evidences of intangible property in this state affords no more than a pre-

sumption that the state has the right to impose the tax under the decisions cited. Such presumption is probably rebuttable by showing that the presence of the paper evidence in the state is merely temporary, transitory or accidental.

See—In re Romaine, 127 N. Y. 80;
In re Enston, 113 N. Y. 174.
See also—Buck vs. Beach, 206 U. S. 392.

Your third question seems not to have been involved in *Re Speers*, supra. It is rendered more doubtful by the fact that the courts of New York, which in decisions cited had sustained the taxation of bonds and other evidences of debt kept in the state, have not applied this rule to non-resident stock in a foreign corporation, though found within the state.

Matter of Whiting, 150 N. Y. 27.

In the other opinion attention has been called to the interesting manner in which the judges of the court of appeals of New York divided on the series of cases reported in 150 New York. Vann, J., announcing the opinion of the court in the Whiting case, supra, (though personally dissenting from a part of it) employed the following language:

> "Augustus Whiting, a resident of Newport, Rhode Island, * * * at the time of his death * * had money on deposit in a bank in this state, and owned certain bonds and certificates of stock that were found in a box rented by him in a safe deposit vault in this state. The stocks and bonds were issued partly by domestic and partly by foreign corporations * * *. All except *the stock of foreign corporations* were included in the appraisement, which was sustained by the surrogate and by the appellate division. The theory upon which the supreme court, by a divided vote, proceeded to judgment, was that the written instruments were physically within the state, and constituted property here subject to taxation. They were regarded as tangible, and apparently as in the nature of chattels. I think this is a sound conclusion, warranted by the *Romaine Case* * * * I think, moreover, that the written instruments issued by *domestic* corporations, including their bonds and the interests represented by them, are subject to a succession tax, independent of the fact of their physical presence in this state * * *. The main use of certificates is for convenience of transfer, and they are treated by business men as property for all practical purposes. They are sold in the market, transferred as collateral security to loans, and are used in various ways as property. * * * They are the only evidence of transfer required by the corporations issuing them in order to make the actual transfer on the books. There is obvious propriety in subjecting the instrument of transfer to a transfer tax when it is left in this state for safekeeping. It is subject to the jurisdiction of our laws, and hence is within the intent of the transfer tax act. * * *
>
> A majority of my associates, however, are of the opinion that the United States bonds, although physically present in this state, are not subject to a transfer tax. By their direction I announce, * * * that the certificates of stock *in question* as well as all of the bonds, except those issued by the United States, were properly held by the courts below subject to taxation under the transfer tax act on account of their physical presence in this state."

The head-note of the case, however, expressly excepts the certificates of stock

of foreign corporations, and it is apparent that inasmuch as the lower courts had held those exempt and the executors and trustees had appealed, no question was before the court respecting the stock of foreign corporations. The question therefore is left in doubt by this decision.

As remarked by Messrs. Gleason and Otis, in their work on inheritance taxation, (p. 250):

> "The reasoning of modern authorities would support such a tax when the certificate is within the jurisdiction of the taxing power."

The authors cite *People ex rel. vs. Reardon*, 185 N. Y., 531, where quotation is made from the very language of Judge Vann above quoted. The earlier New York case of *Matter of James*, 144 N. Y. 6, may be distinguished on the ground that the statute was at that time of narrower interpretation.

People vs. Griffith, 245 Ill. 532, interpreting a statute based on the earlier New York statute, and following *In re James*, held that neither stocks nor bonds of foreign corporations found in safety deposit boxes in Illinois were subject to the Illinois law. This decision, however, was expressly based by the court on the doctrine of adoption by reference, it appearing that the Illinois law was like the New York law was at the time it was interpreted in the *James* and *Romaine* cases, and that the change in the New York law and the consequent change in judicial interpretation thereof worked by the decisions found in 150 New York took place after the Illinois legislature had acted. This principle would not hold here. If anything, the reasoning of the cases found in 150 New York would apply to the Ohio statute.

For the purpose of administration it is the advice of this department that if stocks of corporations are permanently kept in this state they are, on that account alone, in respect of their succession taxable in this state. As stated, this question must be regarded as doubtful, but it would seem to be proper to raise it for judicial determination in this way.

Respectfully,
JOHN G. PRICE,
Attorney-General.

716.

LOCAL OPTION STATUTES—FINES AND FORFEITURES COLLECTED UNDER PROVISIONS OF ABOVE STATUTES ARE PAYABLE INTO TREASURY OF COUNTY OR MUNICIPALITY—COUNCIL BY ORDINANCE MAY PROVIDE FOR PAYMENTS TO PERSONS SECURING EVIDENCE OF VIOLATIONS OF SAID STATUTES.

Fines and forfeitures collected in cases of violation of the local option statutes are payable by the court in which the collection is made, into the treasury of the county or municipality.

When the fine is enforced in a court of a municipality, the money so paid into the treasury is subject to application by the council and it is competent for the council to provide by ordinance for the appropriation of a portion thereof for payment to persons securing evidence of violations of the local option statutes, but such provision of council must be sufficiently complete to amount to a specific authorization for the withdrawal of the money from the treasury in order to be operative.

COLUMBUS, OHIO, October 20, 1919.

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

GENTLEMEN:—I am in receipt of your letter of October 13th referring to opinion

No. 685 recently rendered to your department with reference to which you say that the answer to the first question therein considered is not entirely understood and in fact it is not thought to have been directly answered.

In the inquiry which was the subject of the opinion referred to it was pointed out that:

> "The council of a village passes an ordinance setting aside forty per cent of fines and forfeitures from collections for violation of local option laws to pay persons furnishing evidence resulting in conviction for violation of local option laws. Such moneys are paid out to persons merely for furnishing evidence, among others the marshal of the village."

Your first question was stated thus:

> "Is there any authority of law for council to provide a certain portion of such fines and forfeitures to be paid persons promiscuously for furnishing evidence?"

Your question was considered as relating to the authority for dispensing the fund, or a portion thereof, derived from fines and forfeitures under the local option statutes for the purposes named in your inquiry, rather than as questioning the procedure to be observed in that regard, and accordingly the answer given, after pointing out that the application of such funds toward the securing of evidence of law violations tends to bring about the enforcement of the law, and is not contrary to principles of public policy, was

> "It cannot be said that its application in the direction of securing a more vigilant enforcement of the law, is a misapplication of such funds, and your first question is therefore answered in the affirmative."

It is now perceived, however, that the further query in your mind relates to the method by which such fund so arising from the fines and forfeitures may be dispensed for the purposes named.

It is first to be noted that the provision of section 13247, which was quoted in full in the previous opinion, is

> "Such funds paid into the treasury of the municipal corporation shall be applied as the council thereof may direct."

Provision is made by other sections of the law for the payment into the municipal and county treasury, respectively, by mayors and police courts of all fines, penalties and forfeitures coming into their hands. See sections 4599 and 4271 G. C. Similar provision is made with reference to justices of the peace and other lower courts, and these general provisions would control entirely the disposition of the funds arising from fines and forfeitures except for the special provision here made. Here it is not only especially provided that the proceeds of fines and forfeitures shall be paid into the county treasury when enforced in a county court and into the municipal treasury when enforced in municipal courts, but further the ultimate application of the funds paid into the municipal treasury is taken out of the operation of general provisions and is here governed by the special authorization of council to determine and direct its application.

At the outset therefore it may be stated that fines and forfeitures under the local option statutes must be paid into the treasury of the municipality when enforced in the courts thereof and may not be paid directly by the court to persons furnishing evidence.

When the money has been so paid into the treasury in compliance with the express provision of the statute, the council is then authorized to make disposition thereof, which may be done in my opinion by the enactment of a general ordinance. That is to say, council may provide by the ordinance that a stated per cent or portion of the fines and penalties shall be set aside and appropriated for the particular purpose which they determine and the ordinance may further stipulate what amount shall b payable for a given service and under what circumstances; or it might authorize the mayor or solicitor to procure the service of persons in ferreting out evidence of violations authorizing the use of a stated portion of the accumulated or contingent fund. No doubt council might provide simply that a given per cent of fines and forfeitures coming into the treasury in any case shall be payable to the person or persons furnishing the evidence leading to the conviction of the violator or the prosecution resulting in the forfeiture of recognizance, and it is believed that such provisions as above outlined will be operative, while on the other hand a mere provision by council that a certain portion of the funds should be appropriated for the purpose of securing evidence of violation of the local option laws would not be sufficiently complete to authorize the drawing of the money from the treasury as council has neither determined the specific application of the fund nor vested the administration thereof in any other officer or department.

Respectfully,
JOHN G. PRICE,
Attorney-General.

717.

APPROVAL FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN MORGAN AND GALLIA COUNTIES.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, October 20, 1919.

718.

INHERITANCE TAX—COUPON BONDS ISSUED BY MUNICIPAL AND PRIVATE CORPORATIONS OF STATE OF OHIO AND BELONGING TO ESTATES OF NON-RESIDENT DECEDENTS AND HELD OUTSIDE STATE NOT TAXABLE—REGISTERED BONDS TAXABLE—MUNICIPAL CORPORATIONS NOT WITHIN SCOPE OF SECTION 5348-2 G. C. RELATING TO TRANSFERS OF ASSETS, ETC.—PRIVATE CORPORATIONS WITHIN SCOPE OF SECTION 5348-2 G. C.—SAID SECTION APPLICABLE TO FOREIGN CORPORATIONS REGISTERED TO DO BUSINESS IN OHIO AND ACTUALLY KEEPING STOCK BOOKS IN OHIO—NOT APPLICABLE TO SUCH CORPORATIONS WHOSE STOCK BOOKS, ETC., ARE KEPT OUTSIDE OF THIS STATE

Coupon bonds issued by municipal and private corporations of the state of Ohio and belonging to the estates of non-resident decedents, and held outside the state, are not subject to the Ohio inheritance tax with respect to the succsssion thereto.

On principle and in the absence of authority, the opposite rule should prevail as to registered bonds of such corporations.

Municipal corporations are not within the scope of section 5348-2 G. C., relating to transfers of assets, securities, etc. Private corporations are, and the statute is broad enough to apply to the transfer of registered bonds on the books of the company.

Section 5348-2 G. C. applies to foreign corporations registered to do business in Ohio and actually keeping stock books, etc., in Ohio. It does not apply to such corporations whose stock books, etc., are kept outside of this state. Whether it applies to foreign corporations, if any, not registered to do business in Ohio, but keeping stock books in this state, Query.

COLUMBUS, OHIO, October 21, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your letter of September 15th requesting the opinion of this department, as follows:

> "In connection with the administration of the inheritance tax act, will you be good enough to advise us on the following matters:
>
> 1. To what extent is the registration and transfer of registered bonds (both as issued by subdivisions of the state and by private corporations) controlled or regulated by the provisions of the law mentioned? Similarly as to bonds which have not been registered?
>
> 2. Where such bonds have been issued and are held outside the limits of the state by a non-resident, are they subject to inheritance tax in Ohio? Or is the actual location of the bonds immaterial?
>
> 3. Where the estate of an Ohio decedent possesses shares of stock in a foreign corporation, is the transfer of such stock on the books of the company subject in any way to the provisions of the second and subsequent sentences of section 5348-2 when such corporation has been admitted to do business in this state? Similarly when the corporation has not been admitted to do business in this state?"

Your first two question may be considered together as a negative answer to the second question as applied to either class of bonds mentioned would make unnecessary any answer to your first question.

Accordingly, the first question to be considered is as to whether bonds which have not been registered and are held outside the limits of the state by a non-resident are, in case of the death of such resident and in respect to the succession thereto, subject to taxation in Ohio because the issuer of the bonds is an Ohio municipality or other subdivision or private corporation organized under the laws of this state.

This question must be answered, in the light of the authorities, in the negative. The inheritance tax law of Ohio is not broader in its reach than those of many other states in which this question has arisen, notably New York, and the holdings in such other states are uniform on the point that ordinary coupon bonds issued by a corporation within the taxing state are not "within the state" for the purpose of the incidence of the inheritance tax in case of their transfer by death of a non-resident.

In re Bronson, 150 N. Y. 1; 34 L. R. A. 238;
In re Whiting, 150 N. Y., 33; 34 L. R. A. 232;
Re Fearing, 200 N. Y., 344;
Ramble vs. Dawson, 67 Wash., 81;
Re Fearing, 123 N. Y. Supp. 396;
Re Preston, 78 N. Y. Supp. 91;
Eidman vs. Martinez, 184 U. S. 587.

If there is a distinction in principle between the rule announced by these decisions and the rule referred to in the recent opinion of this department on the question as to the situs for inheritance tax purposes of an insurance policy payable to the estate of a non-resident decedent and issued by a corporation organized under the laws of the taxing state, it lies in the fact that coupon bonds are negotiable instruments designed to pass more or less current and therefore taking their situs for all purposes, including succession, at the place where they are owned or even where they are held and kept.

See— In re Whiting, 150 N. Y., 27;
In re Morgan, 150 N. Y., 36;
Western Insurance Co. vs. Holliday, 126 Fed. 259;
People vs. Griffith, 245 Ill. 541.
See also—Tafel vs. Lewis, 75 O. S. 182.
But see—Eidman vs. Martinez, supra.

In other words, the general current of authority is to the effect that succession to bonds is taxable by a state, either when the bonds themselves are kept within the state or when the decedent was a resident of the state, but not merely on account of the fact that the issuing corporation is domiciled within the state.

So far as ordinary coupon bonds are concerned, therefore, your second question is answered by the foregoing, and an answer to your first question with respect thereto is unnecessary.

The case would seem to be different as regards registered bonds. The legal effect of the registration of a bond is to destroy its negotiability, in that the obligor is not liable to any holder of the instrument in due course, but may discharge its obligation by paying it to the registered owner. Such bonds are, moreover, usually secured by some sort of a mortgage or other collateral security. In the case of private corporations, such collateral security usually consists of a trust deed or other instrument having the effect of a mortgage of property; in the case of municipal corporations and subdivisions of the state, the collateral security consists of tax levies which the subdivision is compellable to make for the purpose of raising a fund to meet the principal and interest of the bonds. It is obvious, as stated by Vann, J., in his dissenting opinion in *Re Bronson*, supra, (p. 25): that

> "Where the bonds are registered, * * * the transfer can only be effected at an office designated by the corporation. * * * It would be necessary, upon this assumption, for the person entitled to succession to these bonds to come into the state of New York, directly or indirectly, to complete his title. The transaction, by virtue of the contract itself, would become localized, for the transfer would require a corporate act in this state done under the sanction of our laws, and possibly by virtue of an appeal to our courts."

This dictum of Vann, J., (for the bonds in the case were actually coupon bonds and not registered bonds) is the only expression of opinion which has been found suggesting a distinction between registered and coupon bonds. Its effect is weakened by the fact that Vann, J., also argued for the subjection to tax of the succession to coupon bonds of New York corporations held by non-resident decedents outside of the state, in which respect his position was not accepted by a majority of the court of which he was a member. It is true that the case of *Callahan* vs. *Woodbridge*, 171 Mass., 595, goes to the extent of holding that any bonds belonging to the estate of a non-resident, whether issued by Massachusetts corporations or not, and whether actually held in Massachusetts or not, were subject to the Massachusetts inheritance

tax when the will was probated in Massachusetts. This department has, however, been hitherto unable to follow this decision, and it is clearly out of line with the current of authorities.

It is strange that no case is to be found dealing with registered bonds. In view of the character of such obligations, however, and the necessity of resorting to the courts of the taxing state for the purpose of perfecting the succession, which does not exist in the case of negotiable bonds, it would seem that upon the principles laid down in the former opinion of this department with respect to insurance policies, heretofore referred to, successions to such bonds should be regarded as taxable when the same are issued by Ohio private or municipal corporations or subdivisions, regardless of the place at which the securities are kept (which in this case would seem to be immaterial, though the decisions above cited would tend in the other direction). At least it is the advice of this department that the administrative rulings should be that the tax is collectible under such circumstances, so that a judicial ruling on the point may be properly secured.

This conclusion as to your second question, in so far as it relates to registered bonds, makes necessary further consideration of your first question as relating to such bonds, and particularly to the provisions of section 5348-2 of the General Code with respect thereto. This section has been quoted in other opinions of the department and its quotation will not now be repeated. Suffice it to say that the language therein employed as descriptive of the institutions which are prohibited from making transfers except with the consent of the commission and upon the retention of a sufficient amount to pay the tax is not broad enough to include public corporations or quasi public corporations. As a matter of the interpretation of the statute, therefore, it is concluded that a municipal corporation or a school district, township or county in this state, or any officer thereof, would not be liable for the penalty provided by that section in the event of failure to withhold the tax, etc., in the case of registered bonds.

It is just as clear that the section does apply to transactions of this sort on the part of private corporations. The statute provides that—

> "No safety deposit company, * * * corporation, etc., * * * having in possession or in control or custody in whole or in part securities * * * belonging to or standing in the name of a decedent * * *, including the shares of capital stock of, or other interest in, such safety deposit company, * * * corporation or other institution, shall * * * transfer the same to any person whatsoever * * * without retaining a sufficient portion or amount thereof to pay any taxes or interest which would thereafter be assessed thereon under this subdivision of this chapter, and unless notice of the time and place of such delivery or transfer be served upon the tax commission of Ohio and the county auditor at least ten days prior to such delivery and transfer."

The retention of which the section speaks could be made of accrued interest, or in case the bonds were due, of a part of the principal thereof, so that the section has possible application, though nothing is to be done excepting to make a transfer on the books.

It is the opinion of this department that section 5348-2 applies to the transfer of registered bonds and their registration in the name of the transferee in case of the accrual of the inheritance tax on account thereof, and that such inheritance tax accrues in all cases in which a private corporation issuing the registered bonds is organized under the laws of this state or has its principal place of business, where its corporate concerns are managed and its books for the registration and transfer of bonds are kept, in this state. This opinion is given with some qualification, as heretofore stated, because of the lack of authority on this point.

Coming to your third question, it will be at once seen that it involves primarily a consideration of the section last above referred to and of that part of it which has been quoted. The first sentence of the section which has been omitted speaks of "corporations organized or existing under the laws of this state" and would not apply to foreign corporations, inasmuch as the phrase "existing under" is probably intended to apply to corporations created by special act prior to the adoption of the constitution of 1851. The second sentence is not so qualified, and so far as the force of its own terms is concerned, would apply at least to all corporations to which any laws of this state might apply, which would include foreign corporations admitted to this state for the purpose of doing business. Foreign corporations not so admitted could scarcely be subject to the laws of this state. But this question will be further considered herein. Before considering it the pursuit of another line of thought seems appropriate. The sentence under consideration prohibits certain acts, and the last sentence of the section imposes a liability which is in the nature of a penalty, in that it is consequent upon failure to comply with the statute. The question now arises as to whether the act commanded by the statute is one that could take place outside the territorial jurisdiction of the state. The section purports to regulate the institutions referred to in respect of certain acts, namely, the delivery or transfer of certain kinds of securities or assets to persons. Aside from the question as to what sort of a construction this statute should receive, it seems obvious that, however phrased, it could not apply to acts committed outside the state of Ohio. No authority has been found on this point, though the section is of a type which is frequently employed in inheritance tax laws. The general principle is that the penal or regulatory laws of a state, including those regulations which have to do with the collection of revenue, have application only within its boundaries so far as non-residents of the state are concerned, though it is possible for the state to prohibit acts of its citizens or residents or creatures, whether committed within or without the state. This is the general principle in conflict of laws, and has application here.

At the most, then, the section regulates transfers taking place in this state and involving action in this state on the part of the institution referred to therein. Therefore a foreign corporation admitted to do business in this state, transferring stock on its books kept in another state from the name of a decedent to that of his executor, administrator or other successor, would not come within the operation of this statute even though the decedent was domiciled in this state, whether the corporation had complied with the laws of this state or not.

On the contrary, a foreign corporation actually keeping its stock books in this state and making transfer here, would at least, if registered as a foreign corporation under the laws of this state, be within the terms of the statute, and it is the opinion of this department that under such circumstances the statute would apply.

These conclusions leave open but one question, namely, as to whether a foreign corporation not registered to do business in this state, but keeping its stock books here and making the transfer here, would be subject to the statute in case of the transfer of stock belonging to a resident decedent. This question is very doubtful, and it would seem hardly possible that it could ever arise in practice.

One thing is certain: unless the corporation is authorized to transact business in this state, or unless it has property in this state subject to attachment, the courts of this state could not acquire jurisdiction over it for the purpose of enforcing the collection of the tax or penalty from the corporation. Inasmuch as the primary liability is not cast upon the corporation for the tax, but, as previously intimated, the liability of the corporation is created by a statute which is penal in its nature, it is very much to be doubted that the courts of any other state would enforce collection of the amount. So that in the case last imagined the only possibility of even raising the question suggested would exist if the corporation should have property subject to attachment in this state.

Unless the commission particularly desires advice on this question, it will be held in abeyance.

Respectfully,
JOHN G. PRICE,
Attorney-General.

719.

APPROVAL, BOND ISSUE FOR DETENTION HOME, TRUMBULL COUNTY, OHIO, IN THE SUM OF $20,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, October 23, 1919.

720.

APPROVAL, BOND ISSUE, WILLOUGHBY RURAL SCHOOL DISTRICT, LAKE COUNTY, OHIO, IN THE SUM OF $24,000.

Industrial Commission of Ohio, Columbus, Ohio

COLUMBUS, OHIO, October 23, 1919.

721.

APPROVAL FINAL RESOLUTIONS, ROAD IMPROVEMENTS IN MERCER AND AUGLAIZE COUNTIES.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, October 23, 1919.

722.

APPROVAL, BOND OF CLEM T. KELLY, CHIEF CLERK TO STATE HIGHWAY COMMISSIONER, IN THE SUM OF $3,500.

COLUMBUS, OHIO, October 23, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*
DEAR SIR:—

IN RE—Bond of Clem T. Kelly.

The above bond in the sum of $3,500.00, given as directed by section 1183 G. C. covering Mr. Kelly's appointment as chief clerk to the state highway commissioner, has been approved by the state highway commisioner as to surety (the Chicago Bonding and Insurance Company) and by myself as to form, and is transmitted herewith for filing in your office in accordance with the provisions of the above named statute.

Respectfully,
JOHN G. PRICE,
Attorney-General.

723.

APPROVAL SEVENTEEN LEASES COVERING CANAL AND RESERVOIR LANDS LOCATED IN OHIO.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

COLUMBUS, OHIO, October 23, 1919.

724.

BANKS AND BANKING—NOT UNLAWFUL FOR BANK EXISTING UNDER LAWS OF OHIO TO APPOINT AGENTS TO TRANSACT FOREIGN EXCHANGE BUSINESS IN PLACES OTHER THAN REGULAR PLACE OF BUSINESS.

It is not unlawful for a bank existing under the laws of Ohio to appoint agents to transact a foreign exchange business at places other than its regular place of business.

COLUMBUS, OHIO, October 23, 1919.

HON. PHILIP C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You have addressed to me this inquiry:

> "May banks appoint agents to transact a foreign exchange business and no other function of banking, at places other than the regular place of business of such banks?"

The importance of arriving at a correct disposition of this question can hardly be overstated. An erroneous conclusion followed by your department may result in consequences disastrous to the banks and their customers. If we answer this inquiry in the affirmative and that conclusion be incorrect, we permit these institutions and those with whom they deal to assume and acquire obligations, the validity of which would be subject to the most serious doubt.

Bank of Augusta vs. Earle, 13 Peters 519.

The number and the importance of the commercial transactions in which banks will participate if advised that they may exercise this function have led me, therefore, to give it most serious consideration. The authorities in point are few and in some conflict, so that we must analyze them carefully to ascertain the true principle.

You correctly characterize the dealing in foreign exchange as a banking function.

"Buying and selling exchange is an exercise of a banking franchise."

Michie on Banks and Banking, p. 1611.

"A bank may buy and sell exchange."

Morse on Banks and Banking, 5th Ed., p. 125.

Section 710-47 G. C., effective in Ohio on July 11, 1919, and relating to the cor-

porate powers of banks, authorizes each "to do all needful acts, to carry into effect the object for which it was created."

Section 710-181 G. C. is in part as follows:

> "No person, firm or corporation, except banks and duly incorporated and qualified railroad, steamship and express companies, shall engage in this state in the business of receiving money for the purpose of transmitting the same, or the equivalent thereof, to foreign countries."

The right of a bank to deal in foreign exchange being well settled by judicial authority and clearly recognized by the legislature, may it exercise this function through agents located at places other than that in which it carries on its general business?

It is said in Michie on Banks and Banking, p. 1611:

> "When a bank is authorized to do banking business in a certain county, the buying and selling exchange through an agency in another county is illegal, as buying and selling exchange is, in effect, discounting paper, and an exercise of a banking franchise."

The author cites in support of this text only the case of People vs. Oakland County Bank (Mich.), 1 Doug. 282. There the supreme court of Michigan held that a bank whose charter required that it should be located in the county of Oakland had violated the law by the establishment of an agency in the county of Wayne, where it received and kept deposits, redeemed its bills, and as incident to such redemption bought and sold exchange. It said at p. 289:

> "It is unnecessary to push our inquiries any further upon this point, as we are all clearly of opinion that, in this respect, there was the assumption of an authority not warranted by law. With regard to the purchase and sale of bills of exchange, in the manner and for the purpose stated in the case made, we are equally clear."

The decision was put upon the ground that the bank was limited in the exercise of its functions to the county at which it was to have its place of business. Nor was there any distinction made between the accepting of deposits and the buying and selling of exchange.

This case was referred to in the dissenting opinion in Thompson vs. Waters, 26 Mich. 214, as settling the law of Michigan that a corporation whose existence is fixed by its charter in a city or town, can not exercise its powers elsewhere. But the majority in deciding Thompson vs. Waters did not apply this doctrine, but held that a railroad company organized under the laws of Indiana could take title to land in Michigan, and in so concluding said:

> "The mere right of a corporation to purchase and sell property, not being in its nature strictly a franchise, but a right existing equally in individuals without special grant, is very generally recognized in states other than those of its creation."

Bank of Augusta vs. Earle, 13 Pet. 589, to which I shall call attention, was cited with approval. In my opinion, therefore, the authority of People vs. Oakland County Bank was very much weakened by the later holding of the same court in Thompson vs. Waters, though not expressly disapproved.

On the other hand, in Bank of Augusta vs. Earle, supra, the supreme court of the United States, speaking through Chief Justice Taney, held that recovery could be

had upon a bill of exchange made for discount by the Mobile, Alabama, agent of the Bank of Augusta in Georgia. The circuit court of the United States had held the contract void and the bill unenforceable, upon the ground that a bank incorporated under the laws of Georgia, with the power among other things to purchase bills of exchange, could not lawfully exercise that function in the state of Alabama. While the supreme court discussed the doctrine of comity between states, rather than the concrete question of the right of a bank to deal in exchange away from its place of business, it could not have reached the conclusion it did without assuming the existence of such power.

City Bank of Columbus vs. Beach, Fed. Cas. No. 2736; 1 Blatch. 425, was heard in the circuit court of the northern district of New York, Mr. Justice Nelson and Judge Conkling sitting. The action was against the acceptors on two bills of exchange drawn by H at Cleveland, Ohio, on the defendant B at Auburn, New York, accepted payable in New York to the order of H and indorsed by him. H, plaintiff's agent in Cleveland, had discounted the bills as such and for its benefit. In deciding in plaintiff's favor, Justice Nelson said: (p. 741, Vol. 5, Fed. Cas.)

> "The acts under which the bank became a corporation, conferred upon it the power to deal in exchange, without restriction, and hence the purchase of bills at the city of Cleveland, for the purpose of remitting the proceeds of paper belonging to the bank collected at that place, or even the dealing generally in exchange at that place by an agent, with the funds thus collected and remitted, was not in contravention of the charter of the bank, or of any law of the state of Ohio. I think this case falls within the principle of the cases of Bank of Augusta vs. Earle, 13 Pet. (38 U. S.) 519, and of Tombigbee R. Co. vs. Kneeland, 4 How. (45 U. S.) 16, and that a new trial ought not to be granted."

Conkling, J., concurred in the judgment in a somewhat lengthy opinion, in which he showed that Bank of Augusta vs. Earle, supra, was in point, and said:

> "The case decides, therefore, that if the City Bank of Columbus had employed its agent and purchased these bills at Mobile, instead of Cleveland, its title would have been indisputable. Is its title then to be held invalid, because the purchases were made within the limits of the state of Ohio?"

The syllabus, which fairly states the law, is as follows (p. 739):

> "1. Where a banking corporation, whose location and place of business was at Columbus, Ohio, had power by its charter to deal in bills of exchange, without restriction as to place: *Held*, that it could purchase such bills at Cleveland, Ohio, for the purpose of remitting to New York the proceeds of paper belonging to the bank, collected at Cleveland.
>
> 2. And it could even deal generally in exchange at Cleveland, through an agent there, with the funds thus collected and remitted.
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> 3. The cases of Bank of Augusta vs. Earle, 13 Pet. (38 U. S.) 519, and of Tombigbee R. Co. vs. Kneeland, 4 How. (45 U. S.) 16, quoted and approved.
>
> 4. The City Bank of Columbus, under the acts of Ohio incorporating it, passed March 17, 1838, and March 6, 1845, and under the general banking law of Ohio, passed February 24, 1845, is restricted to Columbus as its location and place of business. (Per Conkling, J.)"

Section 710-181 G. C., to which reference has been made, contemplates that railroad, steamship and express companies will transact their foreign exchange bus-

iness through agents at various locations. It requires such compamies to file yearly with the superintendent of banks a certificate each place in this state where it maintains an office where money is to be received for such purpose and the person or persons there in authority to receive this money.

We are to keep in mind also the provision of section 710-47 G. C., to the effect that the bank may do all needful acts to carry into effect the objects for which it was created, one of which unquestionably was the purchase and sale of foreign exchange. This function is quite different from that of receiving deposits or loaning money. This the legislature recognized by permitting other corporations to deal in foreign exchange. Nor does it appear why they should be permitted to carry on this business wherever they might establish agencies, and a similar privilege be denied to banks existing under our own laws and amenable to all the supervision and regulation provided in our banking laws.

I therefore advise you that it is not unlawful for a bank existing under the laws of Ohio to appoint agents to transact a foreign exchange business at places other than its regular place of business; but I am not here considering any other question than might arise or be suggested by the provisions of section 710-181 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

725.

APPROVAL, LEASE, MIAMI AND ERIE CANAL, DEFIANCE, OHIO, $300.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

COLUMBUS, OHIO, October 24, 1919.

726.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN PICKAWAY COUNTY, OHIO.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, October 24, 1919.

727.

DISAPPROVAL, DEFICIENCY BONDS OF FAIRFIELD TOWNSHIP SCHOOL DISTRICT, $8,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, October 25, 1919.

RE—Deficiency bonds of Fairfield township school district, in the amount of $8,000.

GENTLEMEN:—I have examined the transcript of the proceedings of the board of education and other officers of Fairfield township school district, relative to the above

bond issue, and am unable to approve the validity of said bonds for the following reasons:

1. These bonds are issued under authority of sections 5656 and 5658 G. C. Section 5658 G. C. provides as follows:

> "No indebtedness of a township, school district or county shall be funded, refunded or extended unless such indebtedness is first determined to be an existing, valid and binding obligation of such township, school district or county by a formal resolution of the trustees, board of education or commissioners thereof, respectively. Such resolution shall state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of their maturity, the rate of interest they shall bear and the place of payment of principal and interest."

The resolution authorizing the issuance of the bonds does not contain a finding or determination that the indebtedness to be refunded is an existing, valid and binding obligation of such school district, as required by the provisions of the section just quoted.

2. Art. XII, Sec. 11 of the Ohio constitution provides:

> "No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtednss is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The language of section 5 of the resolution, authorizing the issuance of these bonds, is not sufficient to meet the requirements of this constitutional provision. The board of education which is the tax levying authority of the district, should, in its resolution authorizing the issuance of the bonds, in direct language, provide for a levy of taxes sufficient to pay the interest and the principal of said bonds as they fall due. Merely directing the clerk to certify to the county auditor in the annual budget a tax to be levied upon all the taxable property of said district, real and personal, is not sufficient without further language providing for the tax levy.

For the reasons just stated, I advise that you decline to accept the above bonds.

Respectfully,
JOHN G. PRICE,
Attorney-General.

728.

PROBATION OFFICER—MAY NOT RESIGN HIS POSITION AND BE IMMEDIATELY REAPPOINTED TO FILL HIS OWN VACANCY AT AN INCREASED SALARY.

A duly appointed probation officer may not resign his position and be immediately reappointed to fill his own vacancy at an increased salary.

COLUMBUS, OHIO, October 25, 1919.

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

GENTLEMEN:—In a recent letter to this department you say:

"We desire to call your attention to opinion of the Attorney-General to be found in the Opinions of the Attorney-General for 1917, Volume 3, page 2100, and would ask as to whether a duly appointed probation officer may resign his position and be reappointed to fill his own vacancy at an increased salary."

One of the holdings of the opinion to which you refer was that after the judge exercising the juvenile jurisdiction had appointed a probation officer and designated his compensation, such compensation could not be increased or diminished. Whether such probation officer might resign and be immediately reappointed to fill his own vacancy at an increased salary—your present question—was not considered in said opinion.

The appointment and compensation of probation officers in juvenile court are provided for in section 1662 G. C. This section has been recently amended, and, so far as pertinent, reads:

"Sec. 1662. The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be a woman, to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as chief probation officer and there may be one or more assistants. Such chief probation officer and assistants shall receive such compensation *as the judge appointing them may designate at the time of the appointment*, but the compensation of the chief probation officer shall not exceed three thousand dollars per annum and that of the assistants shall not exceed eighteen hundred dollars per annum."

Speaking of the provision—

"Such chief probation officer and assistants shall receive such compensation as the judge appointing them may designate at the time of appointment,"

which provision was not changed by the recent amendment of the section, the Attorney-General, in the opinion above referred to, said:

"It will be noted that this section does not merely provide that the salary of the probation officers shall be fixed at the time of their appointment, but provides that the compensation which they shall receive shall be 'as the judge appointing them may designate at the time of the appointment.' The words 'as the judge may designate at the time of the appointment' is descriptive of the salary which the probation officers are to receive, and to my mind makes it impossible for the court to alter the compensation of the probation officer or officers after it has once been fixed at the time of the appointment."

The statutory language just quoted is clear and unambiguous. It clearly evinces an intent on the part of the legislature that the compensation of a probation officer shall be unchanged during the period of his appointment. Such intent would, in my judgment, be defeated were the view adopted that the increased compensation could be paid by the simple process of resignation followed by an immediate reappointment.

Speaking of constitutional and statutory provisions prohibiting increase or decrease of compensation of an officer during his term, Mr. Mechem in his work on Public Offices and Officers says, citing State vs. Hudson Co., 44 N. J. L. 388, that:

"He (the officer) will not be permitted to evade the provisions by resigning his office and being at once reappointed."

It may be contended that such decisions are without point in the present case, for the reason that a probation officer is not, in many essential respects, an "officer," nor is his tenure in the nature of a "term." It seems to me, however, that such decisions are noteworthy as showing how quick courts have been to frustrate attempts to evade statutes providing limitations upon compensation of public officials, and to prevent from being done indirectly what the law making body has clearly said shall not be done directly.

You are therefore advised that a duly appointed probation officer may not resign his position and be immediately reappointed to fill his own vacancy at an increased salary.

Respectfully,
JOHN G. PRICE,
Attorney-General.

729.

TREASURER OF STATE—NOT AUTHORIZED TO DEPOSIT ANY STATE FUNDS PROPER UNDER AN AWARD FOR DEPOSIT OF STATE INSURANCE FUNDS.

The treasurer of state is not authorized to deposit any state funds proper under an award for the deposit of state insurance funds; and it is immaterial that the successful bidder for state insurance funds may also have bid for state funds, but was prevented from receiving an award thereof because of the acceptance of its bid for insurance funds.

COLUMBUS, OHIO, October 25, 1919.

HON. R. W. ARCHER, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Some time ago a letter was received from your department submitting a question as to the operation of the depository law in its application to deposits of state insurance funds. The letter was inadvertently mislaid and some delay has taken place in answering it, for which an apology is tendered.

In that letter it is stated that banks to which state insurance funds have been awarded, subject of course to the limitation on the total amount of state funds which may be deposited in any one bank, have asserted the claim that in the event of the depletion of their deposits by the withdrawal of the insurance funds for investment by the industrial commission in bonds, they are entitled to have the amount awarded to them made up out of state funds deposited in other banks at a lower rate of interest than that offered by them on insurance funds. This contention is supported by the persuasive reasoning that banks in this position were prevented from receiving state funds (though they may have bid high for such funds) because their allotments of insurance funds exhausted their capacity to receive moneys of the state on deposit, under the previous rulings of this department interpreting the statute relating to the deposit of insurance moneys.

As you point out, the result of the acceptance of the view contended for would be that the treasurer of state would, in some instances, have to withdraw moneys from inactive banks in which state funds, as such, were on deposit in order to supply the requirements of the insurance fund depositories, which would lead to great confusion and inconvenience. Of course, this would not necessarily have to be done in all in-

stances as the state treasurer might have state funds for initial deposit. However it is a point which is entitled to some weight.

Ultimately, however, the question which you submit is answered by a few very simple considerations. In the first place, there is no authority whatsoever to withdraw any moneys on deposit save "for the purpose of paying the appropriations and the obligations of the state" (Section 330-2 G. C.). In making the initial awards it is true that the money awarded is to go first to the banks offering to pay the highest rate of interest (Section 330 G. C.); and in withdrawing funds from inactive depositories it is provided that withdrawals shall first be made "from the banks and trust companies paying the lowest rates of interest and in proportional amounts as near as practicable" (Section 330-2). Further than this no bank, whether bidding for state funds or for state insurance funds, acquires any right to have its deposit maintained by withdrawals from other banks.

This of itself answers the specific question which you submit, but I deem it proper to go further and say that deposits of the state insurance fund are separate and distinct from deposits of state funds generally. Section 1465-57 G. C. provides that:

> "The treasurer of state is hereby authorized to deposit any portion of the state insurance fund not needed for immediate use, in the same manner and subject to all the provisions of the law with respect to the deposit of state funds by such treasurer; and all interest earned by such portion of the state insurance fund as may be deposited by the state treasurer in pursuance of authority herein given, shall be collected by him and placed to the credit of such fund."

It further appears that the state insurance fund is not a fund in the state treasury, but that the relation of the treasurer of state to that fund is that of custodian merely (Section 1465-56 G. C.); so that he is authorized by the section last cited to make distribution therefrom on vouchers issued by the industrial commission, without the necessity of appropriations by the general assembly. All the implications of these sections are against the commingling of state insurance funds with state funds proper. Separate bids and separate awards of deposit are to be received and made respectively for these two kinds of moneys. A bank which has bid for and been awarded insurance money has no right to receive under its contract any state funds, and the treasurer of state is not authorized, without separate qualification by such bank, to place any state funds therein. In short, when a deposit of state insurance funds is depleted it would not be lawful for the treasurer of state to make further deposits up to the authorized and contracted amount by using state funds proper for this purpose, even though he might have such funds available without the necessity of making withdrawals from other banks, and although by so doing he might be able to earn for the state moneys a higher rate of interest than he could earn by depositing them in depository banks that had qualified to receive state funds proper but at a lower rate of interest than the rate offered by the depository of the state insurance fund.

The more comprehensive answer to your question is therefore that the treasurer of state is not authorized to deposit any state funds proper under an award for the deposit of state insurance funds; and it is immaterial that the successful bidder for state insurance funds may also have bid for state funds, but was prevented from receiving an award thereof because of the acceptance of its bid for insurance funds.

Respectfully,

JOHN G. PRICE,

Attorney-General.

730.

SHERIFF—AUTOMOBILE BELONGING TO SAID OFFICER'S WIFE USED IN PERFORMANCE OF HIS OFFICIAL DUTIES—WHAT EXPENSES ARE ALLOWABLE BY COUNTY COMMISSIONERS.

Where the sheriff makes use of an automobile belonging to his wife who is matron of the county jail, the county commissioners are authorized under the provisions of section 2997 G. C. to make an allowance to the sheriff for expenses incurred in the operation of such automobile in connection with his official duties, but such allowance may not include any item of compensation for the use of such machine.

COLUMBUS, OHIO, October 25, 1919.

HON. GEO. WAITE, *Prosecuting Attorney, Urbana, Ohio.*

DEAR SIR:—You recently requested my opinion as follows:

"Is it possible for the sheriff of a county to use his wife's automobile while transacting business connected with his office, (she being matron of the jail) and charge for trips taken, providing the charge is just and reasonable, and satisfactory to the county commissioners?"

Section 2997 G. C. provides:

"In addition to the compensation and salary herein provided, the county commissioners shall make allowances quarterly to each sheriff for keeping and feeding prisoners, as provided by law, for his actual and necessary exenses incurred and expended in pursuing or transporting persons accused or convicted of crimes and offenses, in conveying and transferring persons to and from any state hospital for the insane, the institution for feeble minded youth, Ohio hospital for epileptics, boys' industrial school, girls' industrial home, county homes for the friendless, houses of refuge, children's homes, sanitariums, convents, orphan asylums or homes, county infirmaries, and all institutions for the care, cure, correction, reformation and protection of unfortunates, and all expenses of maintaining horses and vehicles necessary to the proper administration of the duties of his office. The county commissioners shall allow the sheriff his actual railroad fare and street car fare expended in serving civil processes and subpoenaing witnesses in civil and criminal cases, and may allow his necessary livery hire for the proper administration of the duties of his office. Each sheriff shall file under oath with the quarterly report herein provided a full, accurate and itemized account of all his actual and necessary expenses, including railroad fare, street car fare and livery hire mentioned in this section before they shall be allowed by the commissioners."

Provision is also made in section 2412-1 G. C. (107 O. L. 585) for the purchase of automobiles or other vehicles by the county commissioners for their use and the use of the sheriff, but your question does not relate to the matter of purchase of an automobile in pursuance of the provisions of this statute, so it will not be further considered.

Considering then your question in connection with the provisions of section 2997 it may be stated that the statute clearly authorizes the allowance to the sheriff of his necessary livery hire incurred in the proper administration of the duties of his office, and it has been held in State ex rel. Sartain vs. Sayre, 12 O. N. P. (n. s.) 61,

that automobile hire constitutes "livery hire" within the purview of the statute. The syllabus is as follows:

> "It is within the discretion of county commissioners to make an allowance to the sheriff for automobile hire, incurred in and necessary to a proper administration of the duties of his office in the service of writs and processes or in pursuing or transporting persons who are wards of the state or are charged with crime."

This decision has been generally followed as authority for the proposition that proper expenses incurred by the sheriff by way of automobile hire in the discharge of the duties of his office may be allowed him by the county commissioners.

But in your question a further consideration is involved, in that it is stated that the automobile in question is owned by the sheriff's wife, who is also the matron of the jail, and the matter of the sheriff' authority to contract with his wife under the circumstances for the employment of her automobile in the administration of his office is to be considered.

In an opinion of this department appearing at page 2397 of the Opinions of the Attorney-General for 1917, Vol. III, the question of the authority of the county commissioners to hire the sheriff's machine for his use in the performance of his official duties was considered, and it was held that section 2997 did not give the county commissioners the authority to hire or provide the means of conveyance for the sheriff; but on the contrary that such provision is to be made by that officer himself. The opinion, however, held that the commissioners under authority of section 2997 may make allowance to the sheriff to reimburse him for his expense incurred in using his own machine for official business. The opinion cites an earlier opinion of this department appearing at page 1276 of the Opinions of the Attorney-General for 1915, Vol. II, in which the same question was considered, and the following conclusion reached:

> "While section 2997 contains the word 'maintaining' and does not contain the word 'operating,' it would undoubtedly follow that said section authorizes the allowance of all expenses incident to the use of the automobile in public business and would include oil and gasoline, as well as necessary repairs to tires and parts.
>
> The county commissioners may, therefore, make an allowance to the sheriff for the expenses of maintaining and operating his automobile when used in the proper administration of the duties of his office. * * * Just what proportion of the expenses may be charged against public funds will depend upon the facts in each particular case and is more a matter of policy than of law."

It was further said by my predecessor in the opinion first above cited:

> "In no case can such arrangement include any item of compensation for the use of said machine,"

and in support of this proposition cited Opinion No. 631, appearing at page 1746 of the Opinions of the Attorney-General for the year 1917, Vol. II, wherein principles of public policy were said to forbid that a public officer, charged with the duty of making an expenditure on behalf of the public, should in that capacity deal with himself. This principle has been laid down in a still earlier opinion, being No. 1161 of the Opinions of the Attorney-General for 1916, page 11, Vol. I, where the following observation was made:

> "* * * While the highway superintendent, being charged with the

duty of providing himself with transportation when engaged on official business, may not deal with himself and include in his expense accounts compensation for the use of his own automobile, yet if the county highway superintendent is the owner of an automobile and uses the same in traveling about the county on official business, he may include in his expense accounts and the county commissioners may allow to him the actual and necessary expenses incident to the maintenance and operation of the automobile during the time the same is used in the public business of the county."

The principle of public policy announced in the several opinions referred to has been adhered to repeatedly in the rulings of this office, and in fact is believed to be one of general recognition.

It is believed that while it is true that for the purposes of general law a husband and wife are perfectly competent to contract with each other, a different principle should be applied to official dealings. The policy of the law prohibits public officers from having any interest in contracts with the public, especially where they are authorized to make the contracts. Here, in the theory that automobile hire is incurred as an expense by the sheriff and reimbursed by the allowance of the county commissioners, the sheriff is the officer who makes the contract for the public. The contract, if contemplating compensation for the use of the machine, would then be between the sheriff and his wife. Though probably not covered by any criminal statute, such a contract is clearly against public policy because of the family relationship involved.

The fact that the sheriff's wife is matron of the jail furnishes an additional reason for the same conclusion, in that it introduces another relationship which accentuates the same public policy.

It is therefore the opinion of this department that it would not be lawful for the sheriff to be reimbursed for automobile hire where the automobile hired belongs to his wife. It would be perfectly lawful for him, however, to use his wife's automobile in his official business as his own and receive from the county an allowance for the maintenance thereof.

Respectfully,
JOHN G. PRICE,
Attorney-General.

731.

BOARD OF EDUCATION—CONTRACT WITH PERSON TO TEACH—WITHOUT AUTHORITY TO PAY SUCH PERSON FOR ANY TIME NOT COVERED BY PROPER CERTIFICATE.

A board of education having made a contract with a person to teach a school in its district, is without authority to pay such person for any time not covered by a proper certificate issued under the requirements demanded in the statutes.

COLUMBUS, OHIO, October 25, 1919.

HON. LEWIS STOUT, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

"The school board of Noble township were unable to find a teacher for a certain school in their district, and finally they hired one J. N., an ex-school

teacher, as a last resort. N. did not at the time of his hiring have a certificate but it was presumed that he would be granted an emergency certificate.

"The parents of the children attending this school seemed to have great objection to N.'s teaching and have refused to allow their children to attend the school. N. went to the school house on Monday, Tuesday and Wednesday of this week, but no pupils appeared. The parents of the children state they will not send their children to school so long as N. is the teacher.

"The board of education held a meeting and succeeded in finding another teacher for this school who is satisfactory to the parents of the pupils, and this last teacher is in possession of a certificate. N. offered to release his contract for $100.00. Is the board of education authorized to make this compromise? It must be understood that N. has been acting in good faith all the way through and was willing to help the board out."

The question which enters here and upon which the rights of Mr. N. rests in this matter is whether he was qualified in a legal sense of the word to make the contract of teaching with the board of education of Noble township, that is, whether he was certificated properly by the board of county school examiners and if so for what length of time.

It is clear from a legal standpoint that even though the contract was regularly made in the method provided in the statutes by the board of education, it could not run if the said N. was without the certificate which is required under section 7830 G. C., which reads as follows:

"No person shall be employed or enter upon the performance of his duties as a teacher in any elementary school supported wholly or in part by the state in any village or rural school district who has not obtained from a board of school examiners having legal jurisdiction a certificate of good moral character; that he or she is qualified to teach orthography, reading, writing, arithmetic, English grammar and composition, geography, history of the United States, physiology, including narcotics, literature and elementary agriculture, and that he or she possess an adequate knowledge of the theory and practice of teaching."

It would seem that under this section, in order to have the full qualifications of entering upon a contract to teach in any elementary public school, the teacher should have at the time of contracting a certificate for the entire time of the contract. You say that "N. did not at the time of his hiring have a certificate, but it was presumed that he would be granted an emergency certificate."

The courts, however, have passed upon this section, as indicated by the following language:

"Under this section a contract for the employment of a person as teacher, who has not obtained a teacher's certificate, is not invalid if such certificate is obtained before such person enters upon the performance of the duties of his employment." (School District vs. Dillman, 22 O. S., 124.)

See also Youmans vs. Board of Education, 13 O. C. C., 207.

Section 7690 G. C. reads in part as follows:

"Each board of education shall have the management and control of all the public schools of whatever name or character in the district. * * *

Each board shall fix the salaries of all teachers, which may be increased but not diminished during the term for which the appointment is made."

You indicate that Mr. N. did not at the time of his hiring have a certificate, but that he would likely be granted an emergency certificate, that is, a certificate that is granted in compliance with section 7832-1 G. C., which reads as follows:

"A 'teacher's emergency certificate' which shall be valid for one year in any village or rural school district in the county may be granted by the county board of school examiners *with the approval of the superintendent of public instruction* to applicants who have had one year's experience teaching in the public schools whenever for any reason there is a shortage of teachers in such district."

The records of the department of public instruction show that permission was granted to the county board of school examiners of Auglaize county by the state superintendent of public instruction to issue an emergency certificate to Mr. J. N., this permission from the state superintendent of public instruction being dated September 9, 1919. In ascertaining as to whether the county board of school examiners of Auglaize county granted a certificate of any kind to Mr. J. N. following this permission from the superintendent of public instruction dated September 9, the Attorney-General is in receipt of the following statement of facts from the county superintendent of schools of Auglaize county, who under the law is also a member of the county board of school examiners of such county:

"Mr. J. N. made application for a certificate on September 6th. The board of examiners thereupon made application to the state department for an emergency certificate.

Mr. N.'s school opened on September 8th. We did not receive an answer from the state department until September 10th, and no emergencies were granted in this county before that date. Before the examiners met for granting these certificates we received word from the president of the board of education that Mr. N. had resigned and that they had engaged another teacher, who held a three-year certificate and measured up to the requirements of the law in every particular. By this action the examiners felt that no emergency existed and therefore did not grant the certificate. In justice to Mr. N. we must state that we are informed that Mr. N. resigned with the understanding that he was to receive $100.00 providing the board could legally pay him. The board of education had requested his resignation because of the sentiment of the people in the district against Mr. N., which was to such a degree that not a pupil came to the school during the two or three days he was in the school room."

From the above letter it is noted that the school in question in Noble township opened on September 8th, and from your statement of facts Mr. N. appeared at such school on the 8th, 9th and 10th days of September; on September 10th the county board of school examiners received permission from the state superintendent of public instruction to grant an emergency certificate to Mr. N., as no emergency certificate had been granted to him prior to that date. It seems that on or about the 10th of September, or at least before the board of examiners met for the purpose of granting certificates, word was received from the president of the board of education of Noble township that another teacher had been engaged who had a three-year certificate and that Mr. N. was no longer the teacher in the school in question in Noble township. Under these circumstances the county board of examiners did not grant

a certificate to Mr. N. and therefore he did not have a certificate on September 8th, when he entered the school room as a teacher, or on any of the days following. It is necessary that a teacher have a certificate of some kind covering every day on which teaching is done, in order to cover payments for services from the employing board of education. The right of Mr. N. to recover from the board of education rests in a very large measure upon his having a certificate, as required by the statutes, covering all the days for which he demands pay, and if he could not show his certificate starting with the day on which he entered upon his duties, then under the decisions of the courts, heretofore quoted, he would not be fully qualified in a legal sense as a teacher and therefore would be without power to contract in such capacity. It must follow, therefore, that as Mr. J. N. did not have a complete status as a teacher in being certificated at the proper time, and thus qualified under the statutes as a teacher, he has no valid claim against the board of education of Noble township.

It is therefore the opinion of the Attorney-General that a board of education having made a contract with a person to teach a school in its district, is without authority to pay such person for any time not covered by a proper certificate issued under the requirements demanded in the statutes.

Respectfully,
JOHN G. PRICE,
Attorney-General.

732

APPROVAL, OIL AND GAS LEASE TO MIAMI CONSERVANCY DISTRICT, CERTAIN LANDS IN GREENE COUNTY, OHIO—CANCELLATION OF FORMER LEASE.

COLUMBUS, OHIO, October 25, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent letter transmitting for approval the oil and gas lease of the state to the Miami Conservancy District for certain lands in Greene county, dated October 7, 1919. Acknowledgment is also made of the receipt of the enclosed cancellation of former lease on the same premises of the same date.

Consideration of the matter and form of the lease and cancellation of the former lease, the facts stated in your letter and the laws of Ohio applicable thereto, has been given by this department.

Section 3209, as supplemented by 3209-1, 105 O. L., page 6, gives authority to the auditor of state to lease

> "for oil, gas, coal, or other minerals, any unsold portions of section sixteen and section twenty-nine, or other lands granted in lieu thereof, * * * upon such terms and for such time as will be for the best interest of the beneficiaries thereof."

The lands are described in the lease as being part of section 16. Section 4 of that act (see also 106 O. L., 245, section 23-1 G. C.) provides that in case of sale of public state land, the state "shall expressly reserve to the state all gas, oil, coal and other minerals in and under such lands."

The object of the proposed new lease and cancellation of the old lease being, as stated in your letter, to secure a practical compliance with the laws relating to the public lands and the leasing of section 16 being by section 3209, supra, vested in

the auditor of state, and the lease being of proper form, said cancellation and new lease are approved as being executed in conformity to the sections above quoted.

Respectfully,
JOHN G. PRICE,
Attorney-General.

733.

MUNICIPAL CORPORATION—PROCEDURE TO BE FOLLOWED BY GOVERNOR IN SUSPENDING OR REMOVING MAYOR OF A NON-CHARTER CITY FROM OFFICE.

COLUMBUS, OHIO, October 27, 1919.

HON. JAMES M. COX, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—Referring to the question submitted by you relative to the procedure to be followed in case of the filing in your office of charges which may involve the suspension or removal of the mayor of a non-charter municipality, I beg to submit the following:

Under the statutes which govern (Secs. 4268 and 4269 G. C.), the first step to be taken consists of the filing in the office of the Governor of a written statement of the alleged causes for the mayor's removal. A form of this statement is hereto appended.

The second step consists of causing a copy of the statment to be served upon the mayor not less than ten days before the hearing of the matter. This copy should be certified by the Governor to be a true copy of the original statement on file in his office. The date of hearing should be set so as to allow an opportunity to complete service on the mayor at a date at least ten days before the date set. The statute does not mention the manner of service, and therefore to avoid all question, such service should be made personally.

Pending the investigation, the Governor may suspend the mayor for a period of thirty days. If this is to be done, the order of suspension may either be separately made or incorporated in the statement so that service of a copy of the latter will inform the mayor of the action of the Governor. The latter would seem to be the better procedure, but in any event, a record of the order of suspension should be entered upon the journal record kept in the office of the Governor on the date on which it is made. (See Sec. 144 G. C.)

The next step consists of the hearing itself. There is no provision for the filing of any formal answer by the mayor. If any is tendered it should probably be accepted. There is no requirement that the Governor shall hear in support of the alleged causes for removal, any evidence other than that which he may already have in his possession. However, it is suggested that "a full and fair opportunity to be heard in his defense" which the statute does expressly guarantee to the mayor, would seem to suggest at least a disclosure to the mayor and to the public of the substance of all the information coming to the knowledge of the Governor respecting the alleged causes for removal.

The hearing must be public. In case the Governor decides not to remove the mayor, the minute of his decision should be entered upon his own records. If the decision is that the mayor be removed, such an entry on the record of the Governor should be made, and in addition thereto, a statement thereof, together with a "full detailed statement of the reasons of such removal" must be filed by the Governor in the office of the secretary of state.

In this connection, you are advised that at the time and place appointed for hearing, the statement of alleged causes should be read publicly and supplemented so far as may be necessary in fairness to the mayor, by a disclosure of the nature of the information supporting the allegations, as above suggested. Thereupon the mayor should be called upon to offer his defense, which he may do in person or by counsel. The Governor must hear the witnesses offered by the mayor as to matters tending to disprove the alleged causes for removal. The Governor would have reasonable discretion in the matter of limiting the number of witnesses on any given point offered by the mayor.

It must be understood that the Governor has no right to compel witnesses to be sworn. However, if the Governor desires to have witnesses giving evidence in support of the charges, sworn, and they are willing to be sworn, he may do so; and in that event, should permit witnesses giving evidence on the part of the mayor likewise to be sworn if so desired by the mayor. In any event, any sworn evidence which is offered should be received by the Governor, subject to his right to limit the number of witnesses above referred to.

The Governor is to conduct the hearing in accordance with his own sense of justice and fair play; he is not bound by technical rules of evidence, though he may well hear counsel for the mayor upon any point respecting the relevancy of any evidence that is offered.

I take it that you understand that there is no power on the part of the Governor nor the mayor to compel the attendance of witnesses.

Any documentary evidence or signed writings considered by the Governor in connection with the alleged cause of removal should be exhibited to the mayor upon the hearing.

The following is a suggested blank form of statement:

State of Ohio,
Office of the Governor,

—In the Matter of the Removal of
— ----------, Mayor of the
— --------of----------.

Statement of Cause.

I, James M. Cox, Governor of the State of Ohio, by virtue of the authority in me vested by section four thousand two hundred sixty-eight of the General Code, do hereby declare that it is alleged that the mayor of the ----------of----------, Ohio, ought to be removed from office for the following cause, to-wit: (e. g.) Gross neglect of duty in the following alleged particulars, to-wit:

(1) He, the said----------(here give a brief statement of facts constituting one or more like instances of alleged neglect, specifying dates and places).

(2) He, the said----------(in case there are two or more different kinds or qualities of alleged neglects, it will be competent and appropriate separately to designate them in this manner).

If the said----------desire to be heard in his defense, he may appear at the office of the Governor on the----day of----------, 19----, at the hour of----------M, and he will be then and there publicly heard.

And the said----------if hereby suspended from the office of mayor of the said----------of----------, Ohio, for the period of thirty days from this date, unless sooner removed or reinstated. (The above clause as stated is to be inserted only in the event the Governor decides to suspend the mayor).

In Witness Whereof, I have hereunto set my hand this_____day of _____, 19____.

_____
Governor of Ohio.

It is to be understood that the particulars under the statutory cause for removal must be such as in law to constitute the particular statutory charge. In the absence of any statement of facts, however, I cannot, in this opinion, deal with the subject of the sufficiency of any given specification or bill of particulars, further than to say, in the language that has received the approval of one supreme court of this state that

"the cause must be one which touches the qualifications of the officer for the office, and shows that he is not a fit or proper person to perform the duties."

State ex rel. vs. Hawkins, 44 O. S. 98-115.

Respectfully,
JOHN G. PRICE,
Attorney-General.

734.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN LUCAS COUNTY, OHIO.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, October 27, 1919.

735.

OFFICES INCOMPATIBLE—COMMON PLEAS JUDGE—OFFICES IN OHIO NATIONAL GUARD.

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.

COLUMBUS, OHIO, October 28, 1919.

HON. ROY H. WILLIAMS, *Judge, Common Pleas Court, Sandusky, Ohio.*

DEAR SIR:—In your recent favor you make this inquiry:

"Does a common pleas judge vacate his office by accepting a commission as officer in the National Guard of Ohio?"

The existing provisions for the organization and maintenance of the National Guard are found in the act of congress approved June 3, 1916, section 73 of which is entitled: "Federal Oath for National Guard Officers." By this oath obedience is pledged to the orders of the President of the United States and to the Governor of the particular state. The act of course makes provision for the compensations of the officers and prescribes their general duties.

Art. IV, Sec. XIV of the Ohio constitution is in part as follows:

"The judges of the supreme court, and of the court of common pleas * * * 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. * * *."

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 State vs. Mayor of Jersey City, 42 Atl. 782, the supreme court of New Jersey held that the position of colonel in the Fourth Regiment of New Jersey Volunteers of the United States army was an office.

In Kerr vs. Jones, 19 Ind. 351, it was ruled that the office of colonel of volunteers in the military service of the United States was a lucrative office and that its acceptance would vacate the office of reporter of decisions of the supreme court of the state.

In State vs. De Gress, 53 Tex. 387, the court said:

"By express enactment, officers of the army on the retired list constitute a part of the army of the United States, retain the actual rank held by them at the date of retirement, receive seventy-five per centum of the pay of that rank, are subject to trial by courts-martial for any breach of the rules and articles of war, and may be assigned to duty at the soldiers' home. * * *

That such an officer holds a lucrative office under the authority of the United States, or, in the language of our state constitution, 'an office of profit or trust under the United States,' is too plain to admit of being made more so."

"An office to which salary, compensation or fees are attached is a lucrative office, or, as it is frequently called, an office of profit. The amount of the salary or compensation attached is not material."

Mechem's Public Offices and Officers, Sec. 13.

"An office whose duties and functions require the exercise of discretion, judgment, experience and skill is an office of trust, and it is not necessary that the officer should have the handling of public money or property, or the care and oversight of some pecuniary interest of the government."

Id., Sec. 16.

"Military officers are those who have command in the army."

Id., Sec. 22.

It seems clear that an individual can not serve as common pleas judge and at the same time hold a commission in the National Guard.

The next question is, what is the effect of such judge's accepting such commission? The American rule is well stated in Throop's Public Officers, at Sec. 31:

"In many of the states of the Union, it is expressly forbidden by the constitution or by statute, that one person should hold two public offices under the state government, and that an officer under the state government should hold office under the United States government. * * * It is, however, the acceptance of, not the election or appointment to, an incom-

patible office, which vacates the first office; and that result follows from such acceptance, without any legal proceedings to oust the party from his first office."

Authorities sustaining this view are collected in the foot note to Attorney-General vs. Marston (N. H.), 13 L. R. A. 670. See also Howard vs. Harrington, 114 Me 443; L. R. A. 1917a, p. 211, 225 (annotation).

A similar conclusion was reached in State ex rel. vs. Mason, 61 O. S. 513. A different constitutional provision was there considered but the holding was that the acceptance of a federal judgeship by a state representative prevented his receiving further compensation as such.

You are therefore advised that 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.

Respectfully,
JOHN G. PRICE,
Attorney-General.

736.

STATE BOARD OF EDUCATION—SPECIAL MEETINGS HOW CALLED AND WHAT MINUTES SHOULD SHOW—MEETING AT CEDAR POINT IRREGULAR.

1. *The meeting of the state board of education at Cedar Point on June 24th was not a special meeting properly called under the law. A special meeting of the state board of education may be held at any place within the state, but to make such meeting legal the president of the state board of education shall make the call, or it can be made by a majority of the board, said call to be sent to all members of the board.*

2. *The minutes of the state board of education, in covering a special meeting of such board, should show by whom such special meeting was called, and the reasons therefor; and all minutes of the board should be signed by the president and secretary in the permanent record.*

COLUMBUS, OHIO, October 28, 1919.

HON. ALFRED VIVIAN, *President State Board of Education, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion on the following statement of facts:

"The act providing for the organization of a board of education to take charge of the vocational work under the terms of the federal vocational act commonly known as the Smith-Hughes bill, provides that the state board shall hold regular meetings in the office of the superintendent of public instruction and special meetings at any other place in the state upon the call of the president or of the majority of the board.

"At the regular June meeting of the board it was voted to hold the next meeting at Cedar Point at the time of the meeting of the State Teachers Association. Four members of the board of education as well as the supervisors of agricultural and home economics education attended that meeting. The auditor of state has refused the payment of their expense accounts on the ground that such a meeting was not within the intent of the law.

"May I have a ruling as to whether this meeting was or was not within the intent of the law by which the state board of education was created?"

In arriving at an answer to the above question, it is necessary to quote the statutes establishing the state board of education of Ohio and the requirements relative to the meetings whether regular or special, of such board.

Following an act of congress, entitled "An act to provide for the promotion of vocational education; to provide for co-operation with the states in the promotion of such education in agriculture and the trades and industries; to provide for co-operation with the states in the preparation of teachers of vocational subjects; and to appropriate money and regulate its expenditure," there was created in Ohio the state board of education as the agency with which the Federal government would have to deal in the matter of joint work pertaining to vocational education in agriculture the trades and industries. In creating such board, section 367-3 G. C. provides:

"In order to carry out the provisions of this act, there is hereby created the state board of education, which shall consist of the superintendent of public instruction, and six appointive members, who shall be persons of recognized standing and ability in business, the professions, industry or the trades, to be appointed by the governor. Not more than three of the appointive members shall be members of the same political party. Two of the six appointive members shall be appointed for a period of two years, two for a period of four years, and two for a period of six years, and at the expiration of their terms their successors shall be appointed for terms of six years each. The board shall elect one of its appointive members to serve as president."

The matter of meetings of the board is covered in section 367-4 G. C., which reads as follows:

"The superintendent of public instruction shall serve as secretary of the board and shall designate some employe of the department of public instruction to act as clerk, who shall take charge of all papers and perform all clerical work in conection with the meetings of the board. Regular meetings of the board shall be held at the office of the superintendent of public instruction and special meetings may be held at any place within the state, upon the call of the president or of a majority of the board. No compensation shall be paid to any member of the board, but each shall receive his necessary and actual expenses incurred in attending meetings and while engaged in performing the duties imposed by this act. All such expenses and any other expenses incurred by the board in the official conduct of its business as authorized in this act shall be paid upon receipt of itemized bills authorized by the board and approved by the president. Vouchers for said bills shall be drawn by the auditor of state, payable from appropriations made by the general assembly."

The pertinent part of such section bearing upon the question at hand, is this sentence:

"Regular meetings of the board shall be held at the office of the superintendent of public instruction and special meetings may be held at any place within the state upon the call of the president or of a majority of the board."

This sentence means that there is an absolute distinction between a special meet-

ing and a regular meeting; that the regular meetings of the board must be held in the office of the superintendent of public instruction at Columbus, but special meetings can be held at other points in the state, but there must be a call either upon the part of the president or of a majority of the board. You say at the regular June meeting of the board it was voted to hold the next meeting at Cedar Point at the time of the meeting of the state teachers association. Following such vote at the June meeting of the state board of education four of the six members, as well as the supervisor of agriculture and home economics education, went to Cedar Point at the time of the state teachers association convention at that place, but now the auditor of state has refused the payment of their expense accounts on the ground that such a meeting was not within the intent of the law. It is therefore necessary to examine the minutes of the Ohio state board of education, in order to find out just how this meeting came to be held at Cedar Point on the day in question.

It is found that during the current year the state board of education, by their minutes, met in Columbus in the office of the superintendent of public instruction on the following days: January 21, 1919, March 18, 1919, April 10, 1919, May 12, 1919, and June 2, 1919, which seems to carry with it that the state board of education holds monthly meetings, although no minutes appear for the month of February, 1919.

The following entries relative to adjournment appear from the records:

On January 21, 1919, the last entry is:

"On motion the *meeting* adjourned."

On March 18, 1919, the entry is:

"On motion the *meeting* adjourned."

On April 10, 1919, the last entry is:

"On motion the *board* adjourned."

On May 12, 1919, the last entry is:

"On motion the board adjourned to meet again on June 2d. Carried."

On June 2, 1919, the last entry is:

"Moved and seconded that the board adjourn to meet again at Cedar Point on Tuesday morning, June 24th, at 9:00 o'clock. Carried."

Following this the next entry bears upon the meeting at Cedar Point and the first paragraph of the minutes of the Cedar Point meeting reads as follows:

"COLUMBUS, OHIO, June 26, 1919.

A special meeting of the Ohio State Board of Education was held at Cedar Point, Hotel Breakers, on Tuesday afternoon, June 24th, at 4 o'clock, with president Vivian, secretary Pearson, members Edmund, Condon, Mrs. Hughes, Eldridge, supervisors Heusch, Stewart, Mrs. Adams and Miss Kaufman, present. McCune absent.

Upon suggestion of Dr. Condon the reading of the minutes of previous meeting was dispensed with."

The minutes show that at this Cedar Point meeting there was one motion made and carried, that being that the Federal board be requested to rule on the matter of securing funds for the transportation of teachers visiting home project work. The last entry of the minutes of the Cedar Point meeting reads as follows:

> "On motion of Mr. Edmund, seconded by Mrs. Hughes, the board adjourned to meet Tuesday, July 8th, at 9 a. m., at the office of the superintendent of public instruction, in Columbus."

It frequently has been held by the courts that a board of education, and in fact any body having similar functions to perform, speaks only from its records, and, as given above, the minutes of the June 2d meeting, at Columbus, shows that it was moved and seconded, though nothing is shown by whom such motions were made, that the board adjourn to meet again at Cedar Point on Tuesday, June 24, at 9:00 o'clock.

The minutes of the next meeting, it will be noted, were dated Columbus, as of June 26th, that is, two days after the time of the meeting at Cedar Point. It seems also that the meeting was called for 9:00 o'clock, June 24th, and the description shows in the minutes of June 26th that the board met on Tuesday, afternoon, June 24th, at 4:00 o'clock. These minutes of June 26th start out by saying "a special meeting of the Ohio state board of education was held at Cedar Point, Hotel Breakers, on Tuesday afternoon, June 24th, at 4:00 o'clock," with various members and board employes present, without showing by whom the special meeting was called or for what purpose.

> "A board of education can speak only through its records, and these must accordingly be complete, showing just what the board did and no more * * * The records of a special meeting should state by whom the meeting was called, as the legality of the proceedings depends upon the legality of the call." 11 Mass., 477; 17 Me., 444.

The question before us is whether the meeting of the Ohio state board of education and its employes at Cedar Point was a special meeting which may be held at any place within the state, but must be upon the call of the president or the call of a majority of the board (section 367-4 G. C.), or whether, referring to the minutes of June 2, 1919, it was an adjourned session of the June meeting, since it was provided for by motion regularly made and recorded in the minutes of the meeting of June 2d. The minutes say in the closing paragraphs of June 2d, that the board adjourned to *meet again* during June, that is on June 24th, at 9:00 o'clock a. m., but actually met at 4:00 o'clock p. m. on that day, and the minutes were written at Columbus under date of June 26th. Here the board acted three weeks ahead in setting its meeting at Cedar Point on June 24th, and as far as can be ascertained, there was no call for the meeting issued to the members of the board by the president of the board or a call issued by four members of the board, that is, a majority of the six composing the board. The minutes of the board show that the board met in June and then by motion, spread upon its minutes, agreed to meet again three weeks later. The contemplation of the law is that a special meeting is one for which there is a special reason in its being called, and this reason must be stated in the call of the president or a majority of the board, and there is nothing in a study of the minutes to indicate that there was a special reason for the meeting of the board at that time or a special reason why it should be held at some specified place other than Columbus, and it would seem, therefore, that as far as the statutes are concerned, the meeting held at Cedar Point by the members and employes of the state board of education was not a special meeting, in compliance with the statute, because the minutes do not show that it was called by the president or by a majority of the board, but

was a meeting held following a motion which said that the board was to meet again at Cedar Point on Tuesday morning, June 24th, this being the same language in calling the June 24th meeting that was used to call the June 2d meeting, because the minutes of May 12, 1919, close as follows:

"On motion the board adjourned *to meet again* on June 2d."

It may be said that the point at issue could be very easily cleared up if the minutes of this board made it clear that the meeting was a special meeting and called in the proper way, with the reasons given in the minutes as to why it was called; but an examination of the minutes of this board does not show that the board met "upon the call of the president or of a majority of the board" (the language of the statute), but upon their own motion on June 2, 1919, that they would meet again on June 24th at Cedar Point, and nothing indicates that this was a "special" meeting in the language of such minutes of June 2, and regular meetings must be held in Columbus.

On the question submitted, it is the opinion of the Attorney-General:

1. The meeting of the state board of education at Cedar Point on June 24th was not a special meeting properly called under the law. A special meeting of the state board of education may be held at any place within the state, but to make such meeting legal the president of the state board of education shall make the call, or it can be made by a majority of the board, said call to be sent to all members of the board

2. The minutes of the state board of education in covering a special meeting of such board, should show by whom such special meeting was called. and the reason therefor; and all minutes of the board shall be signed by the president and secretary in the permanent record.

Respectfully,
JOHN G. PRICE,
Attorney-General.

737.

COMMISSIONER OF SECURITIES — AUTHORIZED TO ISSUE CERTIFICATE PERMITTING DISPOSAL OF "INTERIM CERTIFICATES" OF THE NATIONAL HARDWARE STORES, INC.

The commissioner of securities is authorized to issue his certificate permitting disposal in Ohio of "interim certificates" of the National Hardware Stores, Inc., a corporation of New York, which "interim certificates" simply constitute an evidence of subscription to the capital stock of said corporation, bearing 7 per cent interest and redeemable in the preferred stock of said corporation when the same may be issued in compliance with the laws of New York, the object of the issuance of such interim certificates being to make available to the corporation at the time of making application for authorization to increase its capitalization an amount of assets equal to the amount of the proposed increase, and the undertaking of the corporation being to redeem such certificates in shares of its duly authorized preferred capital stock.

COLUMBUS, OHIO. October 28, 1919.

HON. P. A. BERRY, *Commissioner of Securities, Columbus, Ohio.*

I have your recent communication submitting for the opinion of this department thereon the following statement of facts and inquiry:

"Will you kindly render to this department an opinion on the following question:

The National Hardware Stores, Inc., is a corporation organized under the laws of the state of New York which is proposed to increase its capitalization. The laws of the state of New York provide that before an increase may be authorized the amount of such increase must be subscribed and paid for in advance. Said company is making application to this department for permission to enter this state to dispose of shares representing said proposed increase in its capitalization and to issue interim certificates conditioned upon a sufficient amount of subscriptions or shares being sold to authorize the state of New York to issue a certificate of increase. Has this department authority to issue a certificate of corporate compliance to a corporation organized under the laws of the state of New York with a present capitalization issued and fully paid for, permitting it to enter the state of Ohio to solicit and sell interim certificates for the purpose of increasing its capitalization, the actual certificates to be issued when the increased capitalization has been authorized by the state of New York?".

With your communication you also submit considerable data in the way of reports required under the law to be submitted in connection with the application for certification of the securities proposed to be placed upon the market in this state and from a consideration of which it appears that the National Hardware Stores, Inc., is now proposing to increase its capital stock to $1,000,000 preferred, 7 per cent participating cumulative stock, and 7 per cent non-participating cumulative stock of the par value of $100 per share, and also to increase its no par value stock to 60,000 shares, it being stated that the present capitalization of the company consists of 10 shares of preferred stock of the par value of $100 and 2,000 shares of common stock of no par value, all of which has been issued and the preferred stock paid for at par, while the common stock was paid for at $5.00 per share, thus making a total cash capitalization of $11,000 paid in.

It is stated that the corporation is in process of enlarging and extending the scope of its business, necessitating increased capitalization, and that the plan to issue interim certificates has been adopted out of a consideration of certain requirements of the New York law where the company is located, that the authorization to increase its capital stock may not be effected until the amount of the increase has been received in money or property by the corporation.

The provision of the law said to be applicable is section 20 of the stock corporation law of New York, which is as follows:

"No corporation formed pursuant to section 19 hereto, shall begin to carry on business or shall incur any debts until the amount of capital stated in its certificate of incorporation shall have been fully paid in money or in property taken at its actual value.

In case the amount of the capital stated in its certificate of incorporation shall be increased as herein provided, such corporation shall not increase the amount of its indebtedness then existing until it shall have received in money or property the amount of such increase of its stated capital.

The directors of the corporation assenting to the creation of any debt in violation of this section, shall be liable jointly and severally for such debt."

It is further stated that the "interim certificates" proposed to be issued constitute in fact simply an evidence of subscription to the preferred capital stock of the company, which certificates are interest bearing at the rate of 7 per cent from the date of their issuance and are exchangeable for participating preferred stock of the company

when its issuance is authorized; and further, that upon the procurement of the subscriptions for the entire amount of such preferred stock and the receipt of payment therefor at par, or from time to time as such subscriptions are taken and paid for, the corporation will make application for authorization to issue such stock.

While I have not been furnished with a draft of the proposed "interim certificates," I am informed by the president of the corporation and by its counsel, that the certificates will embody the corporation's specific undertaking to deliver the preferred capital stock of the corporation as described in its financial circular of January 1, 1919, a copy of which is furnished me, and discloses the character and attributes of the stock to be as outlined above.

These certificates thus evidence simply the obligation arising upon a subscription for specific capital stock of the corporation and payment therefor, and are employed, as stated by the corporation's counsel, by reason of an administrative construction of the New York corporation law requiring that a proposed increase in the capitalization of a corporation amenable to such law must be fully subscribed and paid in before the authorization for such increase may be procured.

Upon this state of facts it is to be determined whether the commissioner of securities is authorized to act as provided in the so-called Blue Sky Law in the matter of issuing a certificate as a prerequisite to the disposal of securities.

Pertinent sections of the law will be noted. The term "securities" as comprehended by the law in question is substantially defined in the first section thereof as follows:

> "Section 6373-1. Except as otherwise provided in this act, no dealer shall, within this state, dispose or offer to dispose of any stock, stock certificates, bonds, debentures, collateral trust certificates or other similar instruments (all hereinafter termed 'securities') evidencing title to or interest in property, issued or executed by any private or quasi-public corporation, copartnership or association (except corporations not for profit,) or by any taxing subdivision of any other state, territory, province or foreign government, without first being licensed so to do as hereinafter provided."

It is provided in section 6373-2, subdivision f:

> "As used in this act, the term * * * 'dispose of' shall be construed to mean 'sell, barter, pledge or assign for a valuable consideration or *obtain subscriptions for*.'"

Thus it is at once apparent that the obtaining of subscriptions of the capital stock of the corporation which it is proposed to issue upon qualifying under the provisions of the New York law constitutes an activity comprehended by the terms of the Ohio law, and renders the corporation engaging in the procuring of such subscriptions amenable to the requirements of the law.

Section 6373-14 provides:

> "For the purpose of organizing or promoting any company, or assisting in the flotation of the securities of any company after organization, no issuer or underwriter of such securities and no person or company for or on behalf of such issuer or underwriter shall, within this state, dispose or attempt to dispose of any such security until such commissioner shall issue his certificate as provided in section 6373-16 of the General Code * * *."

From the provisions of the law which have already been noted, it is determined that the taking of subscriptions to the capital stock of the corporation in question or the disposing of its "interim certificates," however the transaction be viewed, constitutes a disposing of securities, which requires compliance with provisions of the

law which direct that the corporation shall file with the commissioner of securities an application for the certificate provided in section 6373-16 G. C. and certain information relative to its organization and the proposed disposal of its securities.

Section 6373-16 provides that the commissioner shall have power to make such examination of the issuer of the securities as he may deem advisable, and that after completion of his investigation,

> "if it shall appear that the law has been complied with and that the business of the applicant is not fraudulently conducted, and that the proposed disposal of such securities or other property is not upon grossly unfair terms, and that the issuer or vendor is solvent, upon the payment of a fee of ten dollars, the commissioner shall issue his certificate to that effect, authorizing such disposal."

It is apparent that under the provisions of the sections which have been considered above, certain of the conditions which must be found by the commissioner preliminary to his issuance of certificate for disposal of the securities relate to questions of fact relative to the solvency of the issuer and the fairness of the proposed terms for disposal of the securities and the absence of fraud in the conduct of the applicant's business.

These questions of fact are to be determined by the commissioner from his investigation and from the information which he is authorized to require from the applicant.

The sole question to be now determined is one of law and really arises from the language of the section last quoted prescribing as a condition to the issuance of the certificate by the commissioner that "it shall appear that the law has been complied with."

Considering this question specifically, I am of the opinion that the method adopted by the corporation for effecting the increase of its authorized capitalization is not inconsistent with the letter and apparent spirit and purpose of the section of the New York law requiring that in case of increase of capitalization "such corporation shall not increase the amount of its indebtedness then existing until it shall have received in money or property the amount of such increase of its stated capital."

By the plan to take subscriptions and issue "interim certificates" evidencing the same, the corporation proposes to procure the equivalent of the proposed new issue of stock in money or property before the issuance of such stock, and when from an examination of the terms of the proposed "interim certificate" you find its provisions and undertaking to be in accord with the plan outlined in the communication at hand, and that the rights and interests of the subscribers are fairly set forth and safeguarded therein, and have further found the other conditions of fact enumerated in the statute favorable to the applicant, you are advised that the conditions of the Blue Sky Law have been met and the issuance of your certificate is authorized.

Respectfully,

JOHN G. PRICE,

Attorney-General.

738.

COUNTY COMMISSIONERS ARE WITHOUT AUTHORITY TO EMPLOY FIELD WORKER TO PLACE DEPENDENT CHILDREN IN PRIVATE FAMILIES—SEE SECTION 3092 G. C., 108 O. L., 51.

Under section 3092 G. C., as amended in house bill 246, 108 O. L., 51, the county commissioners are without authority to employ a field worker who will place its dependent children in private families and exercise supervision over them after placement.

COLUMBUS, OHIO, October 28, 1919.

The Board of State Charities, H. H. SHIRER, *Secretary, Columbus, Ohio.*

GENTLEMEN:—Acknowledgment is made of your recent request for the opinion of this department as follows:

> "A private child caring organization proposes to contract with the county commissioners in one of the counties of Ohio for the care of its dependent children pursuant to the provisions of the amended section of 3092 of the General Code as found in H. B. 246.
>
> In such case, have the county commissioners authority to enter into contract with this institution not merely for the care of its wards on a per capita basis, but may they in addition to this employ a field worker who will place children in family homes and exercise supervision over them after placement?"

Article X, section 5, of the constitution of Ohio, and section 3092 G. C., as amened in house bill 246 (108 O. L., 51), are pertinent to your inquiry.

The constitutional section above referred to prohibits payment of money from the county treasury unless authorized by law. Section 3092 is as follows:

> "In any county where such home has not already been provided the board of county commissioners may enter into a contract for the care of its neglected or dependent children with a county children's home, or with any institution or association in the state which has for one of its objects the care of dependent or neglected children, provided such institution or association has been duly certified by the board of state charities; or the board of county commissioners may pay reasonable board and provide suitable clothing and personal necessities as well as medical, dental and optical examination and treatment of dependent or neglected children who may be placed in the care of private families within the county. Provided that in any such case such dependent or neglected children shall be duly committed to the aforesaid institution or association-or placed in the care of a private family by the juvenile court as provided by law.''

The word "home" as used in the first line of this section refers to a county children's home by reference to the preceding sections and it is to be noted that this section only applies where a county children's home has not been provided. Under it the county commissioners are authorized to enter into a contract "for the care of its neglected or dependent children" with a county children's home or such institution having for one of its objects the care of such children as has been duly certified by the board of state charities. This is the provision of the first part of the section down to the first semi-colon and is complete in itself. Then follows provision for an alternative in this that the section provides that such commissioners may pay reasonable

board and provide clothing and other necessities, as well as medical, dental and optical treatment for such children in "the care of private families within the county."

The provisions relating to placing such children in a county children's home, or in the institution above referred to, is "for the care" of such children, while in the latter part of the section the different things which the commissioners are authorized to contract and pay for are specifically mentioned.

The proposition involved in your inquiry, as stated in your letter, is something "in addition" to the care of such children, and questions the authority of the commissioners to "employ a field worker who will place children in family homes and exercise supervision over them after placement," as stated in your letter. The duties of such employe towards such children cared for outside of a county children's home would be similar to those of a superintendent of a county children's home, and would not be without similarity to those duties of a juvenile probation officer.

The question here is one which goes to the power and authority of the county commissioners, as said in the case of Jones, Auditor, vs. Commissioners, 57 O. S., page 189:

> "The board of county commissioners represents the county, in respect to its financial affairs, only so far as authority is given to it by statute."

Bearing in mind the firmly established rule in this state that public funds can only be paid out by authority of law, if the employment and services of the field worker are, as stated in your letter "in addition" to the care of such children, then it would follow that such employment is not authorized by section 3092, under which the commissioners may contract "for the care" of such children. In view of the fact that under the first part of this section it is contemplated that such children will be placed either in a county children's home or an institution which has for one of its objects the care of such children, it would seem that such supervision would be furnished by the institution or home in which such child was placed and would be included in the care furnished by such home or institution and for which the commissioners would pay.

As already pointed out, the latter part of the section referred to relates exclusively to the care of such children in private families. This part of the section makes no provision for the employment of such a field worker. Can it be said that this section furnishes clear warrant for such expenditure of public funds?

We may turn to section 3092 (103 O. L., 891) before its amendment by house bill 246. At that time this section in part provided for transferring such children to the nearest children's home, or the commissioners could lease suitable premises for that purpose,

> "Which shall be furnished, provided and managed in all respects as provided by law for the support and management of children's homes * * *. But the commissioners may provide for the care and support of such children within their respective counties, *in the manner deemed best for the interest of such children*, which may include the payment of board for such children in a private home."

Here was ample authority and wide discretion vested in the county commissioners in this, that they had authority to provide for the care and support of such children "in the manner deemed best for the interest of such children."

The omission of this grant of discretion and authority from the new act, considered with its present lack of express or implied authority to employ a field worker, leads this department to the conclusion that the county commissioners are not authorized to enter into the contract stated in your letter.

Respectfully,
JOHN G. PRICE,
Attorney-General.

739.

MUNICIPAL COURT OF TOLEDO—FORFEITURE OF BAIL—MAY AT SAME TERM VACATE FORFEITURE—DIRECTOR OF PUBLIC SERVICE IS AUTHORIZED TO INVEST SURPLUS FUNDS ARISING FROM CEMETERY CHARGES—SUCH BONDS IN CUSTODY OF CITY TREASURER.

1. *Where the municipal court of Toledo has declared the forfeiture of bail, it may at the same term vacate and set aside such record of forfeiture.*

2. *Under section* 4167, *the director of public service is authorized to invest surplus funds in his hands arising from regular collections from the cemetery charges, and the bonds or other form of investment purchased by such funds shall be held in the custody of the city treasurer.*

COLUMBUS, OHIO, October 28, 1919.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

> "Following the interview of this morning between your Mr. Martin and State Examiner John E. Diemer of this bureau, we are respectfully requesting written opinion upon the following matters:
>
> Under house bill 79, passed by the recent general assembly, money in lieu of bail is authorized in such court by section 1579-311, pages 8 and 9.
>
> Question 1. After such cash bail has been received and the defendant fails to appear and the court orders the bail forfeited, may such court later revoke or set aside the forfeiture of such cash bail?
>
> We are calling your attention to opinion of the Attorney-General of May 27, 1912, page 1747 of the Annual Reports for 1912, and in case of any surplus accrued from the regular collections of cemetery charges by the director of public service accumulating to an extent to justify investment:
>
> Question 2. Are such investments to be made by the director of public service and are such investments to be held in the custody of the director of public service, or should such investment be made by council and be held in the custody of clerk of council?"

Sections 1579-276 et seq. (107 O. L., 704) creating the Toledo municipal court, sections 1579-296, 1579-287, 1579-311 and sections 13550 et seq. are pertinent to your first question:

Section 1579-276, after establishing such municipal court, fixes the terms thereof as follows:

> "Sec. 2. The calendar of the municipal court shall be divided into four terms of three months each, beginning respectively on the first day of January, April, July and October of each year."

In passing it is here noted that this court is a court having regular and stated terms.

Section 1579-287, as amended in H. B. 79, as to such court's jurisdiction, provides:

> "In all civil actions and proceedings of law for the recovery of money or personal property of which the court of common pleas have or may be given jurisdiction when the amount claimed by any party * * * does not exceed seven hundred and fifty dollars."

Section 1579-296 provides that the laws relating to practice and procedure in actions in the court of common pleas, justices of the peace and police courts, are applicable to like proceedings in the municipal court so far as consistent with the municipal court act.

Section 1579-311 was amended to provide for the admission of a person accused of a misdemeanor to bail by a cash deposit in lieu of a bond and provides "the bail so given or the money so deposited shall continue until the case is finally disposed of."

It is to be noted that the Toledo municipal court act contains no provision as to the forfeit of such cash recognizance.

Section 13550 provides in part:

> "The court, in which the action for the penalty of a forfeited recognizance is brought, may remit or reduce part or the whole of such penalty and render judgment thereof according to the circumstances of the case and the situation of the party, and upon such terms and conditions as seem just and reasonable."

Section 13551 provides for the further right to review the judgment on such forfeited recognizance "when after such rendition, the accused has been arrested and surrendered to the proper court, to be tried on such charge."

Whether or not the Toledo municipal court would have jurisdiction of an action on a forfeited recognizance, the penalty for which is not over $750.00, is not here passed upon, as your question may be answered by consideration of the control which the Toledo municipal court has over its own records.

Similar questions were considered in opinion 251, dated May 2, 1919, directed to Hon. Charles R. Sargent, prosecuting attorney, Jefferson, Ohio, and opinion No. 446, dated June 30, 1919, and directed to your department. The latter opinion cites and quotes from the case of Antonio vs. Milliken, 29 O. C. A., 305, wherein the power of the municipal court of Youngstown to suspend sentence was under consideration. In this case, as in the former opinion of this department, it is pointed out that the power to modify judgments during the term in which they are rendered, is an attribute of courts of general jurisdiction which have terms.

Pointing out that the Youngstown municipal court act provided for the terms of that court, the court held that it had power to suspend the execution of its sentence "during the term at which sentence was passed, even though the defendant had entered upon the imprisonment ordered by the sentence." The reasoning of the court was that the court had such power "upon the theory that a court has control over its judgments and orders during the term at which they are made," and concluded:

> "The judge of the municipal court had a right in the case at bar to direct the release of the prisoner."

Consistent with the foregoing opinions, and the holding established in this and other cases in this state, it is concluded that during the term at which the bond is forfeited, the court may later revoke or set aside such forfeiture.

Your second question is as follows:

> "Are such investments to be made by the director of public service and are such investments to be held in the custody of the director of public service, or should such investment be made by council and be held in the custody of clerk of council? "

Sections 4167, 4168, 4169, 4170 and 4300 G. C. are pertinent. Section 4167 relating to the duty and power of the director of public service, in connection with cemeteries, provides in part: that such director

"shall have entire charge and control of receipts from the sale of lots, and of the laying off and embellishing the grounds. He may receive donations by bequest, devise, or deed of gift, or otherwise, or money, or other property, the principal or interest of which is to be used for the enlargement, improvement, embellishment or care of the cemetery grounds generally, or for any particular part * * * as the donor directs * * *. He shall sell lots, receive payment therefor * * * and invest, manage and control property *received by donations and surplus funds in his hands from any source whatever.*"

Section 4168 provides that the city may accept and maintain permanent funds for the care of lots in such cemeteries. When such a permanent fund is received, the director is authorized to enter full details of such endowment and the expenditure thereof in his books. keeping each case separately.

By the terms of section 4169, the director is ordered to turn

"over to the council property on hand or held by him as a permanent fund, for purposes under his control * * *. The council shall acknowledge receipt thereof in writing to the director signed by its clerk. By resolution duly passed and entered on the minutes of its proceedings, the council shall pledge the faith and credit of the corporation to forever hold such money as a permanent fund, and pay in semi-annual payments, to the director as interest on the funds, sufficient to provide perpetual care of the lot and lots as agreed by the director. The council and its successors shall invest and keep invested such funds in interest bearing debts of the city, if any, and if no such debts are owing by the city, in safe interest bearing bonds, or stocks for the benefit of such cemetery funds, that will bear as great an income as possible, and all such money and the income thereof shall be exempt from taxation, the same as other cemetery property."

Section 4300 provides that:

"The treaurer shall receive and disburse all funds of the corporation including the school funds, and such other funds as arise in or belong to any department or part of the corporation government."

It is to be noted that under sections 4167 and 4168, at least three classes of receipts may be received by the director, as follows: (1) receipts from the sale of lots or other cemetery charges; (2) donation funds to be used and expended immediately; and (3) permanent endowment funds for the perpetual care of such cemetery or certain lots therein. It is noted that your question relates only to "regular collections of cemetery charges" and eliminates what has been above termed classes 2 and 3.

It is to be noted that in section 4167, the director is given charge and control of receipts from the sale of lots. In this section he is also authorized to receive bequests for the use of the cemetery, or a part thereof as the donor may direct. As to these classes of receipts, the last part of the section directs that the director shall "invest, manage and control them."

As to permanent endowments, however, a different course is prescribed. Upon receipt of these the director issues a written receipt and acknowledgment, pledging the faith and credit of the city to the proper use of such funds. A particular record is made on the director's minutes, exhibiting full details of the transaction.

Under section 4169 such fund is turned over to the city council, which issues a receipt to the director. Again the credit of the city is pledged on the council's minutes. In this section as to the permanent endowment funds, council "and its successors shall invest and keep invested such funds."

Consideration has been given the opinion of the former Attorney-General, found in Opinions of the Attorney-General for 1912, Vol. 2, page 1747, and the conclusion therein reached, so far as applicable to the question raised in this inquiry, is approved. It is to be noted, however, that in that opinion only permanent endowment funds were under consideration.

Consideration of these sections leads to the conclusion that the investment of regular collections of cemetery charges is to be made by the director of public service under section 4165. A proper record of such investment should be made by the cemetery secretary and the investment held in the custody of the city treasurer.

Respectfully,
JOHN G. PRICE,
Attorney-General.

740.

AGRICULTURE SEED LICENSE—AN INCORPORATED COMPANY HAVING PAID LICENSE FEE TO SELL AGRICULTURAL SEED IS NOT REQUIRED TO PAY SAME FOR BRANCH HOUSES UNDER SAME NAME IN OHIO.

An incorporated company having paid the license fee required by section 5805-13 *(section* 13, *amended senate bill No.* 11, 108, *O. L.*, 52), *and having received from the secretary of agriculture a certificate to sell agricultural seed, is not required to pay a separate license fee for its branch houses operated under the same name within the state.*

COLUMBUS, OHIO, October 28, 1919.

The Department of Agriculture, Division of Feeds and Fertilizers, Columbus, Ohio.

GENTLEMEN:—Acknowledgemnt is made of the receipt of your letter requesting the opinion of this department as follows:

> "The B. Milling Co. writes us that they are an incorporated company, having four houses, 'branches,' all operating under same name, and requesting to be advised whether one agricultural seed license will cover all places, or if a separate license is required for each separate branch.
>
> We desire to know whether or not one license will cover all branch houses, whether located in the same town or in different towns in different sections of the state."

Section 5805-13 (section 13 of amended senate bill 11) is pertinent. This is the license fee section of the new agricultural seed act and in part provides:

> "For the purpose of defraying the cost of inspection and analyses of agricultural seeds * * * before any person, firm, company or corporation shall sell, offer for sale, or expose for sale in this state any of the agricultural seeds * * * he or they shall pay each year *a license fee* * * * and shall receive from said secretary of agriculture a certificate *to sell agricultural seeds* until the first day of January next following."

For the purpose stated in this section, this license fee is imposed on the business of selling or exposing "for sale in this state any of the agricultural seeds." It is to be noted that the selling or exposing for sale does not relate to such sale or exposure for sale in any particular part of the state, but merely "in this state." It is also noted that but one license fee is required and but one certificate is issued, the act requiring the payment of a "license fee" and the issuance of "a certificate."

The opinion of this department is that separate licenses are not required for branch houses of a company which has complied with this section by the payment of the license fee required and to which has been issued by the secretary of agriculture "a certificate to sell agricultural seeds."

Respectfully,
JOHN G. PRICE,
Attorney-General.

741.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN ADAMS COUNTY, OHIO.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, October 28, 1919.

742.

PROBATE JUDGE—FEMALE PERSON APPOINTED TO ACCOMPANY SHERIFF TO INSTITUTION FOR FEEBLE-MINDED WITH A PATIENT—EXPENSES AND FEES ALLOWABLE—EXPENSES ALLOWABLE TO PERSON APPOINTED BY PROBATE JUDGE TO CONVEY PATIENT TO OHIO HOSPITAL FOR EPILEPTICS.

1. *A female person appointed by the probate judge to accompany the sheriff and a feeble-minded person to the institution for the feeble-minded is entitled to receive only such fees and allowances for expenses as are provided by section* 1981 *G. C., as amended by H. B. No.* 108 *O. L.* 262, *to wit, a fee of two dollars, and mileage at the legal rate of railroad transportation for the distance actually and necessarily traveled. Expenses for meals can not be allowed such assistant.*

2. *A person appointed by the probate judge to convey a patient to the Ohio hospital for epileptics at Gallipolis is entitled to receive a fee of two dollars for such service and likewise traveling and "incidental expenses." "Incidental expenses" include reasonable expenses for the meals of such person.*

COLUMBUS, OHIO, October 29, 1919.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—You recently wrote this office to the following effect:

> "My attention has been called by the sheriff to a bill, the following of which is a true copy, for the transporting of a female patient to the Feeble-Minded Hospital at Columbus, Ohio, on Friday, August 29, under section 1981 limiting the allowance to $2.00 and 2 cents per mile, and under section 1959 requiring the appointment of a suitable female assistant to accompany the sheriff and such insane person to said hospital:
>
> 'Assistant's expenses:
> Railway fare round trip $7 40
> Two meals on trip 1 00
> Total $8 40
> Assistant's fees:
> Mileage 240 miles at 2 cents per mile $4 80
> For making trip 2 00
> Total ..... $6 80'

Your attention is called to the fact that the railroad fare for the round trip was $4.80; that the compensation to such female for services was $2.00, making a total of $6.80. That the actual railroad fare was $7.40, and the actual expenses of the trip being two meals $1.00, making total of $8.40. That for the reason of the expense being greater than the amount of money received, the sheriff will be unable to procure a female attendant to transport such persons to Columbus, and that the institution at Gallipolis being much farther and more expensive to access, he is inquiring what can be done to carry out his duties in this matter."

Section 1893 G. C., as amended in S. B. No. 153, 108 O. L. 552, says in part:

"Feeble-minded persons * * * shall be admitted to the institutions for the feeble-minded * * *. Such persons shall be * * * admitted to the institutions for the feeble-minded in the same manner and by like proceedings as are provided for the commitment and admission of insane persons to the state hospitals for the insane * * * and the same fees, costs and expenses that are allowed and paid in lunacy cases shall be allowed, taxed and paid for similar services in all proceedings related to feeble-minded persons * * *."

Section 1959 G. C., to which you refer, is a part of chapter 7 of title V of the General Code, entitled "Hospitals for the Insane," and reads thus:

"When advised that the patient will be received, the probate judge shall forthwith issue his warrant to the sheriff, commanding him forthwith to take charge of and convey such insane person to the hospital. If the probate judge is satisfied, from proof, that an assistant is necessary, he may appoint one person as such. If the insane person is a female, he shall appoint a suitable female assistant to accompany the sheriff and such insane person to the hospital."

Section 1981 G. C., to which you also refer, is likewise a part of the same chapter of the General Code. This section was recently amended by H. B. 143, 108 O. L. 262, 263, effective August 11, 1919, and now reads, in part, as follows:

"* * *. The costs and expenses, other than the fees of the probate judge and sheriff, to be paid under the provisions of this chapter, shall be as follows: * * * to one assistant to convey to the hospital, when authorized by the probate judge, two dollars *and mileage at the legal rate of railroad transportation;* all mileage herein shall be for the distance actually and necessarily traveled."

The underscored words in the above quoted section are new matter. They take the place of the following language found in said section, prior to its recent amendment:

"* * * two dollars and *two cents per mile each way.*"

It thus appears that the legislature has remedied the difficulty spoken of in your letter. In fact, the amendment to section 1981 G. C. was in effect on August 29, 1919, when you say the services were rendered by the female assistant mentioned in your letter. Such assistant is therefore entitled to receive "mileage at the legal rate of railroad transportation," which, under present conditions, will, of course, be more than two cents per mile.

Your statement is also noted that said assistant, in performing the services noted incurred the expense of two meals, costing one dollar. Your attention is called to the fact that there is no statutory authority for the payment of the "expenses" of the assistant, other than the expense of railroad transportation.

In the case of Ward vs. Russell, 57 O. S. 144, 145, it is said:

> "The right of a sheriff to mileage for transporting an insane person to one of the state hospitals for the insane, is purely statutory; he is entitled to receive for such service whatever the statute allows, and nothing more."

The same considerations apply to the payment of fees and expenses to the sheriff's assistant.

Your letter also refers to the fees and expenses payable to a person appointed by the probate judge to accompany an epileptic person committed to the Ohio hospital for epileptics at Gallipolis.

Authority for the appointment of such a person is given by section 2048 G. C which in part says:

> "If the judge deems it proper to intrust the conveyance of the patient to his parent, guardian, representative or friend, he may issue the warrant to such parent, guardian, representative or friend, *instead of the sheriff*."

The concluding words of the above section indicate that the person accompanying the patient to the hospital for epileptics goes in the place of, and not with, the sheriff. However, section 2044 G. C. provides that in the commitment and conveyance to the hospital of insane or dangerous epileptics, like proceedings shall be had as are provided by law for the commitment and care of the insane. Said section would doubtless authorize the appointment of an assistant to the sheriff in respect of an insane or dangerous epileptic, just as section 1959 G. C. does with respect to insane persons committed to state hospitals for the insane.

Authority for the payment of a fee of two dollars to such person appointed to accompany an epileptic who has been committed to the state hospital for epileptics is contained in section 2050 G. C., by virtue of the reference therein made to the statute giving "similar fees in the commitment of an insane person to a state hospital." Section 2050 G. C. reads in part:

> "The fees of the probate judge, physician and other officers, witnesses and persons, growing out of the admission of a patient to the hospital, shall be paid to the amount, and in the manner as similar fees in the commitment of an insane person to a state hospital. * * *."

Authority for the payment of *expenses* is given by section 2049 G. C., which says in part:

> "* * * The traveling and incidental expenses of the patient and of the officer or other person or persons in charge of the patient, to and from the institution shall be paid by the counties, or as provided by general provisions relating to benevolent institutions."

The words "or as provided by general provisions relating to benevolent institutions" have reference to the expenses of the *patient*, rather than the expenses of the person in charge of the patient. (See H. B. 723, 94 O. L. 182, and R. S., Sec. 631, now known as Sec. 1815 G. C.)

It will be noticed that section 2044 G. C. provides not only for the payment of

traveling expenses of the person in charge of the patient, but for "incidental" expenses as well. Without attempting to decide what all is included in the term "incidental," I am of the opinion that it does include reasonable expenses for meals.

It thus appears that the legislature has made a more liberal provision for the expenses of a person accompanying an epileptic to a state hospital for epileptics, than for the expenses of a person accompanying an insane person to a state hospital for the insane, or a feeble-minded person to the institution for the feeble-minded, in this, that the former is entitled to a fee of two dollars and to traveling expenses (including meals), whereas the latter is entitled to a fee of two dollars and mileage at the legal rate of railroad transportation, but is not allowed the expense of meals en route.

Respectfully,
JOHN G. PRICE,
Attorney-General.

743.

DISAPPROVAL, BONDS OF MERCER COUNTY, IMPROVEMENT CHATTANOOGA ROAD IN THE SUM OF $35,000.

COLUMBUS, OHIO, October 29, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

RE: Bonds of Mercer county in the amount of $35,000 for the improvement of Chattanooga road.

GENTLEMEN:—I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript reveals that the county commissioners failed to cause the notice required by section 6912 G. C. to be published for the length of time provided in said section. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing upon the question of allowing the improvement was held July 28, 1919. The notice of such hearing was published July 18th and 25th of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of hearing.

In the case of Fenner vs. City of Cincinnati, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held: (quoting from the syllabus)

> "Where a statute provides that municipal bonds can only be issued 'After advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same report, p. 342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that the notice of the hearing of September 6, 1919, upon the schedule of estimated assessments was published August 29th and September 5th of the same year. Section 6922 requires that such notice be published "once a week for two consecutive weeks." For the reasons stated in the preceding paragraph I do not believe the published notice meets the requirements of section 6922 and as a result that the county commissioners were without authority to proceed to levy the assessments or to issue bonds in anticipation of the collection of the same.

For the reasons stated, I am of the opinion that the bonds above described are not valid obligations of Mercer county and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

744.

DISAPPROVAL, BONDS OF MERCER COUNTY FOR ROAD IMPROVEMENT IN THE SUM OF $4,300.

COLUMBUS, OHIO, October 29, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

RE: Bonds of Mercer county in the amount of $4,300.00 for the improvement of Bruns road.

GENTLEMEN:—I have examined the transcript of the proceedings of the county commissioners relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript discloses that the county commissioners failed to publish for the required length of time before the date set for hearing objections to said improvement the notice required by section 6912 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing was held August 21, 1919, and notice was published August 8th and 15th of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of the hearing.

In the case of Fenner vs. City of Cincinnati, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, is special term, held: (quoting from the syllabus)

> "Where a statute provides that municipal bonds can only be issued 'After advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same report p. 342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported

opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that notice of the hearing of September 8, 1919, upon the schedule of estimated assessments was published on August 29th and September 5th of the same year. Section 6922 G. C. requires this notice to be published "once a week for two consecutive weeks." For the reasons stated in the preceding paragraph I do not believe the notice given meets the requirements of section 6922.

(3) The resolution of January 13, 1919 fails to determine the kind of the improvement, and this omission is not cured by any subsequent legislation of the county commissioners.

For the several reasons set forth above I am of the opinion that said bonds are not valid obligations of Mercer county and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

745.

DISAPPROVAL, BOND ISSUE MERCER COUNTY ROAD IMPROVEMENT IN THE SUM OF $5,000.

COLUMBUS, OHIO, October 29, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

RE: Bonds of Mercer county in the amount of $5,000 for the improvement of Fullenkamp road.

GENTLEMEN:—I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript reveals that the county commissioners failed to publish for the required length of time before the hearing of objections to said improvement the notice required by section 6912 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing was held August 21, 1919. The notice was published on August 8th and 15th of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of the hearing.

In the case of Fenner vs. City of Cincinnati, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held: (quoting from the syllabus)

> "Where a statute provides that municipal bonds can only be issued 'After advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same report, p. 342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I beleive that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript shows that the notice of the hearing of September 8th on the schedule of estimated assessments was published on August 29th and September 5th of the same year. Section 6922 G. C. requires this notice to be published once each week for two consecutive weeks." For the reasons stated in the preceding paragraph, I do not believe the notice given meets the requirements of section 6922 G. C.

(3) The resolution of July 9, 1919, fails to determine the kind of the improvement and this omission is not cured by any subsequent legislation of the county commissioners.

For the several reasons set forth above I am of the opinion that the bonds under consideration are not valid obligations of Mercer county and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

746.

DISAPPROVAL, BOND ISSUE MERCER COUNTY ROAD IMPROVEMENT IN THE SUM OF $14,000.

COLUMBUS, OHIO, October 29, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE: Bonds of Butler township, Mercer county, in the amount of $14,000 for the improvement of Gerdes road in said township.

I have examined the transcript of the proceedings of the trustees and other officers of Butler township relative to the above bond issue and decline to approve of the validity of said bonds for the following reasons:

(1) The transcript discloses that the township trustees failed to publish for the required length of time prior to the hearing of objections to said improvement the notice required by section 3298-7 G. C. The language of this section is that such notice shall be published "once a week for two consecutive weeks." This hearing was held August 4, 1919. The publisher's affidavit shows that notice was published July 25th and August 1st of the same year. Two full weeks or fourteen days should have intervened between the first publication and the date of hearing.

In the case of Fenner vs. City of Cincinnati, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held: (quoting from the syllabus)

"Where a statute provides that municipal bonds can only be issued 'After

advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same report, p. 342). The supereme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment ot Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable in the interpretation of the language used in section 3298-7 and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript also shows that the notice of the hearing of September 6, 1919, upon the schedule of estimated assessments was published on August 29th and September 5, 1919. Section 3298-15a requires this notice to be published once a week for two consecutive weeks. For the reasons stated in the preceding paragraph I do not believe the notice given meets the requirements of said section 3298-15a.

The transcript is deficient in other respects, probably through omission of matters of record which can be corrected. It is unnecessary, however, to call attention to them specifically as I am of the opinion that the defects mentioned in paragraphs (1) and (2) are fatal. I therefore advise that you decline to accept the above bonds.

Respectfully,
JOHN G. PRICE,
Attorney-General.

747.

MAUSOLEUM—CONTRACT BETWEEN CITY OF ZANESVILLE AND MARIETTA AMERICAN MAUSOLEUM COMPANY FOR ERECTION, CONTROL, REGULATION AND MANAGEMENT OF SUCH BUILDING VALID—SAID MAUSOLEUM EXEMPT FROM TAXATION—DISCUSSION—AND EXCEPTION.

The license granted by the city of Zanesville to the Marietta American Mausolcum Company for the erection of a community mausoleum in the municipal cemetery of Zanesville, and the contract entered into between said city and mausoleum company providing for the exclusive control, regulation and management of said mausoleum by the city, are held to be legal and valid.

The mausoleum, together with the portion of the cemetery grounds which it occupies, devoted to the purpose of entombment of the dead, are exempt from taxation; except to the extent of the property rights reserved to the mausoleum company and held with a view to profit from the sale of crypts in said mausoleum.

COLUMBUS, OHIO, October 29, 1919.

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

GENTLEMEN:—Acknowledgment is made of your request for my opinion as follows:

"We are enclosing you herewith copy of circular No. 419, which was sent to every municipality in the state of Ohio, under date of May 27, 1919, and are referring you to opinion of Attorney-General covering mausoleums, which you will find on page 16. We are also enclosing you copy of contract entered into by the city of Zanesville with a mausoleum company on October 1, 1918, together with bond covering same, entered into June 21, 1919. Also a statement showing Chas. R. Raynor as proprietor of the Marietta American Mausoleum Company and also of the Muskingum county Mausoleum Company, together with motion of council, the only act of authority attempted in the matter, and would respectfully request your written opinion upon the following matters:

Question 1. Is such a structure after erection or completion, not being in itself municipal property, exempt from taxation?

Question 2. What recommendation can this department make the officers of Zanesville relative to the completion of this structure, now nearing about half completion?

Question 3. What recommendation can you make this department relative to stoping this illegal practice?"

With your letter you enclose a copy of the contract entered into between the Marietta American Mausoleum Company and the director of public service of the city of Zanesville, which discloses an agreement between said parties substantially as follows:

By item 1, the mausoleum company is granted the right and privilege to erect a community mausoleum within the Greenwood Cemetery, which is a cemetery located within the city of Zanesville and under its control.

By item 2, the city undertakes to furnish the mausoleum company sufficient ground within said cemetery upon which to construct said mausoleum, the site to be determined by the director of public service and approved by the mausoleum company. Items 3 and 4 provide for compensation to the city for the ground so to be occupied by the mausoleum, said compensation being fixed at thirty cents per square foot, which I am advised is the usual price received for conveyances of burial lots under the rules governing the cemetery.

By item 5, it is provided that the mausoleum company shall pay to the city the sum of $10.00 for each and every crypt constructed within said mausoleum, and the funds so paid to be held as an endowment fund, the same to be perpetually held by the city for the benefit of persons having crypts in said mausoleum building and to be used exclusively for the maintenance, care and preservation of said mausoleum and grounds upon which it is located, in such manner as may be directed by the proper authorities of said city.

Items 7, 8, 9 and 10 of the contract relate to the specifications for construction of the mausoleum and the time allotted for the completion thereof.

Items 11, 12 and 13 provide as follows:

"ELEVENTH. It is mutually understood and agreed between both parties hereto that after said mausoleum shall have been completed, the building together with the land upon which it is located, shall be under exclusive control and direction of the said party of the second part hereto, its successors or assigns, subject to the rules as adopted, or which may hereafter be adopted for the government and control of said cemetery and mausoleum, and in conformity of the laws of the state, county, city and township in which said mausoleum building is located.

TWELFTH. It being further understood and agreed, however, that the said party of the first part and the purchasers of crypts in said mausoleum shall be fully protected in their perpetual lease-hold rights in said crypts.

THIRTEENTH. It is understood and agreed that the use of the chapel in said mausoleum shall be entirely free to the owners of crypts and that there shall be no charge whatsoever by the cemetery to owners of crypts except for the opening and closing of said crypts at a price not to exceed five ($5.00) dollars per crypt."

Item 15 of the contract provides for the execution of a bond by the mausoleum company for the faithful performance of its obligations before entering upon the construction of the building or receiving subscriptions for crypts therein.

Thus in logical sequence your questions numbers 2 and 3 should first be given consideration, as they are interpreted as raising the question of the legality of the arrangement embodied in the contract.

It is noted that the erection of the mausoleum is practically one-half completed, and your third question as well as the reference to a previous opinion of this department indicate that the legality of the transaction is challenged.

The opinion of my predecessor to which you refer is that of October 10, 1913, and appearing at page 1575 of the annual reports of the Attorney-General for said year, and it is there held that:

"A city has no authority at the present time to enter into a contract with the mausoleum company for the erection of a mausoleum in a cemetery for the purpose of selling crypts therein."

My predecessor also announced substantially the same conclusion in an opinion dated January 25, 1912, appearing in the Annual Reports of the Attorney-General for said year at page 342, in which it was said:

"Cemetery trustees or boards, either municipal or township, are not authorized to lease or deed lots to a mausoleum company."

And in an opinion of the same year, appearing at page 1810 of the annual reports it was said:

"The only power given by the statutes to trustees or boards controlling public cemeteries, either municipal or township, is to vest the title to lots directly to individuals who purchase the same.

They have no power, therefore, to lease or deed cemetery lots, either permanently or temporarily to a mausoleum company under any agreement whatever."

From a consideration of the contract entered into by the director of public service of the city of Zanesville, it does not appear that the transaction involved is a sale of lots or grounds in the cemetery to the mausoleum company to be evidenced by a deed of conveyance; but on the contrary, the provisions of the contract indicate a license to the mausoleum company to enter upon identified grounds of the cemetery and construct a mausoleum upon terms and conditions imposed and provided by the contract.

An examination of the opinion of my predecessor discloses that the writer proceeded upon the theory that there is entire lack of authority to enter into any arrangement for the use or conveyance of cemetery grounds, except to purchase for individual burial purposes, and remarked that the statutory authority in this regard indicated such a transaction as would be consummated by a deed of conveyance.

However, I am of the opinion that the rule thus announced must now be abandoned in view of decisions of courts upon the question.

The opinion of October 10, 1913, above referred to, was directed to Hon. S. C.

Karns, city solicitor of Cambridge, Ohio, and I am advised related to the same question which afterwards was before the common pleas court of Guernsey county involved in the case of city of Cambridge vs. John H. Morgan, director of public service. The action was determined in July, 1918, and was a proceeding for injunction against said director of public service seeking to restrain him from granting a license to the Builders of Mausoleums Company for the construction of a mausoleum in the cemetery of the city of Cambridge, and from executing a contract with said mausoleum company which in all substantial respects was the same as that involved in your inquiry relating to the city of Zanesville. The proposed contract provided for the erection of a mausoleum upon ground in the cemetery to be designated by the director of public service, and in other respects was substantially the same in its terms as the contract entered into by the city of Zanesville. The journal entry embodying the final determination of the question by the court recites that:

> "The court further considering the rights of the director of public service to grant the license and execute the contract as set forth and attached to the amended and supplemental answer and marked exhibit "A," finds that there is no legal objection to the signing of such contract or the granting of such license, and that the same is not a violation of law.
>
> It is therefore ordered, adjudged and decreed that the motion for an injunction to restrain the director of public service from granting the license and signing the agreement set forth and attached to the amended answer should be, and is hereby overruled."

It does not appear that the case was reviewed in the higher courts, but a case arising at the city of Dover, Ohio, involving the questions presented here, sustained the authority of the director of public service to enter into a contract authorizing the erection of a mausoleum in the municipal cemetery of Dover, the holding being sanctioned by both the common pleas court and court of appeals, and an application for review of the judgment was denied in the supreme court. The case referred to is styled The City of Dover vs. The Tuscarawas Mausoleum Company, et al., and in my opinion went far beyond the scope of the question which is now before me, in sustaining the action of the municipal authorities involved in that case. The facts of the case included a conveyance of a plot of ground to the mausoleum company by the city authorities for the purpose of the erection thereon of a community mausoleum; and after the erection of the mausoleum, a contract of purchase of the mausoleum and grounds which it occupied, by the city, at a price of $10,000.00, the same to be provided by a tax levy and bond issue.

The validity of the entire procedure was attacked in an action for an injunction and to set aside the original deed of conveyance of the grounds for the purpose of the erection of a mausoleum in the cemetery.

From an examination of the briefs it appears that the case turned largely upon the fundamental question of the authority of the city to grant any rights in cemetery property looking to the establishment of a community mausoleum thereon. The opinions of my predecessor were urged upon the consideration of the court, and the authority for any grant of cemetery property for the purposes involved was clearly along the principal issues presented. True, the case involved the power of the cemetery trustees of a union cemetery maintained jointly by the city of Dover and Dover township, but it was pointed out that by the provisions of section 4193-1 G. C. the powers of such board of trustees of a union cemetery are the same as those exercised and performed by directors of public service of a municipality, so that the ultimate question was identical with the one now before me in this respect. Only a very brief opinion was rendered by the court of appeals, and only such excerpts therefrom as will be necessary to disclose the question determined will be quoted. The opinion was ren-

dered June 28, 1919, and I think is not reported. Houck, J., speaking for the court, said:

> "The relief sought by the plaintiff is to set aside a deed and for injunction.
>
> The question now before the court and for its determination is—was the purchase, under the evidence and law, legal and must it be enforced or set aside?
>
> Under the facts, law and statutory enactments governing union cemeteries, we find that all things done, in the premises, were regular and according to law, and in the absence of any evidence of fraud must stand.
>
> The petition is dismissed and the injunction is dissolved."

From consideration of the holdings which have just been reviewed, I am constrained to advise that the arrangement contemplated by the contract entered into by the city of Zanesville and the mausoleum company is not illegal, but is one whose legality has been fully recognized and approved by the courts of the state to such an extent that the conclusions there announced may well be relied upon as decisive of the legality of the license granted and contract entered into on the part of the city officers of Zanesville.

Having thus concluded that the project for construction of a mausoleum in the municipal cemetery may lawfully proceed to consummation, we may then consider the question of the liability for taxation as embodied in your first interrogatory.

Section 2 of article XII of the constitution provides in part:

> "Burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value five hundred dollars to each individual, may by general laws be exempted from taxation."

Legislation for the exemption of cemeteries has been enacted and section 5350 G. C. is pertinent. Section 5350 provides as follows:

> "Lands used exclusively as graveyards, or grounds for burying the dead, except such as are held by a person, company or corporation with a view to profit, or for the purpose of speculating in the sale thereof, shall be exempt from taxation."

The terms "cemetery," "graveyard" and "burying grounds" as commonly used are practically synonymous and import a place for the entombment of the dead, not necessarily under ground.

"Burying grounds" is defined by the Standard Dictionary as

> "A plot of ground set apart for burial of the dead; cemetery; graveyard."

"Cemetery" is defined as

> "A place for the burial of the dead; formerly a church yard or catacomb; now usually a large park like enclosure regularly laid out and kept for purposes of interment."

In Cemetery vs. Brooks, 8 C. C. 439, the court, speaking of the provisions of the statute now embodied in section 5350, said:

"While this is so, we suppose that it should have reasonable construction in other respects—for instance, that if a cemetery association has land prepared for and set apart for the burial of the dead, that it is not essential to make it exempt from taxation under our law, that the whole of it be used in this way. It would seem that there might be necessary and proper buildings thereon as chapels, offices, etc., and it may be even a place of residence for those in charge, and that the fact that a very considerable part of the ground was not used for the mere purpose of burial but was used for avenues or plots, useful or ornamental, if not used for profit, would not render the whole or any part of the land liable to taxation."

My predecessor in an opinion found at page 1435 of the Annual Reports of the Attorney-General for 1914, held:

"A building for the residence of the cemetery superintendent constructed by the association upon the lands set apart and actually used for burial purposes, and otherwise conceded to be exempt, is itself exempt from taxation."

In my opinion these rulings just cited extend the rule farther than the facts I am considering require. From what has been said above, I reach the conclusion that the mausoleum and the specific ground upon which it is located are plainly within the ordinary significance of the term "burying grounds" or "grounds for burying the dead" as used in the constitution and statute, and are therefore within the purview of the exemption from taxation in so far as its purpose and character is determinative.

However, it is to be noted that the exemption provided in section 5350 G. C. supra, does not extend to burying grounds held by persons, companies or corporations with a view to profit, or for the purpose of speculating in the sale thereof, and I am of the opinion that to the extent of interests in the mausoleum held with a view to profit, or for the purpose of speculating in the sale of crypts, it is subject to taxation.

In Cleveland Library Association vs. Pelton, Treas., 36 O. S. 253, it was held that where such an association owned a lot of ground with a block of buildings constructed as an entirety, and a part of the rooms of the building were used by it for its purposes, while some were rented out, such parts of the building as were rented or otherwise used with a view to profit, were not exempt from taxation; and the fact that the buildings were so constructed that the parts leased or otherwise used with a view to profit could not be separated from the residue by definite lines was no obstacle to a valuation of such part for the purposes of taxation, having due reference to the taxable value of the entire property.

It appears that the mausoleum company is to be protected in certain interests in the building designated as its "perpetual lease-hold rights" which, it is understood, relate to its interest in the proceeds of sale of crypts therein, and whether or not such interests or rights amount to a legal title in the real estate, in my opinion, is unimportant the fact being that a part of the mausoleum is held with a view to profit and is, therefore, not within the terms of the statutory exemption from taxation.

You are, therefore, advised that the mausoleum together with the ground devoted to its maintenance is within the statutory exemption from taxation, except to the extent of the value of portions thereof held with a view to profit as above noted.

Respectfully,

JOHN G. PRICE,

Attorney-General.

748.

APPROVAL, BOND ISSUE MEDINA COUNTY ROAD IMPROVEMENT IN THE SUM OF $22,888.45.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, October 29, 1919.

749.

COUNTY COMMISSIONER—WHEN ELECTED TO SECOND TERM AND FAILS TO QUALIFY—VACANCY HOW FILLED—ADJUDICATION OF OFFICER TO BE INSANE DISQUALIFIES HIM FROM HOLDING OFFICE.

Where one elected to a second term as county commissioner fails to qualify in pursuance of such election, a vacancy occurs which is to be filled as provided by law. The provision of section 8 G. C. for holding over is not applicable to such case.

The adjudication of an officer to be insane disqualifies him from holding office.

COLUMBUS, OHIO, October 30, 1919.

HON. LLOYD S. LEECH, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—You recently submitted a statement of facts relative to the office of county commissioner in your county, and requesting my opinion thereon as to the legal status of said office. Your statement of facts and inquiry is as follows:

"In the year 1916, Daniel T. Sommers was elected as a member of the board of commissioners of Coshocton county, Ohio, and began his term of office on the third Monday of September, 1917, giving a surety bond furnished by the Southern Surety Company, a copy of said bond enclosed herewith together with oath and approval.

In 1918 Mr. Sommers was again a candidate for county commissioner and re-elected. On the third Monday of September, 1919, when his new term of office was to begin he did not file a new bond, but there was attached to the old bond a certificate from the agent of the Southern Surety Company setting forth that the company had renewed his bond. A copy of said renewal certificate is furnished you with the copy of the bond.

You will notice from the old bond that it was approved in 1917 by Don C. Porter as prosecuting attorney, Milo C. Ely as probate judge and sworn to before Chas. B. Wilhelm, clerk of court, and filed with the treasurer August 15, 1917. When his second term of office began nothing was done toward giving a bond except the attachment of the renewal certificate; no oath was taken, and the bond was not reapproved by the probate judge or myself as prosecuting attorney.

On Tuesday, September 16, 1919, that being the second day after his term of office was to begin, a lunacy affidavit against the said Daniel T. Sommers was filed in the probate court. On the 17th he was given a hearing and an examination made as provided by law, and he was duly adjudged insane and committed to the institution for the insane at Massillon, Ohio, and since said date has been an inmate thereof.

We desire to know whether or not the bond herein set forth could be construed to be a sufficient bond, whether or not Mr. Sommers duly qualified as such county commissioner and whether or not the fact that he has been adjudged insane will create a vacancy in the board of commissioners.

We are very desirous of having an early report on the above matter, as payment of the salary of the said Sommers as commissioner has been held up by the county auditor and treasurer."

With your communication you submitted a copy of the official bond of the officer in question which was executed in 1917 before entering upon his first term, and which is referred to in your letter as having had attached thereto a certificate purporting to be a renewal of the bond by the Southern Surety Company.

Without setting forth the bond in full, it is sufficient for the purposes of this opinion to say that it evidences the undertaking of the officer and the surety company to the state of Ohio in the penal sum of $5,000.00 conditioned as follows:

"The condition of this obligation is such, that whereas the said Daniel T. Sommers was, on the seventh day of November in the year of our Lord one thousand nine hundred and sixteen (1916) duly elected to the office of county commissioner of Coshocton county, Ohio, to hold his office for two (2) years, to begin on the third Monday in September next after his said election, and until his successor is chosen and qualified.

Now, if the said Daniel T. Sommers shall faithfully discharge his official duties as such officer, and pay any loss or damage that the county may sustain by reason of his failure therein, during the term for which he has been elected as aforesaid, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue."

This bond bears the signature of Daniel T. Sommers and the Southern Surety Company by R. H. Clark, attorney in fact; also a certificate of sufficiency by the prosecuting attorney and an approval of the bond as to amount and sureties by the probate judge. To the bond is attached an oath of office duly signed by the officer with the certificate of the clerk of court that the oath was taken before him on the 5th day of August, 1917.

The renewal certificate referred to is in the following language:

"RENEWAL CERTIFICATE.

The Southern Surety Company hereby renews the bond of Daniel T. Sommers as a member of the board of county commissioners of Coshocton county for a term of two years from the third Monday in September, 1919."

Upon this state of facts it is to be determined whether the office of county commissioner is vacant or is lawfully held and occupied by Daniel T. Sommers. The questions entering into such determination are, has Daniel T. Sommers duly qualified for the office of commissioner in pursuance of his election for a second term in 1918? If not, is he the lawful incumbent of the office by reason of his election in 1916, and qualification for the office pursuant thereto? What is the legal effect of the adjudication of insanity against Daniel T. Sommers?

In considering the questions in the order enumerated, it is appropriate to note certain provisions of the constitution and statutes relative to the qualification of an officer-elect entitling him to the status of legal incumbent of the office.

Section 7 of article XV of the constitution of Ohio provides:

"Every person chosen or appointed to any office under this state, before entering upon the discharge of his duties, shall take an oath or affirmation, to support the constitution of the United States, and of this state, and also an oath of office."

Section 2399 G. C. provides:

"Before entering upon the discharge of his duties, each commissioner shall give a bond to the state in a sum not less than five thousand dollars, with two or more sureties, approved by the probate judge of the county, conditioned for the faithful discharge of his official duties, and for the payment of any loss or damage thst the county may sustain therein. Such bond, with the oath of office and the approval of the probate judge endorsed thereon, shall be deposited with the treasurer of the county and kept in his office. Such surety may be discharged in the manner provided by law for the release of sureties of guardians."

Section 2 G. C. is also a general provision that may be noted in this connection:

"Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties."

Section 3 provides the form of the oath which is applicable to the office of county commissioner.

Section 6 G. C. provides a form of bond which shall be sufficient, and directs that among other things, the election and appointment of the person to an office or public trust shall be recited therein, and the bond shall be conditioned for the faithful performance of the duties of such office or trust.

Section 7 provides:

"A person elected or appointed to an office who is required by law to give a bond or security previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law, and in all respects to quality himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and such office shall be considered vacant and be filled as provided by law."

Returning now to the statement of facts submitted, it is noted that no bond was executed and filed for approval by Daniel T. Sommers in pursuance of his election for a second term as county commissioner, nor was any oath of office taken. It is stated that nothing was done toward giving a bond except the attachment of a renewal certificate by the surety company to the old bond of the officer in question, which was, executed as a qualification for entering upon his first term, and that said renewal certificate was not approved by the probate judge or prosecuting attorney as an official bond of the officer.

From these facts it is readily seen that there was a complete failure on the part of Daniel T. Sommers to qualify in pursuance of law for the office to which he was elected for a second term. He took no oath of office, he signed no bond, and he failed to furnish the securities prescribed by the statute for the official bond.

Section 5 G. C. relating to official bonds speaks of the signing thereof both by principals and sureties. Other sections provide for the approval by the prosecuting attorney and the probate judge, none of which requirements were observed in the

case under consideration, and you are advised that the provisions of section 7 G. C. are determinative of the status resulting from the failure to give bond, in that the officer-elect shall be deemed to have refused to accept the office, and therefore forfeited his rights under such election.

The section further provides that "such office shall be considered vacant and filled as provided by law." But the succeeding section must be noted in this connection, making the following provision:

> "Section 8. A person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws."

This leads us to a consideration of the second inquiry above enumerated, which requires a determination of the status of Daniel T. Sommers as the incumbent of the office of county commissioner under his prior election and qualification for such office, since under his election for a second term he has failed to qualify.

It has been held in State ex rel. vs. McCracken, 51 O. S. 123, that there is no vacancy so long as there is an incumbent that can lawfully hold over until a successor is elected and qualified.

Section 8 G. C. would obviously authorize the incumbent of the office to hold over in event of failure of his successor to qualify "unless otherwise provided in the constitution or laws."

It is thus pertinent to note any provisions of the constitution and statutes that might have a bearing upon the conclusion to be reached with reference to the existence of a vacancy or the contrary.

Two sections of the constitution relate to the terms of county officers, and are in direct conflict in their provisions. Section 2 of article X provides:

> "County officers shall be elected on the first Tuesday after the first Monday in November, by the electors of each county in such manner, and for such term, not exceeding *three years*, as may be provided by law."

Section 2 of article XVII provides:

> "The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding *four* (4) years as may be so prescribed."

The first provision quoted providing the three year limitation was adopted in 1885, while the latter section was adopted in 1905, and in view of the irreconcilable conflict in their provisions, familiar rules of construction would determine that the latter provision shall supersede the former.

The pertinency of this constitutional provision lies in its limitation upon the length of term of the county office, and a question arises as to whether the provision of section 8 G. C. to the effect that an incumbent of an office shall hold over until his successor is elected or appointed, is in conflict with the constitutional limitation of the term of county officers, or perhaps to be more specific, where the express provision of section 8, limiting its application to cases where it is not "otherwise provided in the constitution or laws," renders it inapplicable to a county office in view of the limitation provided in the constitution.

And, of course, in the same connection it is necessary to give due consideration to the provision of section 7 G. C. above set out, particularly the provision that the officer failing to qualify shall be deemed to have refused to accept the office "and such office shall be considered vacant and be filled as provided by law." The special

provision for filling vacancies in the office of the county commissioner is found in section 2397, which is as follows:

> "If a vacancy in the office of commissioner occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat. If a vacancy occurs more than thirty days before such election, or within that time, and the interest of the county requires that the vacancy be filled before the election, the probate judge, auditor, and recorder of the county, or a majority of them, shall appoint a commissioner, who shall hold his office until his successor is elected and qualified."

It is the doctrine of many cases, and notably State vs. Metcalfe 80 O. S. 224, that an office is not to be considered vacant while filled by one lawfully entitled to hold it, but the cases in which that doctrine has been generally declared related in the main to instances where the officer-elect died before the time of taking his office, and the conclusion was rested upon the provisions of section 8 G. C. supra, which, of course, would be authority for the incumbent continuing in office until his successor is qualified, in the absence of a contrary provision either by the constitution or other statutes. But the section itself provides the exception to the rule announced in the cases referred to, and in the case of State ex rel. vs. Brewster, 44 O. S. 589, while recognizing that the state of the law relating to the filling of vacancies in office did not regard an office as vacant when an incumbent might lawfully hold over, the court called special attention to the proviso in section 8, and said with reference to the office of county auditor.

> "We find it 'otherwise provided' in the constitutional limitation of the term of this office to three years; and 'otherwise provided' by the law, which authorizes the county commissioners to fill the vacancy in the auditor's office by appointment."

The statutory provision relative to vacancies in the office of county auditor was the same as now provided in sections 2561 and 2562, as follows:

> "Sec. 2561. If a county auditor elect fails to give bond and take the oath of office as required by law on or before the day on which he is so required to take possession of his office, it shall become vacant.
>
> "Sec. 2562. If a vacancy occurs in the office of county auditor, from any cause, the commissioners of the county shall appoint a suitable person, resident of the county, to fill the vacancy."

The court in the Brewster case further said:

> "We can not, without violence to its language, hold this latter provision to have been repealed by any rational implication from section 8, and the legislative intention that the former section (1017) should point out the mode of filling such vacancy as existed in the present case seems too clear for serious controversy."

In State ex rel. vs. Howe, 25 O. S. 588, the court said:

> "After a careful examination of the question, in the light of both principle and authority, we are led to the conclusion that the general assembly may provide against the occurrence of vacancies by authorizng incumbents

to hold over their terms in *cases where the duration of their tenures is not fixed and limited by the constitution.*

Further, the court said:

> "The evils contemplated as likely to result from vacancies in office are guarded against by confining the exercise of the power to fill vacancies in office to those cases where no one is authorized by law to discharge the public duties; which, we think, is the constitutional scope of that power."

While the observations of the court in the cases just cited raise considerable question as to the application of section 8 where a limitation on the term of office is prescribed by the constitution, yet, in view of the provision for electing county officers each two years it is arguable that a holding over under section 8 until the next general election for county offices would not contravene the constitutional limitation of the term of county offices to four years, and that at least until the constitutional period has elapsed, in case of a holding over, the constitution is not violated.

This view was adopted in previous opinions of this department involving a different state of facts from that now before me. See opinion No. 587, dated August 25, 1919, directed to Hon. D. M. Cupp, prosecuting attorney, Delaware, Ohio, and opinion No. 605, dated September 2, 1919, directed to Hon. Charles R. Sargent, prosecuting attorney, Jefferson, Ohio, but upon the facts of the case now before me, while not holding that the constitutional provision for four year limitation upon county offices constitutes a provision excluding the application of section 8, yet I am of the opinion that the provision of section 7 G. C. expressly providing that in event of failure of an officer to qualify, his office becomes vacant, renders inapplicable the provision of section 8 G. C. for holding over, it being "otherwise provided" by law that the office shall be considered vacant and shall be filled as provided by law.

This conclusion seems to be directly in line with the decision of Anderson vs. Brewster, 44 O. S. 576, hereinbefore discussed, and you are therefore advised that section 8 G. C. may not be construed as continuing Mr. Sommers in office in pursuance of his election and qualification for his first term as county commissioner; but on the contrary, his office must be considered to have been vacated by reason of his failure to qualify in pursuance of his second election, authorizing the filling of the vacancy in pursuance of the provision of section 2397 supra.

The determination of the existence of a vacancy need not rest entirely upon the ground so far pointed out, but the facts involved in the third inquiry above enumerated also would require the same conclusion.

It is stated in your communication that on September 16, 1919, that being the second day of his term of office, a lunacy affidavit was filed against Daniel T. Sommers in the probate court, and on the 17th day of September he was duly adjudged insane and committed to Massillon Hospital, and has since been an inmate thereof.

Section 4 of article XV of the constitution provides:

> "No person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector."

Section 6 of article V of the constitution provides:

> "No idiot or insane person shall be entitled to the privileges of an elector."

In State ex rel. vs. Collister, 6 O. C. C. (N. S.) 33, the court had before it the right of an alien who had been elected to the office of councilman to hold the office The defendant had not been naturalized, and the court held:

"Where such an one has been elected to the office of councilman and has taken his seat, a judgment of ouster will be entered against him."

The question of his qualification arose under section 1 of article X of the constitution, which provided citizenship as one of the qualifications of an elector. In discussing the case the court said that the defendant did not have "the qualifications required by law for such officer."

That case is entirely analogous to the situation here presented, in that an insane person is not entitled to the privileges of an elector.

Under section 4 of article XV one of the qualifications for office holding is that the person must be an elector.

In the case of In Re South Charleston Election Contest, 3 O. N. P. (N. S.) 373, the court said:

"One whose mental condition is such that a court would experience no hesitancy in committing him to an insane asylum or in appointing a guardian for him, where proper application made, comes well within the class of persons who under the term 'idiot' or 'insane,' are prohibited from voting by the constitution."

This case is authority for the conclusion that the adjudication of the officer in question to be insane by the probate court, sufficiently fixes his legal status to terminate his qualification in contemplation of law as an office holder.

An additional consideration which should be noted in this connection is that the provision of section 8 for "holding over" could hardly be made applicable to the case of the failure of a county commissioner to qualify where there is more than one outgoing incumbent of the office, assuming the application of section 8 on other considerations. That is to say, it could hardly be determined that Daniel T. Sommers was elected as his own successor, and therefore identified as the one of the commissioners to hold over in event one or both of the other incumbents would occupy the same status.

If other members of the board of commissioners are retiring from the office, the question of ascertainment of the particular incumbent to hold over would at once arise, and its solution is not found in the provisions of section 8 G. C., so that the conclusion would again follow that section 8 could not be regarded as operative in such case.

You are therefore advised that for the reasons pointed out, the office of county commissioner as involved in your inquiry became vacant, not only by reason of the failure of the commissioner-elect to qualify, but also by reason of the adjudication that he was insane at the beginning of his term of office.

Respectfully,
JOHN G. PRICE,
Attorney-General.

750.

DISAPPROVAL, BOND ISSUE MERCER COUNTY ROAD IMPROVEMENT IN THE SUM OF $5,500.00.

COLUMBUS, OHIO, October 30, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

IN RE: Bonds of Gibson township, Mercer county, in the amount of $5,500.00, for the improvement of Denney road in said township.

GENTLEMEN:

I have examined the transcript of the proceedings of the township trustees and other officers relative to the above bond issue and decline to approve the validity of said bonds for the following reasons:

(1) The transcript discloses that the township trustees failed to publish the notice required by section 3298-7 of the General Code for the required length of time before the date set for hearing objections to said improvement. The hearing was held August 11, 1919. The notice of such hearing was published August 1st and August 8th of the same year. Section 3298-7 G. C. provides that such notice shall be published "once a week for two consecutive weeks." Two full weeks or fourteen days should have intervened between the first publication and the date of the hearing.

In the case of Fenner vs. City of Cincinnati, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held (quoting from the syllabus):

> "Where a statute provides that municipal bonds can only be issued 'After advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same Report, p. 342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation of similar language laid down by Judge Smith in the case referred to is applicable to the language used in section 3298-7 and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

(2) The transcript also shows that the hearing on the schedule of estimated assessments was held August 25th and that notice thereof was published August 15th and 22nd of the same year. Section 3298-15a requires such notice to be published "once a week for two consecutive weeks," For the reasons stated in the preceding paragraph I do not believe the notice published meets the requirements of section 3298-15a.

For the reasons set forth above I am of the opinion that the bonds under consideration are not valid obligations of Gibson township and advise you to decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

751.

BOWLING GREEN STATE NORMAL COLLEGE—APPROVAL, CONTRACT OF LOUIS BRANDT, LANDSCAPE ARCHITECT.

COLUMBUS, OHIO, October 31, 1919.

The Board of Trustees of the Bowling Green State Normal College, Bowling Green, Ohio.

GENTLEMEN:—There has this day been submitted to me for my approval, as per section 2314 G. C., a contract between your board and Mr. Louis Brandt, landscape architect, relative to certain contemplated improvements at your institution.

I have approved said contract and am this day filing same, with my said approval indorsed thereon, with the auditor of state.

Respectfully,
JOHN G. PRICE,
Attorney-General.

752.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN JEFFERSON COUNTY, OHIO.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, October 31, 1919.

753.

APPROVAL, BOND OF CHARLES ASH AS DEPUTY HIGHWAY COMMISSIONER IN THE SUM OF $5,000.00.

COLUMBUS, OHIO, October 31, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Attached I am transmitting bond in the sum of $5,000.00 given by Charles Ash with the Aetna Casualty & Surety Company as surety, covering Mr. Ash's appointment as deputy highway commissioner, for the term beginning October 22nd.

You will note that this bond has received the approval of the state highway commissioner as to surety and of myself as to form.

Section 1181 G. C. in conformity with which the bond is given, does not specify with whom it shall be filed. However, as the official bond of the state highway commissioner as well as the bonds of certain employes of the highway department are directed by law to be filed in your office, I believe that the same course should be followed as to the bond attached, and for that reason I am transmitting it to you for filing.

Respectfully,
JOHN G. PRICE,
Attorney-General.

754.

ELECTIONS—PROPOSED TAX CLASSIFICATION AMENDMENT TO OHIO CONSTITUTION—CORPORATIONS PROHIBITED FROM MAKING CONTRIBUTIONS FOR POLITICAL PURPOSES—SEE SECTIONS 13320 AND 13321 G. C.—WHO ARE REQUIRED TO MAKE REPORT OF RECEIPTS AND EXPENDITURES AT ELECTIONS UNDER SECTION 5175-1 G. C.

Sections 13320 *and* 13321 *G. C. are held applicable to contributions by corporations in business in this state for the purpose of promoting or defeating at the polls the proposed tax classification amendment to the state constitution. In the absence of judicial decision or other decisive considerations to the contrary, the previous ruling of this department is approved and followed.*

A committee or combination of two or more persons co-operating to aid in or promote the success or defeat of any proposition submitted to a vote at any election required under the law to make report of receipts and expenditures unless clearly shown to be within exempted class in section 5175-1 *G. C.*

COLUMBUS, OHIO, November 1, 1919.

HON. HUGO N. SCHLESINGER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date submitting for my consideration the matter of contributions by corporations engaged in business in this state for the purpose of promoting or defeating at the polls the proposed tax classification amendment to the state constitution, has been duly received.

The public policy of this state on the subject of contributions by corporations for political purposes is disclosed by sections 5522, 8729, 8730, 13320 and 13321 G. C., the latter two of which sections are penal in character.

Section 13320 provides:

> "Whoever, being a corporation in business in this state, directly or indirectly, pays, uses, offers, or consents or agrees to pay or use money or property for, or in aid of a political party, committee or organization, or for or in aid of a candidate for political office, or for a nomination thereto, or uses money or property for any political purpose whatever, or for the reimbursement or indemnification of any person or persons for money or property so used, shall be fined not less than five hundred dollars nor more than five thousand dollars."

Section 13321 provides a penalty applicable to an officer, stockholder, attorney or agent of a corporation participating in, aiding or advising the violation of the preceding section.

On June 17, 1917, my predecessor ruled that the making of contributions by a corporation for the purpose of affecting the result of what are commonly referred to as "Wet" and "Dry" elections is prohibited by the statutes under consideration. This ruling was directed to Hon. C. Ellis Moore, prosecuting attorney, Cambridge, Ohio, and is herewith set forth in full, as follows:

> "Sometime ago you inquired of this office whether or not a corporation as such could make a contribution to the organization known as the Ohio Dry Federation which is organized for the purpose of promoting the cause of statewide prohibition in Ohio. Answering your inquiry it is my opinion under the provisions of section 13320 of the General Code, a corporation doing business in Ohio can not legally contribute money of the corporation, either directly or indirectly to affect the result of what are known as wet and dry

elections. As one authority supporting the proposition, I cite the case of People vs. Gainsley, 158 Northwestern Report, 195. I also call your attention to the title of the act, of which section 13320 General Code is a part. You will note from this title that there are two different provisions, one *to prevent the corruption of elections;* and the other *to prevent the corruption of political parties."*

The question is not free from doubt and has been the subject of much controversy subsequent to the ruling of the Attorney-General to which reference is made. The conclusion there reached has not been disapproved by any court and in view of the manifest purpose of the law I see no sufficient reason suggesting a departure from the former ruling until there be a judicial determination to the contrary.

Your second question is as follows:

"Must a report on the receipts and expenditures of all money used by any committee or organization for the purpose of defeating or supporting said amendment be filed with the secretary of state under the provisions of the corrupt practice law of Ohio?"

A reading of the provisions of sections G. C. 5175-1 to 5175-6 inclusive at once leads to this conclusion: that a committee or combination of two or more persons, which is co-operating to aid in or promote the success or defeat of any proposition submitted to a vote at any election and is soliciting money or has solicited and received money to be used in its activities in connection with the election at which the proposition is submitted, is required to file a statement of its receipts and expenditures with the secretary of stste within ten days following the election. The requirement would not be applicable to a "committee or organization for the discussion or advancement of political or economic questions" as is apparent from the exception in section 5175-1. There is nothing before this office which tends to show that the committee or organization to which you have referred is within the exempted class. That point is one to be determined from various tests and amounts to a question of fact to be passed upon by the court in case complaint is made that the provisions of the corrupt practices act have been violated. The mode of procedure of course is provided in sections 5175-14 et seq.

It is my opinion that a report of the receipts and expenditures of any such committee or organization referred to above should be made as provided by law, unless it is made clearly to appear that it comes within the exempted class referred to in section 5175-1 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

755.

APPROVAL, SALE OF STATE CANAL LANDS IN AKRON, OHIO.

COLUMBUS, OHIO, November 1, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of October 22, 1919, transmitting duplicate memoranda of three sales of state canal lands at public sale at the door of the court house in Akron, Ohio, as follows:

4875 sq. ft., more or less, Ohio canal land in city of Akron, appraised at $1,625.00, bid in by the People's Savings & Trust Company for the sum of $1,219.00 cash.

2500 sq. ft., more or less, Ohio canal land in city of Akron, appraised at $4,166.66, bid in by the Williams Foundry & Machine Company for $3,125.00 cash.

3581 sq. ft. Ohio canal land, city of Akron, appraised at $8,410.00, bid in by Latham H. Conger for $6,308.00 cash."

I have carefully examined the memoranda submitted and find that the same shows that the proceedings have been in conformity with law.

I am therefore returning the memoranda in question with an endorsement of my approval of the sales.

Respectfully,
JOHN G. PRICE,
Attorney-General.

756.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN ERIE COUNTY, OHIO.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, November 1, 1919.

757.

ELECTIONS—NO CANDIDATE, AS SUCH, HAS RIGHT TO DESIGNATE CHALLENGERS OR WITNESSES AT VOTING PLACES—STATUTES PROVIDE THREE METHODS FOR APPOINTMENT OF CHALLENGERS AND WITNESSES—HOW MADE.

No candidate, as such, whether partisan or otherwise, has the right to designate representatives of himself as challengers or witnesses at the various voting places.

Under existing laws such challengers and witnesses can be appointed in three ways only:

(1) *By political parties acting through committees.*

(2) *In special elections where no candidates are to be voted for, by the judges and clerks of election in each precinct (sections 5058 and 5080-G. C.)*

(This provision may apply only in non-registration cities, but no opinion is expressed on this point.)

(3) *At any election committees in good faith advocating or opposing any measure to be voted upon have the right in question (section 5058-1 G. C.)*

COLUMBUS, OHIO, November 4, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—You have requested the opinion of this department upon the fo lowing question:

"Mr. Zimpfer, one of the candidates for mayor of the city of Columbus,

has been refused by the board of deputy state supervisors and inspectors of elections of Franklin county, Ohio, witnesses to the count in the various polling places in said city during the canvassing and counting of the vote in the various precincts of the city in the said mayoralty contest November 4, 1919.

Has Mr. Zimpfer, under the provisions of the city charter, or the General Code, governing elections the legal right to have qualified representatives as witnesses in the various voting places of the city at the counting and canvassing of the votes in said contest?"

The charter of the city of Columbus has been examined. The provisions thereof need not be quoted in full. It is sufficient to state that candidates for mayor are to be nominated by petition without the agency of any political party. The sections which govern the matter of nominations by petition do not attempt to confer any right upon such nominees, or any one acting in their behalf, to appoint or otherwise designate witnesses and challengers.

It is expressly provided in section 200 of the charter that:

"Except as otherwise provided in this charter, all elections shall be held and conducted and the results thereof ascertained and certified as provided by the general laws of the state and by the election authorities therein provided for."

This being the condition of the charter of the city of Columbus, it is obvious that the question which you submit must be answered by reference to the general laws of the state.

The city of Columbus is a registration city. Accordingly, section 4922 of the General Code applies to elections held therein. It provides as follows:

"At each election, the executive or principal committee of each political party presenting one or more candidates for suffrage may, by writing, certified by its chairman and secretary, and presented to the judges of election at or before this meeting, designate not more than one elector of such city as witness and one other elector as challenger, to attend at such election in behalf of such party. The judges of election in each ward or election precinct shall admit such witnesses and challengers so accredited into the polling room with themselves and the clerks at the ensuing election and place them so near to themselves and the clerks that they can fully and conveniently watch every proceeding of the judges and clerks from the time of opening to closing of the polls. No other person, except the witnesses and the judges and clerks of the election shall be admitted to the polling place after the closing of the polls until the counting, certifying and signing of the final returns of such election have been completed."

Provisions for the appointment of challengers in other than registration cities, is found in section 5058 G. C., which need not be quoted. This section does, however provide for the appointment of challengers "in special elections when no candidates are to be elected." This provision obviously does not apply to the instant case because candidates are to be elected at the pending election.

Section 5080 G. C. performs a similar office with respect to the designation of inspectors and witnesses in election districts other than registration cities. This section is inapplicable as a whole for the reason just pointed out in discussing section 5058. It also provides for the appointment of inspectors and witnesses "in special elections when there are no candidates to be elected," and for reasons stated this part of the section can have no application.

A supplement to section 5080 (104 O. L. 124), commented upon in a recent opinion

addressed to you, provides for the selection of witnesses and challengers by committees acting for or in opposition to propositions to be voted on by the electors. This section obviously can have no application to the appointment of witnesses and challengers to act in behalf of a candidate.

The only other provisions which are found in the statutes respecting witnesses and inspectors deal with the rights and duties of such witnesses and inspectors. Those which have been quoted are the only ones which upon search have been found dealing with the designation of such witnesses and inspectors.

The question under consideration does not depend for its solution even upon the principle that the expression of one thing is the exclusion of others, because section 4922, which governs, expressly provides that "no other person except the witnesses and the judges and clerks of the election shall be admitted to the polling place after the closing of the polls until the counting, certifying and signing of the final returns of such election have been completed." This is a direct prohibition, unambiguous in purport, and operates expressly to forbid the admission of any witnesses into the polling places during the counting excepting those of whom it and related sections speak.

It may not be out of place to remark that none of the candidates for mayor at the pending election in the city of Columbus are entitled to be represented by witnesses and challengers in their several capacities as such candidates. It happens, however, that said election is an election at which political parties are "presenting one or more candidates for suffrage" in the persons of the candidates for assessors and those for boards of education, as pointed out in the recent opinion addressed to you. That being the case, party challengers and witnesses are permissible at this election, and must be admitted to the polling places if designated in the proper manner. Being so admitted, the statutes give them authority to watch every proceeding and exercise their rights as they see fit (See section 4922 above quoted, and sections 5083 et seq. G. C., dealing with the functions of witnesses and inspectors).

In short, the general assembly has never deemed it expedient to allow candidates nominated by petition, as such, or any committee or organization acting in behalf of a non-partisan candidate to designate witnesses and challengers who shall have the right to be admitted to the polling places in such capacities. Undoubtedly the reason for this omission on the part of the legislature lies in the fact that it would be utterly impracticable to afford each candidate so nominated the right to exercise such a privilege; and the legislature has not chosen to discriminate in this particular in favor of candidates for the "head of the ticket."

For all theses reasons, the answer to your question is that the candidate in question has not the right to designate representatives of himself as challengers or witnesses at the various voting places in the city during the casting or the counting and canvassing of the votes at the pending election.

This conclusion, of course, applies to all candidates as such, whether partisan or otherwise.

Under existing laws such challengers and witnesses can be appointed in three ways only:

"(1) By political parties acting through committees;

(2) In special elections where no candidates are to be voted for, by the judges and clerks of election in each precinct. (Sections 5058 and 5080.)

(This provision may apply only in non-registration cities, but no opinion is expressed on this point.)

(3) At any election committees in good faith advocating or opposing any measure to be voted upon have the right in question." (Section 5058-1.)

Respectfully,

JOHN G. PRICE,

Attorney-General.

758.

APPROVAL, ARTICLES OF INCORPORATION OF THE OHIO CASUALTY INSURANCE COMPANY OF HAMILTON, OHIO.

COLUMBUS, OHIO, November 6, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The articles of incorporation of the Ohio Casualty Insurence Company of Hamilton, Ohio, are herewith returned with my certificate of approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

759.

ROADS AND HIGHWAYS—HOUSE BILL No. 162, 108 O. L. 478, CONSTRUED—ROAD LEVIES MAY BE MADE BY COUNTY COMMISSIONERS ON TAX DUPLICATE FOR YEAR 1919 WHEN FAVORABLE VOTE HAD BY ELECTORS—LEVY MAY BE MADE THEREAFTER—SECTIONS 6926 AND 6926-1 G. C. CONSTRUED.

Elections may be held in counties under section 6926-1 *G. C. as enacted by house bill No.* 162 *at the regular time for holding elections in* 1919.

The favorable vote of the electors on the question submitted under said section will authorize road levies to be made by county commissioners on the duplicate made up in the year 1919, *exempt from all limitations of law on tax levies.*

In the event no levy has been made under section 6926 *for the year* 1919, *the favorable vote of the electors at such election will authorize such levy to be made thereafter by the county commissioners.*

In the event that a levy has been made under section 6926 *G. C., the favorable vote of the electors at such election will authorize a levy at the rate approved by the electors to be made after the election by the county commissioners, in lieu of such levy theretofore made under section* 6926 *G. C., but not in addition thereto.*

In the event the authority thus conferred is exercised by the county commissioners, and the result of the elimination of the levy theretofore made under section 6926 *G. C. is to release levying power which would have been possessed by any taxing district in the county had such levy not been made in the first instance, the budget commission should be reconvened for the purpose of readjusting the levies in the taxing districts so affected so as to permit the exercise of such released levying power. Such reconvening of the budget commission and action on its part will be unnecessary unless the elimination of a levy under section* 6926 *actually has such effect in some taxing district in the county.*

COLUMBUS, OHIO, November 7, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge the receipt of your letter of recent date requesting the opinion of this department on the following questions:

> "The commission is advised that in a large number of the counties of the state the county commissioners have taken the necessary action under section 6926-1, as enacted by H. B. No. 162 passed May 27, 1919, to submit to

the electors of the county at the election to be held November 4, 1919, the question of exempting from all tax limitations all or part of the two mill levy provided for by section 6926 G. C. Your opinion is respectfully requested upon the following questions in connection therewith:

If the proposition is carried in any county—

1. Will the exemption be effective for the year 1919?

2. In the event that no levy has been made under section 6926 for the year 1919 may one be made? If so, by what board or authority?

3. If a levy has been made under section 6926 for the year 1919 may it be increased to the amount stated in the resolution and the other levies in any taxing district in the county be adjusted to conform to the exemption of this levy from all limitations? If so, by what board or authority?"

The following sections of the General Code, now in force, require quotation in this connection:

"Section 6926. * * * For the purpose of providing by taxation a fund for the payment of the county's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, improving, maintaining, and repairing roads under the provisions of this chapter, the county commissioners are hereby authorized to levy annually a tax not exceeding two mills upon each dollar of the taxable property of said county. *Said levy shall be in addition to all other levies authorized by law for county purposes, and subject only to the limitation on the combined maximum rate for all taxes now in force.*"

Section 6926-1. The county commissioners of any county may, and upon the petition of qualified electors of the county in a number equal to at least five per cent. of the number of votes cast therein at the last preceding general election of state and county officers, shall by resolution submit to the electors of such county at the first ensuing November election that occurs more than forty days after the adoption of such resolution, the question of *exempting from all tax limitations the levy of two mills provided by section* 6926 *of the General Code* * * * or the question of so exempting a part of such levy, such exemption to continue for a definite term of years not exceeding ten. When such question is submitted upon the petition of electors, such petition shall state the portion of the levy to be so exempted and the number of years during which such exemption shall continue, and these matters set forth in the petition shall also be set forth in like manner in the resolution adopted by the county commissioners pursuant thereto. * * * The board of county commissioners, upon the adoption of such resolution by a majority vote of all the members elected or appointed thereto, shall cause a copy of such resolution to be certified to the deputy state supervisors and inspectors or the deputy state supervisors of elections of the proper county.

Section 6926-2. Such proposition shall be submitted to the electors of such county at the first ensuing November election that occurs more than forty days after the adoption of such resolution. * * *

The form of the ballots cast at such election shall be:

'For an additional levy of taxes for the purpose of constructing, reconstructing, maintaining and repairing county roads not exceeding _____ mills, for not to exceed _____ years. Yes.'

'For an additional levy of taxes for the purpose of constructing, reconstructing, maintaining and repairing county roads not exceeding _____ mills, for not to exceed _____ years. No.'

Section 6926-3. The ballots shall be marked as is provided by law with

reference to other ballots and the result of such election shall be certified by the deputy state supervisors and inspectors or the deputy state supervisors of elections to the county commissioners of such county. If a majority of the electors voting thereon at such election vote in favor of such levy or levies, *it shall be lawful to levy taxes* within such county at a rate not to exceed such increased rate for and during the period provided for in such resolution, such taxes to be in addition to such other taxes for the same purposes as may be levied subject to any limitation prescribed by law upon the combined maximum rate for all taxes, *and the taxes so levied pursuant to such vote of the electors shall be in addition to all other levies made for any purpose or purposes and the same shall not be construed as limited, restricted or decreased in amount or otherwise by and existing law or laws.*"

The sections have not been quoted in full, but it may be said of the last three of them that they bear a striking resemblance in language and practical effect to sections 5649-5, 5649-5a and 5649-5b G. C., part of the Smith one per cent law, so-called. Both sets of statutes provide for the submission of a proposition affecting tax rates and limitations at the November election. It is reasonable to suppose therefore that the general assembly when it enacted sections 6926-1 et seq. G. C., intended that the same effect should be given to such new legislation as had been practically given to the similar provisions of the Smith one per cent law.

The questions submitted might be easily answered by saying that no action could in practice be taken at a November election to affect tax rates for the ensuing year, inasmuch as at that time the budget commissions have completed their work and the rates of other subdivisions levying within the districts affected by the vote have been adjusted by the commission to the levies of such district, on the theory that they were subject to one or more of the limitations of the Smith law; also because in November the duplicate is supposed to be in the possession of the county treasurer for the collection of taxes thereon.

These considerations are, however, in a measure at least practical rather than strictly legal. The same objections might be raised against giving effect to a vote under section 5649-5 G. C. in the year in which the vote is taken. It is believed, however, that the practical interpretation which has been given to the Smith law is contrary to the view suggested by the above objections. In other words, in numerous instance additional levies have been voted under sections 5649-5 et seq. G. C., and placed on the duplicate after election and before the time for the collection of taxes, although, as will be hereinafter pointed out, such action has, in certain instances, required the reconvening of the budget commission.

This department is not in possession of the exact facts with respect to the statement just made. The commission, it is believed, is aware of the situation. However, a general impression to that effect obtains, and it is believed that we must take it that the general assembly shared that impression and intended in so closely following section 5649-5b to make a law which would have the same practical effect so far as that feature of the question is concerned.

For this reason, then, it is the opinion of this department that a favorable vote of the electors under sections 6926-1 et seq. G. C. will be effective with respect to the duplicate upon which collections are to be made in December, 1919, and June, 1920. This statement is a categorical answer to your first question, though perhaps not a complete one.

In answer to your second question it may be said to be the opinion of this department that the fact that no levy has been made under section 6926 for the year 1919 does not prevent action under authority of a vote of the people by virtue of sections 6926-1 et seq. This answer is dictated by the principle just laid down.

Similarly, your third question must be partially answered by the statement that

action previously taken under section 6926 may be rescinded under authority of a vote of the people effective in the year 1919 and taken under sections 6926-1 et seq., so that the rate levied subject to the limitations of the former section may be expunged and a new rate, levied outside of the limitations of that section, substituted therefor.

Coming now to some of the important collateral questions suggested by your inquiries in general, and indeed submitted in your third question, the following observations should be made:

In the first place, the essence of the vote is after all, as stated in section 6926-1, to exempt a levy for a purpose authorized by section 6926 G. C. from the limitations of the Smith law. Although section 6926-3 speaks of authority to levy the tax springing from a favorable vote of the electors, such tax is not in addition to other taxes that may be levied under section 6926 but must take the place of and be a substitute for levies under section 6926. Putting it in another way: when the people have authorized by their vote a levy under section 6926-3, the making of any levy referable to that authority destroys any authority to levy under section 6926 itself. This last way of putting the case is not strictly accurate but is intended to convey a clear impression of the practical result of the operation of the statute.

In the second place, the conclusion that the favorable vote of the electors may be acted upon so as to affect the current duplicate makes it necessary to hold that the budget commission must reconvene and make a new adjustment of levies throughout the county, in each instance in which a levy has already been made under section 6926 and allowed by the budget commission. For it having also been held that the effect of the exemption vote being to substitute the exempted levy for the one made subject to the limitations, or to take that levy out of the operation of the limitations, it is clear that the result must be that levying power equivalent to the amount of the levy under section 6926 as fixed by the budget commission may and most probably will be released by such exemption. It is true that this will not necessarily be the case in every instance. For example, no levy may have been made under section 6926 as suggested in your second question. In this event no action by the budget commission will be necessary. The county commissioners can make the levy at the rate authorized by the vote and certify their action to the county auditor, who will merely place the levy on the duplicate, without more.

Again, it is a fact not to be overlooked that the levy under section 6926 is subject only to the fifteen mill limit. It is logically possible, though not very probable, that there may be no taxing district in the county in which the release of levying power subject only to the fifteen mill limit will in anywise affect the adjustments made, the levies reduced having been those subject to the ten mill limit. Here is another case in which it is at least theoretically possible that no adjustment of levies will be required.

In the great majority of instances, however, it is supposed that the release of levying power will be such as to leave one or more taxing districts in the county with smaller tax levies than they are strictly entitled to with the road levy exempted. If these districts should insist upon it, it would certainly be the duty of the budget commission, if reconvened, to make a readjustment in such manner as to afford to them the full revenues to which they are entitled after the exemption of the county road levy.

In some instances it might be that the effect of the release of the levying power would be negligible and there would be no demand for such a readjustment. Wherever there is one, however, it should be met.

Opposed to the conclusions of this opinion is the provision of section 5637 G. C., to the general effect that the county commissioners shall levy taxes at their June session. If this provision and the provisions of section 5649-3a G. C. be given full effect. the June session of the county commissioners is the only time at which the

act of levying taxes may be done. The practical interpretation of sections 5649-5 et seq., however, is to the contrary, and it is upon that practical interpretation, together with the similarity which exists between those sections and the ones immediately under consideration in this opinion, that the conclusions of this opinion are based.

Respectfully,
JOHN G. PRICE,
Attorney-General.

760.

CHIEF INSPECTOR OF WORKSHOPS, FACTORIES AND PUBLIC BUILDINGS—WITHOUT AUTHORITY TO ISSUE ORDER TO BOARD OF EDUCATION TO DISCONTINUE PRACTICE OF CHARGING ADMISSION TO MOTION PICTURE ENTERTAINMENTS.

The chief inspector of workshops, factories and public buildings is without authority to issue an order to a board of education to discontinue the practice of charging admission to motion picture entertainments.

COLUMBUS, OHIO, November 7, 1919.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion upon the question as to whether the chief inspector or workshops, factories and public buildings has authority to issue an order to a board of education to discontinue the practice of charging admission to motion picture entertainments.

In the statement of facts submitted by you, it is noted that there is nothing irregular in the board of education holding such entertainments as you have in mind, the same being provided for under sections 7622, 7622-1, 7622-2, 7622-3, 7622-4, 7622-5 and 7622-6 of the General Code.

The question before us is whether the official named by you has authority to issue an order on any matter which does not come within the scope of his duties, as provided by the statute.

An examination of the statutes bearing upon all of the duties and powers of the chief deputy of the division of workshops, factories and public buildings, in the industrial commission fails to show any authority for the official in question to issue an order to the board of education to discontinue charging admission to motion picture entertainments. A brief analysis of the powers of the above official as regards boards of education shows that he has authority to prohibit the use of school buildings for school purposes under certain conditions; he can issue repair orders on such school buildings, which must be complied with by the board of education; he can limit the number of pupils in any one room or building and prohibit the use of such room or building if a greater number are forced to use such room or building for public school purposes; he has authority to direct the correction of any dangerous condition existing about such school building, including the proper installation of any moving picture machine, and the proper kind of booth in which such machine is installed. Under the compulsory education laws, which, however, do not apply in this case at hand, he can forbid the employment of children of school age who should be in school, as provided by the statutes, but no where is any authority found for the chief inspector of the division of workshops, factories and public buildings to issue an order prohibiting a board of education or any other organization from charging admission to motion picture entertainments.

Respectfully,
JOHN G. PRICE,
Attorney-General.

761.

TAXES AND TAXATION—WHERE NON-DEPOSITORY BANK RECEIVES COUNTY FUNDS FOR PERIODS OF FROM SIXTY TO ONE HUNDRED DAYS WITHOUT BANK PAYING ANY INTEREST—LIABILITY OF BANK AND COUNTY TREASURER.

Where a non-depository bank receives county funds, having actual or imputed knowledge of their public character. Such funds are not deposited for transportation purposes under sections 2748 G. C. et seq. and such bank commingles and uses such funds with its general deposits, deriving a profit therefrom. HELD:

1. *Such bank may be required to account to the county for the use of such funds. The questions of the measure of liability as to rate and time in computing interest reserved for further specific facts.*

2. *Such a deposit by a county treasurer constitutes a violation of sections 2715 et seq. (county depository laws) and if all of the facts in connection therewith show beyond a reasonable doubt that such violation was wilful, he is amenable to prosecution under section 2743 G. C. He is also liable in a civil action to account for any public money thus unaccounted for, wrongfully converted or misappropriated under section 286 G. C., as construed in State ex rel. vs. Maharry, 97 O. S., 272.*

3. *Where such deposit is made in a regularly designated county depository with such actual or imputed knowledge, not for transportation under sections 2748 et seq., G. C., and such funds are not credited to or deposited in such depositary account but are credited to such county in a non-interest bearing account, and by such bank commingled and used with its general deposit, such bank is liable for the use of such money. The same questions as to rate and period of interest on accounting that are stated in paragraph 1 hereof are likewise reserved.*

COLUMBUS, OHIO, November 7, 1919.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion of this department, as follows:

> "Examiners of this department have discovered in certain counties, that where the treasurer received taxes under the provisions of sections 2746 to 2749, General Code, inclusive, that it has been the practice to permit the collections made at these places to be deposited with banks of deposit located at the place where collections were made and to permit the funds so collected to remain in said banks for periods of from 60 to 100 days without the bank paying any interest for the use of said funds and without the treasurer having reported same as tax collections in his daily statements to the auditor under section 2642 G. C.
>
> Question 1. What is the responsibility of the bank as to paying interest for the use of these funds?
>
> 2. What is the responsibility of the treasurer who permits these funds to remain in said bank as to the question of interest thereon?
>
> 3. Where a bank under the circumstances mentioned above is the regularly designated depository of county funds and the funds so left with this bank from such collections are not credited to the depository account, what is the responsibility of the bank as to interest on such funds?"

Sections 2715 and 2745 G. C., relating to county depositories, and sections 2746 and 2749, relating to tax receiving offices, are pertinent to your inquiry. Without quoting all of these depository statutes, it is deemed sufficient to set forth such parts

thereof as may show the general intent of the legislature with reference to the safe-keeping of the county's funds.

Section 2715 in part provides:

> "The commissioners in each county shall designate in the manner hereinafter provided a bank or banks * * * as inactive depositories, and one or more of such banks * * * as active depositories of the money of the county."

Section 2715-1 in part provides that the deposits in active depositories "shall at all times be subject to draft for the purpose of meeting the current expenses of the county," and that deposits in inactive depositories shall remain "until such time as the county treasurer is obliged to withdraw a portion or all of the same and place it in the active depository * * * for current use." In passing it may be noted that funds which are not needed for current expenses are those required to be deposited in a different kind of a depository than those funds which are needed for current expenses.

Section 2722 provides that no award on proposals for depositing public money shall be made until the statutory security is given under this section and sections 2723 and 2724.

Section 2729 fixes the time or final condition, viz., the acceptance of the depository undertaking and hypothecation of bonds upon which such bank or banks become depositories.

Section 2736, as amended in 103 O. L., 562, provides that after the treasurer is notified by the commissioners of the selection of a depository,

> "such treasurer shall deposit in such bank or banks * * * as directed by the commissioners and designated as inactive depositaries to the credit of the county all money in his possession, except such amount as is necessary to meet current demands, which shall be deposited by such treasurer in the active depositary or depositaries. Thereafter, before *noon of each business day*, he shall deposit therein the balance, if any, remaining in his hands after having paid out of the receipts of the *preceding business day*, in cash, warrants presented to him for payment during such day, except as hereinbefore provided."

Section 2737 in part provides:

> "*All money deposited with any depositary* shall bear interest at the rate specified in the proposal on which the award thereof was made, *computed on daily balances*, and on the first day of each calendar month * * * such interest shall be placed to the credit of the county, and the depositary shall notify the auditor and treasurer, each separately, in writing of the amount thereof before noon of the next business day. All such interest realized on the money belonging to the undivided tax funds shall be apportioned by the county auditor to the state, * * * or assessing districts in the proportion that the amounts collected for the respective political divisions * * * bear to the entire amount collected by the county treasurer for such undivided tax funds and deposited as herein provided."

Section 2743 provides that:

> "An officer of a county having a county deposit who wilfully violates any provision of this chapter relating to county depositaries, or wilfully neg-

lects or refuses to perform any duties thereby imposed upon him, shall be fined not more than ten thousand dollars * * * or be imprisoned in the penitentiary not less than one year nor more than ten years, or both."

Section 2746 authorizes the county treasurer to open a tax receiving office, in each township whenever in his opinion it is necessary and, as to such office, provides:

"Such office shall be in a city or village in which is located a bank of deposit."

Section 2748 provides that

"*For the purpose of transportation*, the county treasurer may deposit temporarily in any bank of deposit located at such place of collection any money received in the payment of taxes."

This section also requires that such bank receiving temporary deposits for the purpose of transportation, must give security, subject to the approval of the county commissioners.

From the facts stated in your letter, supplemented by personal conference, it is learned that your question relates largely to a practice in connection with the deposit of money received in payment of taxes and which belongs, until settlement and distribution, to the undivided general tax fund. Questions 1 and 2 are understood to relate to such deposits being made in non-depositary banks.

These questions require that sections 2746 to 2749, inclusive, be construed with the county depositary sections, above quoted or referred to.

The first part of section 2715 is free from doubt and under it the county commissioners are given no discretion as to selecting and maintaining a county depositary, the statute reading that they "shall designate in the manner hereinafter provided a bank or banks" as depositaries for the money of the county.

Section 2736 leaves no doubt about the imperative duty of the treasurer, after making the deposits which should go into the inactive depositary, depositing all the rest of the money in his possession "before noon of each business day."

Section 2737 is free from ambiguity, providing that "all money deposited with any depositary shall bear interest."

Section 2748, it must be remembered, permits the deposit only of money collected at such place of collection (where the bank is located) temporarily and only "for the purpose of transportation." The enactment of these statutes followed the decisions in the cases of Eshelby vs. Board of Education, 66 O. S., 71; Glenville vs. Englehart, 19 O. C. C., 285, and others which arose upon the acts of treasurers depositing and loaning public money to banks and claiming to own the income or interest thereof. Their purpose is to safeguard and insure the proper custody of public money, but they go further than that and require that such part of the increment of the public funds, as is agreed upon, shall inure to the benefit of the public.

Assuming the deposits made by the treasurer in such banks, located at the place where branch tax collection offices are opened, are not legally designated depositaries of public funds, as required by section 2715 et seq. G. C., your first question is, "what is the responsibility of the bank as to paying interest for the use of these funds."

The case of Eshelby vs. Board of Education, (supra), while a case on different issues than here involved, throws some light on this question. In that case funds were deposited in a bank which was not a depositary of the school district funds and interest accrued on the deposit which the treasurer claimed as his property. The case was presented to the court on the question of whether the interest accruing upon such public funds belonged to the school district or to the treasurer and was disposed of on this reasoning:

"Since the funds belong to the school district, the ultimate question in the case is answered in favor of the defendant in error (board of education) by the elementary proposition, that in the absence of a statute or stipulation to the contrary, *the increment follows the principal.*"

As reflecting upon the treasurer's duties, a further quotation from this opinion may be made as follows:

"The safety of public funds has been the chief object of care. For their security the law employs the character and ability of the treasurer, and the security which is afforded by his official bond."

In a suit against the bondsmen of the state treasurer, the same result was reached in the case of State vs. McKinnon, et al., 15 O. C. C. (n. s.) 1. This case was affirmed by the supreme court.

Other cases awarding a recovery against the treasurer or his bondsmen for interest collected on funds illegally deposited, are found in State vs. Bank, 19 O. D., p. 82, State vs. Schott, et al., 9 N. P. (n. s.) 522.

The result of these holdings leaves no doubt as to the rights of the county and the duty and liability of the treasurer, where the money so illegally deposited has drawn interest, and there is no doubt in such cases that the bank could be required to pay such interest to the county, or, if same has been paid to the treasurer, he and his bondsmen are liable to an accounting for such interest. This, however, presents a different case from the one under discussion, for it is assumed that the funds in this case have been deposited without any understanding or agreement as to interest being paid either to the treasurer or to the county.

The case of Franklin Bank vs. Newark, 96 O. S., 453, is the nearest in point of any available decision. In that case the city treasurer deposited in the Franklin Bank a certain sum of money in violation of section 4294 G. C., which then provided that

"Upon giving bond, as required by council, the treasurer may, by and with the consent of his bondsmen, deposit all funds and public monies of which he has charge, in such bank or banks * * * which may seem best for the protection of such funds * * *. All profits arising from such deposit * * * shall inure to the benefit of the fund."

The plaintiff in that case had not provided a depositary for the city funds and the defendant bank claimed that the deposit was made with the knowledge and consent of the city council and the bondsmen of the city treasurer, and was received by the bank under an agreement with the treasurer that no interest was to be paid on said funds or compensation charged for their safe keeping.

The city claimed that the bank had full knowledge that such funds were the public funds of the city of Newark and that the bank derived profits in loaning the same in its banking business, and plaintiff sought an accounting of the profits.

The banks in the case under consideration are not legal depositaries and, except for temporary deposits for the purpose of transportation, a deposit of county funds in such banks, without any agreement as to interest, is an illegal deposit resembling the facts in the Newark case. On page 456, after stating the issues in the Newark case, the supreme court stated the material facts to be:

"The issues of fact which may be regarded as material in this case were whether such funds were received upon the condition that no compensation should be paid therefor either as interest or otherwise, and whether such funds were in fact received and at all times held by the bank as a special deposit and no profit realized by the bank from the possession and use thereof."

The trial court had found in fact that such deposit was not a special deposit and that the bank did derive a profit from the possession and use thereof, and, after quoting section 4294 (supra), the court laid down this general rule:

> "We think it clear from the provisions of this and cognate sections of the General Code that any bank receiving funds of a municipality under the circumstances disclosed by this record, knowing the same to be the funds of the municipality, becomes a trustee and must account to the municipality for the fund so deposited and all profits arising from such deposit."

The special facts as to the deposits made in your question are not given, but in consideration of the statutes and cases above cited, a general rule may be announced that in case of such illegal deposits, if the bank knows, or by the exercise of ordinary prudence should know, that the funds deposited belong to the county, and receive the same not as a special deposit, but commingle and use the same with the other general deposits of the bank, and derive a profit from the possession and use thereof, such bank must account for the profits arising from such deposit.

This results in an answer to your first question that the responsibility of the bank, where the facts are as above stated, is that it may be held to an accounting to the county and be required to pay to the county the amount which such accounting would show to be due the county for the use and possession of its funds.

Your second question is,

> "What is the responsibility of the treasurer who permits these funds to remain in said bank as to the question of interest therein?"

His responsibility criminally would be determined by applying the provisions of section 2743 (supra), to the facts in each case, on the wilfullness of his neglect or refusal to perform any of the duties imposed upon him by the depositary statutes, and if the facts show beyond a reasonable doubt that the county treasurer wilfully violated any provision of those laws, or wilfully neglected or refused to perform his duties thereunder, he is subject upon conviction to the fines or imprisonment, or both, as provided in section 2743.

Section 286 G. C., as amended in 103 O. L., 508, in part provides that if an examiner's report sets forth any misfeasance or gross neglect of duty on the part of an officer, for which a criminal penalty is provided by law, the prosecuting attorney is obliged, upon the receipt of certified copy of the report, to institute criminal proceedings against such offender.

The same section provides that:

> "If the report sets forth that any public money * * * has not been accounted for, or that any public money has been converted or misappropriated,"

the prosecuting attorney, upon receipt of such report, is authorized and required to bring a civil action for the recovery of such public money. Public money is defined in the same section to be "all money received or collected under color of office, whether in accordance with or under authority of any law * * * or otherwise, and all public officials * * * shall be liable therefor."

If the county treasurer wilfully violates any provision of the depositary laws and wilfully neglects or refuses to perform the duties imposed upon him of depositing the public money in the designated depositary, and for unlawful purposes deposits said money in an unauthorized bank, where such public money draws interest, he has in law converted such money to his own use and he and his bondsmen are liable to the

county for the amount of the increment to the public funds. See State vs. McKinnon and other cases cited in answer to your first question.

Your third question relates to such temporary depositing of county money by the treasurer in a bank which is the regularly designated depositary of the county and where such deposit in the depositary is not credited to the regular depositary account, and your inquiry is "what is the responsibility of the bank as to interest on such funds."

Enough of the depositary sections have been quoted to show that upon the acceptance of the depositary proposal, the giving and acceptance of its bonds and notice from the county commissioners to the county treasurer, it is made the unmistakable duty of the treasurer to deposit the active funds of the county in such depositary before noon of each business day. The depositary is charged with knowledge of this law, which is read into and is a part of its depositary contract.

Excepting such moneys which the county will not need for the payment of its current expenses and which must be deposited in the inactive depositary, there is no provision in law whereby a lawfully designated depositary of county funds may receive any of the public money of the county and place it in a separate non-interest bearing account, except as herein pointed out.

It is a known fact that during the tax paying period, and up to the time of the semi-annual settlement of the county treasurer, large sums of money are paid into the undivided general tax funds. The law provides for the computation of the interest on the county funds in an active depositary on a daily cash balance basis. With the great amount of money thus paid in during the tax-paying period, the legislature realized the importance of having such undivided tax funds bearing interest on the daily balance basis, and the action of the county treasurer and county depositary, in depositing such money in a separate and irregular non-interest bearing account is to defeat the manifest purpose of this act, and is nothing more or less than a plain evasion of the law.

Here the bank is the legal depositary and, as your letter is understood, it has also qualified as what may be here termed "temporary depositary for transportation only." It must be remembered that such bank may receive deposits in either of these capacities. If duly received in the capacity first referred to, the liability and rate are fixed by statute and the depositary contract thereunder, and this phase may be eliminated from further discussion.

But in the latter situation there is no such contractual rate and the money is and can be received only as a special deposit; this is so from the very nature of the transaction and its legal effect under the statutes permitting such deposits. The bank in this instance receives the county's monies and holds them temporarily for transportation. In theory it must hold and transport the particular monies it receives. Under no circumstances can it legally treat them as a general deposit and use and commingle them with its general deposits.

The length of time allowed for transportation is not fixed by statute but may be determined by established banking custom, subject to special facts in particular cases, and no hard and fast rule is here made.

It may be suggested that the necessity and justification for such temporary deposit in a designated depositary would not ordinarily exist. One exception, however, may be pointed out; where such bank has already received as a regular depositary the maximum amount it could receive under its agreement upon qualifying under sections 2748 et seq. it could receive such temporary deposits.

Where, however, by agreement with the treasurer, such bank receives such money with actual or imputed knowledge of their public character, not for the purpose of transportation but with the agreement and intention to hold such money for a period of time clearly beyond the time necessary for transportation, and such funds are not placed or credited in the regular depositary account, but are placed in a non-interest

bearing account, and used and commingled with the bank's general deposits, its liability is certain.

In such a case, entertaining no doubt as to the bank's liability, these questions remain as to the measure of the bank's liability: (a) what rate of interest is recoverable, and (b) from what time shall such rate be charged.

Specific facts as to the particular deposits not being given in your letter, and it being understood that your questions are asked with a view of ascertaining and announcing a general rule in such matters toward the end that certain practices in this matter may be stopped, rather than at present making this opinion the legal basis for a particular finding or suit for recovery, these general questions will be noted and tentatively considered, but not finally decided until presentation of actual facts in specific cases.

(a) As to the rate of interest, the rate finally recoverable in the Newark case, it is suggested, may not be adopted for all cases. In that case the trial court found against the bank (page 455) on accounting on the basis of "the rate of net profit realized by the bank upon its entire assets during the period said fund was on deposit." The supreme court held, however, that the facts constituted the bank a trustee, from which upon established principles of equity, other facts being equal, it may be claimed the trustees have wrongfully converted the money to its own use and used and commingled the funds of its *cestui que* trust with its own funds or with other funds controlled by it in such a way as to make it impossible to ascertain the increment thereto, that the trustee would be liable for the legal rate of interest where no rate is agreed upon, viz., 6 per cent. This claim does not appear to have been made in the pleadings in the Newark case and was not considered in the supreme court, so that the measure of liability fixed in that case may not be held as a precedent for all cases. Again, a trustee bank in such a case may have used and commingled such money in such a negligent and imprudent manner as to have made little or no profit thereon; in such case it would seem unsafe to hold that the *cestui que* trust would be bound by such negligence and imprudence and entitled only to such profits as resulted therefrom.

(b) In the consideration of the question as to the time from which such rate shall be charged, it must be noted that, (1) sections 2748 et seq. do not fix a time limit for transporting such monies. It may be observed, however, that in the ordinary course of banking in ordinary cases, this would require but a short time; (2) such money is subject to the control of the treasurer and not the bank.

The liability of the bank may depend in some (if not all) cases upon its treating such funds as a general deposit.

In a given case, where such funds are received and held by the bank as a special deposit, but not transported because of the negligence of the treasurer, no reason for the bank's liability is apparent. But if such bank receives such funds, according to law, and their transportation is delayed by reason of the neglect of the treasurer or the bank, and such funds are used and commingled as before stated, the time of such use and commingling would be the beginning of the interest bearing time.

In another case in which may be supposed, the transportation is unreasonably delayed by the bank, the interest would then be charged from the beginning of such delay. But where it is the understanding between the treasurer and the bank that such funds are not intended as such temporary deposit and it was the understanding and the intention that they were to be used by the bank as a general deposit, the interest begins from the time of the deposit.

These questions are noted (but not decided) for practical purposes in guiding your examiners in procuring pertinent facts in the process of their examinations and are reserved for final consideration as actual cases may arise and be submitted.

Respectfully,

JOHN G. PRICE,
Attorney-General.

762.

SCHOOLS—COUNTY AND DISTRICT SUPERINTENDENTS NOT ENTITLED TO PAY FOR ATTENDING COUNTY TEACHERS' INSTITUTES.

County and district superintendents are not entitled to pay for attending the county teachers' institutes.

COLUMBUS, OHIO, November 7, 1919.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department upon the following question:

> "Are county and district superintendents entitled to pay for attending a county teachers' institute?"

Section 7870 G. C., reads as follows:

> "When a teachers' institute has been authorized by the county board of education the boards of education of all school districts shall pay the teachers and superintendents of their respective districts their regular salary for the week they attend the institute upon the teachers or superintendents presenting certificates of full regular daily attendance, signed by the county superintendent. If the institute is held when the public schools are not in session, such teachers or superintendents shall be paid two dollars a day for actual daily attendance as certified by the county superintendent, for not more than five days of actual attendance, to be paid as an addition to the first month's salary after the institute, by the board of education by which such teacher or superintendent is then employed. In case he or she is unemployed at the time of the institute, such salary shall be paid by the board next employing such teacher or superintendent, if the term of employment begins within three months after the institute closes."

Relative to the question of a district superintendent being entitled to the additional compensation of $2.00 per day mentioned in section 7870 G. C., the attorney general in 1915 passed upon this question in opinion 749, appearing at page 1531, Vol. 2, 1915, the syllabus of which reads:

> "A district superintendent is not entitled to pay for attending a teachers institute under authority of section 7870 G. C., as amended in 104 O. L., 107."

It is advised that section 7870 G. C. has not been amended since 1915 by any subsequent legislation upon this particular subject and the law at present reads the same as it did at the time it was construed by the attorney-general in 1915. The attorney-general arrived at his conclusion in such opinion upon the ground that,

> "While the provisions of said statute are general in that they apply to a teacher or superintendent employed by the board of education of any school district in the county, it will be observed that such teacher or superintendent must be employed by such board of education within the meaning of said provisions of such statute in order to be entitled to pay for attending said institute."

It seems, therefore, that it was not the intention of the legislature, in amending

said section (7870) to extend the meaning of said provision so as to include district superintendents. The present attorney-general concurs in the opinion above given and for the reasons appearing therein.

Coming to the question as to whether the county superintendent is entitled to pay for attending the county teachers' institute, attention is invited to the fact that he is employed by the year starting on August 1st and running for a period of twelve months thereafter. In Opinion No. 104, issued by the Attorney-General on March 8, 1919, such annual salary as appearing in the contract of the county superintendent should be paid in twelve equal installments and therefore the county superintendent would be drawing his regular salary for attendance at the county teachers' institute, no matter what part or time of the year such institute might be held. Again, the question arises as to whether the management of a county teachers' institute, the expenses of which are paid by the county board of education, is not one of the duties of the county superintendent in the capacity for which he was employed. It will be noted that section 7870, supra, says that the daily attendance of the teachers and superintendents at the county teachers' institute "shall be paid * * * as certified by the county superintendent * * *," which would indicate that before such county superintendent could certify any teacher or superintendent as being present at such institute, he would be there personally himself in order to certify the daily attendance of others. The section in question seems to contemplate the payment of $10.00 as maintenance for teachers and superintendents who might not be on the salary roll at a time when the teachers' institute is held, in which event, if they desire to attend such institute, they would be compelled to pay from their own funds maintenance in attending a county teachers' institute at a time when they themselves were not on the pay roll, for in the majority of cases the teachers are paid for their work at the end of each school month, beginning with the school month of September, and when the school term has ended with its last month, they have under contract with the board of education received their last month's salary, in which event, during the months prior to September, that is to say, the summer months in which the institute might be held, they are not on the pay roll of any board of education at that particular time.

The intention of the law seems to be to encourage attendance at the teachers' institutes and it has thus provided that those persons who are not being paid during the summer months shall receive this additional compensation of $10.00, that is, five days attendance at $2.00 per day, from the next employing board of education, to be paid as an addition to the first months salary by the employing board. This condition does not seem to apply in the case of a county superintendent of schools who receives his annual salary in twelve equal installments, to be paid throughout all of the months of the calendar year, nor does it apply, it may be said, in the case of a district superintendent who should be paid in the same manner, these two employes being paid as indicated above for their time throughout the entire calendar year of twelve months.

It is, therefore, the opinion of the attorney-general that county and district superintendents are not entitled to pay for attending the county teachers' institutes.

Respectfully,

JOHN G. PRICE,
Attorney-General.

763.

OHIO BOARD OF ADMINISTRATION—REDRAFT OF AGREEMENT WITH THE MASSILLON ELECTRIC AND GAS COMPANY.

COLUMBUS, OHIO, November 7, 1919.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your letter of recent date, enclosing duplicate copies of a certain proposed memorandum of agreement between your board and the Massillon Electric & Gas Company, relative to the erection by the latter of an electric transmission line across state land.

I have taken the liberty of redrafting the agreement, with the view of accomplishing the following things:

"(1) Incorporating within the agreement itself a copy of the law authorizing the same to be made.

(2) Making the blue print, by definite reference, a part of the agreement.

(3) Limiting, as does the act, the use of the line to *transmission* use only.

(4) Following the words of the act with reference to the non-liability of the state for injuries occasioned by the erection or use of the line.

(5) Giving the state the right to revoke, upon failure of the company to observe any of the terms and conditions of the agreement, including the payment of rent.

(6) Limiting the duration of the agreement to a period of ten years certain."

Inasmuch as the act is silent as to the duration of the right authorized to be granted, it is thought that nothing is gained by the reference that "this agreement * * * shall continue thereafter from year to year *in accordance with House Bill No.* 323," etc. At the end of ten years the agreement may, of course, be renewed.

As redrafted, said agreement is hereby approved as to form.

Very respectfully,
JOHN G. PRICE,
Attorney-General.

764.

COLLATERAL INHERITANCE TAX—WHERE TESTATOR DEVISED ALL HIS PROPERTY TO A AND B, HUSBAND AND WIFE, AND COLLATERAL RELATIVES FOR LIFE, SURVIVOR TO SUCCEED TO WHOLE FOR LIFE AND REMAINDER OVER TO OTHER COLLATERAL RELATIVES IN FEE—TAX HOW DETERMINED.

Where a testator devised all his property to A and B, husband and wife, and collateral relatives, for life, the survivor to succeed to the whole for life and remainder over to other collateral relatives in fee, the right to succeed to the whole estate for life in the survivor is a contingent interest passing by the will in addition to the half interest for life passing to each of the life tenants as a vested interest. The vesting of such contingent interest constitutes

a new inheritance taxable under the collateral inheritance tax law in addition to the original life estate.

COLUMBUS, OHIO, November 8, 1919.

HON. CHARLES G. WHITE, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—I have your letter of recent date requesting opinion of this department as follows:

> "One M. E. B., of Clermont county, died in October, 1918, her will was duly probated on October 21, 1918. Under the provisions of her will she left all her money to J. J. U. and M. J. U. for life, with the further provision that should one of them die the survivor should hold the entire estate for life. Upon the death of both of these parties the estate was to go to eight nieces and nephews in fee. J. J. U., one of the holders of the life estate died several months ago, and after the will was probated, therefore, of course, enjoying for at least a few months the life estate of half of this property.
>
> The question now comes up as to the payment of the inheritance tax. The appraisement of the estate was $6150.00. The bona fide debts of the estate amount to $1195.82. There was no personal property and the executrix, who happens to be one of the life tenants, M. J. U., paid all the debts out of her own personal funds. It is admitted, of course, that she could have sold the real estate to pay these debts, but she did not elect to do so.
>
> After the payment of the debts there was left in the estate $4954.18. The life interest of M. J. U., she being 64 years of age, was $1114.69, and after deducting the $500.00 exemption, left an amount on which she was to pay an inheritance tax of $614.69.
>
> The life estate of J. J. U, he being 67 years old, amounted to $1016.65. Taking the $500.00 exemption from this, left $516.65, on which he was to pay inheritance tax.
>
> The probate judge seems to think that, in addition to the payment of this tax, M. J. U., on account of the death of J. J. U., when she inherited a life estate in all the property, should pay an additional tax on that part which she inherited by reason of the death of J. J. U.
>
> In other words, the court claims that Mrs. U. should pay an inheritance tax on her life estate in one-half of the property, and Mr. U. should pay an inheritance tax on his half of the property, and in addition Mrs. U. should pay inheritance tax on the half which she is now entitled to on account of the death of Mr. U.
>
> The attorney for the executrix claims that the last named item of tax should not be paid, claiming that the tax having been paid on the whole estate, to-wit, the two halves, it will make a double taxation to charge for three parts.
>
> Will you kindly advise me whether this estate should pay on the half inherited by Mrs. U., the half inherited by Mr. U., and also if Mrs. U. will have to again pay an inheritance tax on the half she gets by reason of the death of Mr. U.?"

It appears from your statement of facts that all the events mentioned occurred before the present inheritance tax law went into effect on June 5, 1919. These questions are therefore all to be solved by the application of the former collateral inheritance tax law.

I may say at the outset that the old collateral inheritance tax law contains no specific provision to govern such a case, except the one providing generally how the value of life estates shall be computed.

In the case under consideration it would appear that the life estates created by

the will might be described as life tenancy in common or joint tenancy (the distinction between the two being immaterial for present purposes) for the joint lives of the husband and wife, with a contingent survivorship by way of remainder for life. In other words, each of the takers had a life interest which was vested as of the death of the testator, and the survivor was to have a life interest contingent upon the fact of survivorship.

Under the old law contingent estates, especially those which were wholly contingent, could not be appraised and taxed until the contingency happened. It appears in this instance, however, the contingency has happened before the necessity for determining the tax has arisen, in that the husband has died. The wife therefore appears as the survivor who acquires a life estate in the whole and therefore an enhancement in value of the life estate which she theretofore had, which was a half interest only, by reason of the death of her husband. This is a new succession upon which it is proper, as the probate judge has ruled, to collect an additional tax.

I have not made computations to verify the correctness of the probate judge's assessment of the initial life estates. Assuming, however, that such initial assessments were upon the theory that the husband had a life estate in a half interest, joint or in common, and the wife also a life estate in a half interest, both of which were vested as of the death of the testator, the assessment of such life interests and the payment of taxes thereon would leave unassessed and untaxed the new interest which the wife acquired by the death of her husband. It would not be double taxation either in law or in fact to tax the wife for this newly acquired interest.

You are advised, therefore, that in principle the probate judge's view of the case is correct, though no opinion is expressed as to the correctness of the valuations.

Respectfully,
JOHN G. PRICE,
Attorney-General.

765.

INHERITANCE TAX—WHERE THE GOODYEAR TIRE AND RUBBER COMPANY OF AKRON DECIDES TO REDEEM AN ISSUE OF ITS PREFERRED STOCK AT FIXED PRICE—SUCH TRANSACTION NOT WITHIN PURVIEW OF SECTION 5348-2 G. C. OF INHERITANCE TAX LAW.

Where a corporation decides to redeem an issue of its preferred stock at a fixed price, and gives notice thereof and makes arrangements with a financial institution to pay out money necessary to redeem the issue if the shares are preferred, the act of such trust company in paying out cash for the shares of redeemed stock is not a transaction within the purview of section 5348-2 G. C., a part of the inheritance tax law, requiring notice to be given to the tax commission of Ohio and consent on the part of that commission to such transaction, etc.

COLUMBUS, OHIO, November 8, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I acknowledge the receipt of your letter of recent date quoting the following communication to the commission on the part of the Goodyear Tire & Rubber Company:

> "The Goodyear Tire & Rubber Company of this city is redeeming an issue of preferred stock, the redemption to be made on November 1st of this year.

The Ohio Savings & Trust Company, also of this city (Akron) is acting for the Goodyear Tire & Rubber Company in the redemption of this preferred stock. The certificates of stock will be, when presented to the Ohio Savings & Trust Company, redeemed by the payment of money therefor. Some of the certificates of preferred stock will be in the hands of the representatives of deceased persons, and inquiry is therefore made as to whether the Ohio Savings & Trust Company may safely pay to the representatives of the deceased, the money represented by the stock certificate.

The inquiry, of course, arises out of section No. 5348-2, General Code, being a part of the new inheritance tax law.

The Trust Company is of the opinion that this transaction does not constitute a delivery of assets or property belonging to the decedent, but that it is a conversion by the representatives of the deceased of an asset of the deceased into another form. We request, therefore, that you inform us at your very earliest convenience as to whether or not the Trust Company may accept the certificates of stock presented by representatives of deceased persons, and pay them the redemption price therefor, or whether the Trust Company must retain from the redemption price, a sufficient amount to pay the inheritance tax.

It is further requested that if it be the holding of your commission that such tax must be retained under the law, you give to the Ohio Savings & Trust Company consent to pay to the representatives of deceased persons, the redemption price for the preferred stock to be redeemed by the Trust Company, the consent of your department being authorized by the provision of section No. 5348-2."

You request the advice of this department as to the proper procedure and as to the duties imposed on the Ohio Savings & Trust Company by the section of the inheritance tax law to which reference is made.

The letter quoted above is susceptible to two interpretations with respect to the nature of the arrangement between the trust company and the corporation. Under one of such possible interpretations the trust company would have a general deposit of the corporation commingled with its other assets, and would have agreed merely as agent of the corporation to redeem the stock in question and charge the account of the corporation with the payments thus made. Under the other interpretation the trust company would be the depositary of a special fund, set apart by the corporation out of its assets for the specific purpose of retiring this stock.

In the one case the relation between the trust company and the corporation would be purely that of debtor and creditor as to the moneys on deposit, and of agent and principal as to the duty to retire the stock. There would be no trust in the technical sense of the word, either for the corporation or for the stockholders. The assets subject to be paid over to the stockholders would be in the legal sense assets of the trust company itself. Even in the strict equitable sense they would be its assets. But if in such view they might be regarded as the assets of any one other than the trust company, they would have to be regarded as those of the corporation. It would be impossible in any view to regard the moneys as assets of the stockholders. Hence, the statute would not apply.

In the other possible view of the case the special deposit above described would constitute a trust, but a trust primarily for the benefit of the corporation. The assets in the possession of the trust company would then be, in the equitable sense at least, assets of the corporation devoted by it to the particular purpose of redeeming the stock.

The question would then arise as to whether or not such an arrangement would constitute a trust for the benefit of the stockholders in such a sense as that the assets

in the possession of the trust company could be regarded as assets belonging to the stockholders, and the redemption of the stock as a transfer of such assets to the stockholders.

In connection with this question it must be remembered that a resolution to retire stock has the effect of terminating many of the incidents at least of the relation of stockholder and corporation. The right to dividends ceases, as does the right, if any, to participate in the internal management of the corporation. The situation becomes analogous to that arising between a vendor and a vendee under a contract of sale and purchase subject to conditions which have occurred. It is assumed, of course, in the discussion of this question that the stock has been issued under statutory provisions similar to those obtaining in Ohio, so that a subscription for or purchase of a share of stock gives rise not only to the relation of stockholder and corporation until the redemption takes place, but also to an executory contract between the corporation and the holder of the stock looking to the purchase of the share on or after a day certain, at the election of the corporation and at a fixed price. This option being exercised by the corporation, the stockholder ceases to be such in the full sense of the word and becomes merely a person having a right to offer the certificate to the corporation for purchase by it; and the corporation becomes bound by its own action to purchase the stock when offered at a particular price.

In this view of the case the trust, if any, can be regarded as nothing more than a trust for the discharge of an executory contract of purchase. The fund to be used for this purpose cannot be regarded as belonging beneficially to the holders of the retired stock in proportion to their several interests therein, because in order to avail themselves of whatever right they may have to participate in that fund the holders of the retired stock will be obliged to part with their certificates, which now constitute choses in action in the sense that they evidence a claim to a matured contract of purchase.

Previous opinions of this department have laid down the principle that payment by a debtor to the estate of a deceased creditor of a claim due that estate cannot be regarded as a delivery or transfer of assets within the meaning of section 5348-2 G. C., for the reason that the asset of the estate consists of the duty to pay, which is known as a "credit" in the hands of the estate. The specific money which may be in the possession of the debtor and by him intended to meet the claim when presented belongs to him and is to be used by him in discharging the debt; it does not belong to the creditor. This principle applies *a fortiori* to the present case where the "asset belonging to the decedent" is evidenced in the tangible form of a certificate of stock which has been called in. What actually takes place is that this asset is liquidated; and its liquidation does not constitute a transfer of assets on the part of the corporation nor any agent or trustee of it.

For all these reasons it is concluded that on neither possible interpretation of the letter which is quoted in the commission's request for opinion would the retirement of the stock in question through the agency of the trust company be a transaction which would require the giving of notice to the tax commission and its consent in writing thereto, in order to avoid the liability of the trust company for inheritance taxes.

Respectfully,
JOHN G. PRICE,
Attorney-General.

766.

DITCHES—WHEN PROCEEDING FOR CLEANING DITCH BEGUN UNDER FORMER SECTION 6691 ET SEQ. G. C. REPEALED, 108 O. L. 926—TO BE COMPLETED ACCORDING TO REPEALED SECTIONS.

By virtue of section 26 G. C.; a proceeding for cleaning a ditch begun under former sections 6691, et seq., G. C., repealed as of October 10, 1919, 108 O. L. 926, is to be completed in the manner pointed out in said repealed sections.

COLUMBUS, OHIO, November 8, 1919.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR—Your letter of recent date is received, reading as follows:

> "A ditch in Jefferson township, this county, established heretofore, was apportioned by the township ditch supervisor for a 'clean out' more than one year ago. Practically all of the work was done promptly, but two different sections were left uncompleted at the time the new ditch law went into effect.
>
> Will you kindly advise whether the old trustees or ditch supervisor have any present authority to carry out their original orders?"

The matter of the appointment and duties of township ditch supervisor was provided for by former sections 3366 to 3390 G. C. Among these sections was section 3389, reading as follows:

> "The township ditch supervisor shall have the supervision of all township and county ditches in his township. He shall clean them out and keep them in repair as provided by law and shall perform such other duties as are imposed upon him by law."

The matter of cleaning and keeping in repair of township ditches was provided for by former sections 6691 to 6726 G. C. These sections, in brief, provide that the township ditch supervisor of the township through which a ditch runs, shall divide it into working sections and apportion the sections to landowners, corporate roads, railroads, township and county according to the benefit received, whereupon such landowners and others interested are charged with cleaning out their respective "working sections." The right is given a landowner dissatisfied with his apportionment, to file a protest with the township trustees, and the right is also given of an appeal to the probate court from the proceedings of the trustees.

By sections 6705, 6706 and 6707 it is provided in substance that if the persons to whom "working sections" are apportioned, refuse to clean or keep them in repair, the ditch supervisor may let to the lowest responsible bidder the work of cleaning them, and certify the cost of said work to the county auditor, whereupon the amount assessed attaches as a lien upon the affected land. All costs certified to the county auditor are to be collected by the county treasurer and paid over to the treasurer of the township for use as township ditch funds.

In an opinion of this department (No. 447) dated June 30, 1919, directed to Hon. Haveth E. Mau, prosecuting attorney, Dayton, Ohio, the two series of sections above referred to were considered and their history reviewed. The conclusion reached was that the two series were to be construed together.

All of said sections were expressly repealed by the new ditch law, known as amended senate bill No. 100 (108 O. L., 926) effective October 10, 1919. In the new law pro-

vision is made by sections 64 to 67 for the cleaning of ditches under the supervision of the county commissioners, and for an assessment of the cost against lands originally assessed for the construction of the ditch, except that in the case where no record of the original assessment has been preserved, then the assessment is to be made according to benefits, etc.

The answer to your question turns on the fact whether the steps directed to be taken by said repealed sections constitute a proceeding within the meaning of section 26 G. C. That section reads:

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

While it was at one time a matter of doubt whether said section had application to proceedings other than judicial proceedings, that doubt was disposed of by the supreme court in the case of Cincinnati vs. Davis, 58 O. S. 225—a case involving the validity of an assessment for the improvement of an alley. The principal objection to the assessment was that the ordinance for the improvement was not adopted by the proper municipal body in that it was adopted by the board of legislation, when as claimed, it should have been adopted by the board of administration in accordance with an act of the legislature giving jurisdiction to the latter board as to improvements of the character there involved, which act of the legislature was passed subsequently to the beginning of the improvement proceedings by the passage of resolution of necessity by the board of legislation. The court in the course of its opinion holds said section 26 (then known as section 79 R. S.) to be applicable, and disapproves the case of Commissioners vs. Green, 40 O. S., 316, in so far as the latter case held said section applicable only to judicial proceedings. The syllabus in the Cincinnati case reads as follows:

> "Where a resolution, declaring the necessity of the improvement of an alley, is made by the proper board of a city, at the time the resolution is adopted, the subsequent amendment of the law, whereby the making of such improvements as to alleys of a certain width, is conferred on another board, does not work a discontinuance of the pending proceeding, though it be of such an alley; and the improvement should be prosecuted to completion by the board that adopted the resolution, unless otherwise expressly provided in the amendment."

The various steps provided under the repealed statutes for the cleaning of a given ditch are so related as to give them the character of a "proceeding." It is well to bear in mind also that the matter of assessment lien is involved and that speaking generally, the steps pointed out by the applicable statutes must be strictly followed in order to give validity to such assessment. For these reasons the case of Cincinnati vs. Davis is in point, and in answer to your inquiry, leads to the conclusion that the repealed statutes are applicable to your situation and that the township trustees and ditch supervisor retain their authority to the extent that the proceeding for cleaning out the ditch in question should be completed under their supervision, in the manner pointed out in the repealed statutes.

It is true that in the Cincinnati case the amendment there in question, so far as is shown in the report of the case, did not operate to discontinue the existence of the

board of legislation; whereas, by the terms of the new ditch law all statutes relating to the office of ditch supervisor, and conferring power on the township trustees in the matter of cleaning ditches, are expressly repealed. However, such distinction cannot be accepted as ground for holding section 26 inapplicable in the present instance, because that section in terms states that a "repeal or amendment shall *in no manner* affect pending * * * proceedings;" thus making plain that all official authority necessarily involved in the pending proceeding is continued in force for the purpose of completing the proceeding.

You are therefore advised in answer to your inquiry that the township trustees and ditch supervisor have authority to carry out their original orders, provided that such orders were, when made, in accordance with the steps pointed out by the statutes then in force.

Respectfully,
JOHN G. PRICE,
Attorney-General.

767.

APPROVAL, BOND ISSUE, MORGAN COUNTY, IN THE SUM OF $27,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 11, 1919.

768.

DISAPPROVAL, BOND ISSUE IN CLARK COUNTY IN THE SUM OF $11,000.00—PURCHASE LAND AND CONSTRUCT SCHOOL BUILDING.

COLUMBUS, OHIO, November 11, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

Re Bonds of Springfield township rural school district of Clark county, Ohio, in the amount of $11,000.00, to purchase land and construct a school building, being 22 bonds of $500.00 each.

GENTLEMEN:—I have examined the transcript of the proceedings of the board of education and other officers of Springfield township rural school district relative to the above bond issue and herewith decline to approve the validity of said bonds for the following reason:

Section 7629 G. C., under authority of which these bonds are issued, is as follows:

> "The board of education of any school district may issue bonds to obtain or improve public school property, and in anticipation of income from taxes, for such purposes, levied or to be levied, from time to time, as occasion requires, may issue and sell bonds, under the restrictions and bearing a rate of interest specified in sections seventy-six hundred and twenty-six and seventy-six hundred and twenty-seven. The board shall pay such bonds and

the interest thereon when due, but provide that no greater amount of bonds be issued in any year than would equal the aggregate of a tax at the rate of two mills, for the year next preceding such issue. The order to issue bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of its full membership, taken by yeas and nays and entered upon its journal."

It will be noted that the last paragraph of this section provides that the order to issue such bonds can only be made by a vote of two-thirds of the full membership of the board of education. The transcript reveals that the board of education of Springfield township rural school district is composed of five members. The clerk of the board recites in his certificate attached to the transcript that four of these members were present at the opening of the board meeting at which the bond resolution was adopted, but that one of the four members present, Mr. Driscoll, was called away from the meeting before the vote was taken, leaving only three members to vote for the adoption of the resolution.

The provisions of section 7629, above referred to, are mandatory and the board of education is without authority to issue bonds under said section except by a vote of not less than four of its members at a regular meeting.

I am, therefore, of the opinion that said bonds do not constitute valid and binding obligations of the school district and advise you not to accept the same.

Respectfully,
JOHN G. PRICE,
Attorney-General.

769.

APPROVAL OF BOND ISSUE FOR ROAD IMPROVEMENT IN PICKAWAY COUNTY.

HON. A. R. TAYLOR, *State Highway Superintendent, Columbus, Ohio.*

COLUMBUS, OHIO, November 13, 1919.

770.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN MARION AND PORTAGE COUNTIES.

COLUMBUS, OHIO, November 13, 1919.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

771.

APPROVAL, ARTICLES OF INCORPORATION OF THE CELINA MUTUAL CASUALTY COMPANY.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

COLUMBUS, OHIO, November 13, 1919.

772.

APPROVAL, FINAL RESOLUTION FOR ROAD IMPROVEMENT IN JACKSON COUNTY.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, November 14, 1919.

773.

APPROVAL, CONTRACT OF SECRETARY OF AGRICULTURE WITH HENDERSON BROTHERS OF CHAGRIN FALLS, OHIO, FOR CONSTRUCTION OF ADDITION TO CHAGRIN FALLS FISH HATCHERY.

COLUMBUS, OHIO, November 14, 1919.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for approval, as per section 2319 G. C. (107 O. L. 455), a contract between the state of Ohio, per the secretary of agriculture, and Henderson Brothers of Chagrin Falls, Ohio, calling for the construction of an addition to the Chagrin Falls fish hatchery. You have also submitted the bond covering said contract.

Having before me the certificate of the auditor of state that there are funds in the appropriation heretofore made for the purpose set forth in said contract, sufficient to cover the amount payable thereunder, and being satisfied that the contract and bond are in accordance with law, I am this day certifying my approval thereon.

I have this day filed said contract and bond with the auditor of state. All other papers submitted to me in this connection I am returning to you herewith.

Respectfully,

JOHN G. PRICE,
Attorney-General.

774.

APPROVAL, BOND ISSUE, HURON COUNTY IN THE SUM OF $40,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 14, 1919.

775.

APPROVAL OF ABSTRACT AND DEED FROM CHARLES S. BRUNEY AND WIFE TO STATE OF OHIO, CERTAIN PREMISES IN PERRY COUNTY.

COLUMBUS, OHIO, November 14, 1919.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—There was recently submitted to this department an abstract of title covering the following described premises, accompanied with request that the same be examined with reference to the state of said title:

Situate in the county of Perry, in the state of Ohio, and in township of Jackson and bounded and described as follows:

Being part of the northwest quarter of section five (5), township fifteen (15), range sixteen (16): Commencing at a point where the county road intersects the B. & O. railroad; thence east nineteen (19) rods and fourteen (14) feet to a stone in the half-section line; thence north thirty (30) rods and thirteen (13) feet to a point; thence west twenty-seven (27) rods to the B. & O. railroad; thence south along said railroad thirty (30) rods and thirteen (13) feet to the place of beginning, containing five (5) acres, more or less, excepting therefrom the following described parcel, to-wit:

Commencing at a stone in the quarter section line 327½ feet east of the B. & O. railroad; thence north thirty (30) rods and thirteen (13) feet to a point; thence west 298½ feet; thence south thirty (30) rods and thirteen (13) feet; thence east 249½ feet to the place of beginning, containing three (3) acres, more or less.

There was also submitted with said abstract a proposed deed from Charles S. Bruney and wife to the state of Ohio for my approval.

Upon examination of the abstract, which is dated October 27, 1919, together with the subsequent deeds attached evidencing the continuation of chain of title, I find it discloses title to the premises above described in said Charles S. Bruney. The abstract is not entirely satisfactory from the standpoint of description of the premises in that there are occasional discrepancies in the courses and distances marking the boundaries, particularly in the sheriff's deed executed in pursuance of the proceeding for partition of the estate of Enos Goble, deceased, and in the record of said proceeding, as appears at sections 17 to 27 of the abstract.

However, these discrepancies are not considered to be probably indicative of a defective title, inasmuch as the several descriptions are sufficiently in accord to identify the property and the discrepancies are obviously merely typographical.

As before indicated, the description embodied in the record of said partition proceeding and the sheriff's deed executed in pursuance of the judgment in said cause evidences the most marked departure from the original description of the premises as shown in the preceding chain of title, but this infirmity is materially lessened by supplementing the description by courses and distances with certain location of the property by metes and bounds, which is consistent with the location shown in the earlier chain of the title.

Further, the inaccuracies of the description are shown to have been later remedied by the embodiment of practically the same identification of boundaries as embraced in the earlier deeds, so that I am not inclined to reject the evidence of title as defective in this respect.

Some other irregularities are noted in the abstract of the title in that the executions of certain of the conveyances were informal and that grants of rights of way for railroad purposes are not specific in point of location, but the lapse of time has cured the most, if not all, of the irregularities which are observed.

It is reported that there are no liens against the premises except a mortgage for $1,900, executed by the present holder of the legal title, Charles S. Bruney, to his predecessor in title, which mortgage, however, I am informed, is to be assumed by the state, as a credit against the purchase price.

The taxes for the year 1919 are not shown to have been paid and are therefore a lien against said premises.

The deed for conveyance of said premises to the state of Ohio by said Charles S. Bruney and wife is found to be in proper form and substance for vesting the title of the grantors in the state, subject to taxes for the year 1919 and the mortgage lien of $1,900 above mentioned, which conveyance is made with the reservation of right

to obtain water from said premises granted to Jefferson Middaugh, his heirs and assigns, by condition of a prior deed in the chain of title.

You are therefore advised that subject to the mortgage lien and lien for taxes and water rights above enumerated, the abstract discloses legal title to the premises involved in Charles S. Bruney upon the date of its examination and that the deed submitted with said abstract and executed by said Charles S. Bruney and Isabelle A. Bruney, his wife, is approved as a conveyance of said premises to the state of Ohio.

Respectfully,
JOHN G. PRICE,
Attorney-General.

776.

COMMOM PLEAS JUDGE—COUNTY COMMISSIONERS ARE WITHOUT AUTHORITY TO PROVIDE PERMANENT OFFICE FOR JUDGE OUTSIDE OF COURT HOUSE.

The commissioners of Hocking county are without authority to provide a permanent office for the judge of the common pleas court outside of the court house. Sections 2418 and 2419 G. C.

COLUMBUS, OHIO, November 15, 1919.

HON. EUGENE WRIGHT, *Prosecuting Attorney, Logan, Ohio.*

DEAR SIR:—Your letter of recent date in which you state that there is not sufficient office room in the county court house to supply an office for the common pleas judge, and inquiring whether or not the county commissioners have authority to rent an office outside of the court house for such purpose, was duly received.

I note your statement that you are inclined to the opinion that the common pleas judge is a county officer, and that therefore the county commissioners are warranted by section 2419 G. C. in providing him an office outside the court house.

Section 2419 G. C., as recently amended, provides, among other things, that

> "A court house, jail, public comfort station, offices for county officers and an infirmary shall be provided by the commissioners when in their judgment they or any of them are needed."

Whether or not a judge of the court of common pleas is a state or county officer has been the subject of considerable discussion in this state. In 1906 Annual Report of the Attorney-General, page 293, he was held to be a state officer; in 1918 Opinions of the Attorney-General, Vol. I, page 756, the opinion was that he is a state officer "for most purposes," but a county officer for the purposes of the primary election laws. In State vs. Rafferty, 26 Ohio Dec., 371, the common pleas court of Henry county reached the conclusion that he is not a state officer, but an officer who acts in a dual capacity, partly for the state and partly for the county in which he is elected; but when the case reached the court of appeals (27 Ohio Cir. 569), that court considered, and also decided it on the theory, that the judge was a state officer, upon whom certain non-judicial duties local in nature and effect had been imposed, and I am of the same opinion. The question in the case, as stated by the court, was whether the legislature may impose upon purely state officers duties which in their nature and effect are local to counties, and require the counties to contribute to the expense thereof from funds raised by taxation wholly within such counties. The question was answered

in the affirmative. A list of the non-judicial duties imposed upon judges of the common pleas court is set out in the opinion.

Under the law of this state (sections 2418 and 2419 G. C.), the proper building in which to hold court and discharge judicial functions is the court house, which the commissioners are expressly authorized to provide at the permanent seat of justice in the county. A court house has been provided for Hocking county and is now fit for occupancy. That being the case there is no authority vested in the commissioners to expend public funds in providing and maintaining a place for judicial purposes elsewhere, whether it be denominated a court room, judge's chambers, or judge's office. This conclusion is also justified by section 2418 G. C., which confers authority upon the commissioners to provide temporary quarters for the court, viz.: "Until proper buildings are erected for the permanent seat of justice in a county, the commissioners shall provide a suitable place for holding the courts thereof."

It is not intended to hold, either expressly or by implication, that the commissioners are without authority to provide temporary quarters at the permanent seat of justice, when the county is without a court house, or where the court house that has been provided is unfit for occupancy or is undergoing repairs. No such situation exists in Hocking county. The present condition arises solely by reason of the fact that the county officers have been given precedence over the court in the matter of providing offices in the court house, whereas the preference should have been in favor of the court, and outside offices, if necessary, provided for such of the other officers as may not be required to have offices in the court house.

Since the question under consideration involves the authority of the commissioners to expend public funds in providing a permanent office for the judge outside of the court house, and their right to do so is based solely upon the ground that there is not sufficient room in the court house for the purpose by reason of the fact that the available office space has been assigned to the county officers, the line of cases referred to in 15 Corpus Juris, p. 898, and in 11 Cyc., p. 738, to the effect that it is not essential in all cases to the validity of court proceedings that court be held in the court house, are not in point.

It may be contended that the judge when discharging some of the non-judicial duties imposed upon him by law may be acting as a county and not as a state officer, and that the commissioners would be warranted in providing him an office to be used for such purposes outside the court house. The contention is plausible, but not sound. The law, as already pointed out, has made provision for a court house which, when erected, is the proper building in which to hold court and discharge judicial duties, and where court should be held and judicial duties discharged, excepting only when the building has become unfit for occupancy or is undergoing repairs, in which latter event temporary quarters may be provided elsewhere. The court house having been provided, it must be held that the legislature did not contemplate or intend that a separate office or room be provided away from the court house for the use of the judge in discharging his non-judicial duties, but rather that he use the judicial office for such purposes whenever necessary.

Respectfully,
JOHN G. PRICE,
Attorney-General.

777.

OLEOMARGARINE CONTAINING COLORING MATTER—MANUFACTURE OF SAME IN OHIO FOR SALE IN OTHER STATES, UNLAWFUL—SEE SECTION 12733 G. C.

The manufacture in Ohio of oleomargarine containing coloring matter, although manufactured exclusively for sale in other states, is made unlawful by section 12733 of the General Code.

COLUMBUS, OHIO, November 15, 1919.

HON. THOMAS C. GAULT, *Chief, Bureau of Dairy and Foods, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date inquiring whether or not section 12733 G. C. prohibits the manufacture of colored oleomargarine in this state exclusively for sale outside the state, was duly received.

The section reads as follows:

> "Section 12733. Whoever manufactures oleomargarine which contains methyl orange, butter-yellow, annatto, aniline dyes or other coloring matter, shall be fined not less than one hundred dollars nor more than five hundred dollars, and, for each subsequent offense, in addition to the above fine, may be imprisoned not more than ninety days."

Section 12733 G. C. was originally a part of an act passed May 6, 1894 (91 O. L. 274), to prevent fraud and deception in the manufacture and sale of oleomargarine. The constitutionality of the act was sustained in State vs. Capital City Dairy Co., 62 O. S. 315, as a valid exercise of the police power of the state, and the judgment of the state court was affirmed by the supreme court of the United States in Capital City Dairy Co. vs. State, 183 U. S. 238.

It has been suggested that if the statute prohibits the manufacture in this state of colored oleomargarine exclusively for sale outside of Ohio, it imposes a direct and unwarranted burden upon interstate commerce, and is therefore unconstitutional.

That the power granted to congress by the federal constitution "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" (Art. 1, Sec. 8, Ch. 3) confers no authority upon congress to control the states in the exercise of their police power over local trade and manufacturing, has been sustained by the federal supreme court in a long line of cases. One of the latest decisions is that of Hammer vs. Dagenhart, 247 U. S. 251, commonly referred to as the child labor act case, in which the court at pp. 273 and 274 said:

> "The grant of power to congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the tenth amendment to the constitution."

The point for decision, however, does not, in my opinion, involve either interstate or intrastate commerce, nor the power of congress under the commerce clause of the federal constitution, for the reason that the question for determination is not the abstract right to transport colored oleomargarine from Ohio to other states, or the right to sell it within the latter states, but the right to *manufacture it in this state* for such purposes.

The fact that it is intended, after an article has been manufactured in this state,

to transport it to other states for sale, or that it is manufactured for the exclusive purpose of being transported to and sold in other states, presents no question calling for the application of the commerce clause of the federal constitution, because manufacture is not commerce, and neither the intention of the manufacturer nor the purpose for which he manufactures an article can make it such. Manufacture and commerce are distinct and independent things. As was tersely said in United States vs. Knight Co., 156 U. S. 1, "Commerce succeeds to manufacture and is not a part of it." The distinction, or independent character of each, was also emphasized by the same court in Capital City Dairy Co. vs. State, supra, as follows:

> "All the acts of the corporation which were comblained of related to oleomargarine manufactured by it in the state of Ohio, in violation of the laws of that state, and therefore operated on the corporation within the state, and affected the product manufactured by it *before it had become a subject of interstate commerce.*"

In Hammer vs. Dagenhart, supra, the court at page 272 used the following language:

> "The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. Railroad Co. vs. Yurkonis, 238 U. S., 439. Over interstate transportation, or its incidents, the regulatory power of commerce is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."

"If it were otherwise," said Mr. Justice Day in Hammer vs. Dagenhart, supra, pp. 272, 273, "all manufacture intended for interstate shipments would be brought under federal control to the practical exclusion of the authority of the states, a result certainly not contemplated by the framers of the constitution when they voted in congress the authority to regulate commerce among the states."

The language of Mr. Chief Justice Fuller in U. S. vs. Knight Co., supra, covers not only the case of a manufacturer who intends to ship and sell his product outside the state, but also where the product is manufactured exclusively for that purpose and is particularly pertinent, viz.:

> "The fact that an article is *manufactured for export to another state*, does not of itself make it an article of interstate commerce, *and the intent of the manufacturer* does not determine the time when an article or product passes from the control of the state and belongs to congress."

And in the earlier case of Kidd vs. Pearson, 128 U. S. 1, it was held that the Iowa statute prohibiting the manufacture within the state of intoxicating liquors except for certain specified purposes, but for no other—*not even for the purpose of transportation beyond the limits of the state*—was within the police power of the state, and that one who manufactured liquors exclusively for transportation and sale outside the state was within the prohibition of the statute. The court distinctly recognized and applied the rule that the fact that an article is manufactured for export to another state does not make it an article of interstate commerce.

See. also, Diamond Glue Co. vs. Glue Co., 187 U. S. 611, to the effect that the fact that a portion of a contract involves interstate commerce, does not bring the part relating to the manufacture of the particular article involved within the commerce clause of the federal constitution.

Commerce does not begin, according to the decision in the celebrated case of Coe

vs. Errol, 116 U. S. 517, until goods are committed to the common carrier for transportation out of the state to the state of their destination, or until they have started on their ultimate passage to that state. "The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence," said Mr. Justice Bradley, "is not part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. * * * Until shipped or started on its final journey out of the state its exportation is a matter entirely *in fieri*, and not at all a fixed and certain thing."

The object and purpose of section 12733 G. C. are not to exert the jurisdiction of the state over persons or property or transactions within the limits of other states, or to act upon colored oleomargarine as an export or while it is in process of exportation. Its purpose is to prevent, not the transportation of colored oleomargarine out of the state, nor its sale in other states, but to prevent its manufatcure within the state of Ohio. It is true that, notwithstanding its purposes and ends are restricted to the jurisdictional limits of Ohio, and apply to transactions wholly internal and between its own citizens, its effects may reach beyond the state by lessening the amount of colored oleomargarine exported.

> "But it does not follow," said Mr. Justice Lamar in Kidd vs. Pearson, supra, "that because the products of a domestic manufacture may ultimately become the subjects of interstate commerce, at the pleasure of the manufacturer, the legislation of the states respecting such manufacture is an attempted exercise of the power to regulate commerce exclusively conferred upon Congress. Can it be said that a refusal of a state to allow articles to be manufactured within her borders (for export) any more directly or materially affects her external commerce than does her action in forbidding the retail within her borders of the same articles after they have left the hands of the importers? That the latter could be done was decided years ago; and we think there is no practical difference in principle between the two cases."

But it is contended that the legislature of Ohio only had in mind the protection of the people of this state when it enacted section 12733 G. C., that the manufacture of colored oleomargarine exclusively for sale in other states can in no way endanger or affect the people of this state, and that there is no necessity for prohibiting its manufacture for that purpose.

The statute, however, admits of no such interpretation, and so far as the necessity for such legislation is concerned, the general assembly alone is the judge, and its decision, unless violative of some constitutional provision, must be respected and obeyed.

> "Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute * * * involves such danger to the public health as to require, for the protection of the people the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients," said Mr. Justice Harlan in Powell vs. Pennsylvania, 127 U. S. 678, "are questions of fact and of public policy which belong to the legislative department to determine."

The manufacture of colored oleomargarine in this state is made unlawful by sec-

tion 12733 G. C. The statute provides for and makes no exception in favor of a manufacturer who intends to sell his product outside the state, or who manufactures it exclusively for sale in other states, and the officers whose duty it is to enforce the law are without authority to read any such exception into the statute.

Respectfully,
JOHN G. PRICE,
Attorney-General.

778.

APPROVAL, BOND ISSUE FOR ROAD IMPROVEMENT, FRANKLIN COUNTY IN THE SUM OF $16,600.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 15, 1919.

779.

STATE HIGHWAY COMMISSIONER—APPROVAL OF FORMS OF RESOLUTIONS FOR USE BY BOARDS OF COUNTY COMMISSIONERS FOR HIGHWAY IMPROVEMENTS.

COLUMBUS, OHIO, November 15, 1919.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR—

In the matter of approval of forms of resolution by boards of county commissioners as to highway improvements, a part of the cost of which is to be contributed by the state.

There has been in use for sometime by county commissioners in connection with state highway improvement work a form known as "Final Resolution." This form covers not only the final resolution proper, that is to say, the resolution appropriating money for the share of cost other than that borne by the state, and assuming such share in the first instance, but also a resolution approving plans and determining that the work be done under the series of statutes relating to state highway work.

As your department has found in practice that the form now in use is somewhat confusing to the county officials, I have revised such present form, and have provided for two forms of resolution, the first to be designated "Resolution Approving Plans and Determining to Proceed" which form has particular reference to sections 1199 and 1200 G. C. and the second to be designated "Final Resolution," which has particular reference to sections 1218 and 5660 G. C.

The two forms as revised, which I now approve, are respectively as follows:

"Received_____ _____County
Pet. No_____ _____No_____Sec_____
Name of Road_____

Resolution Approving Plans and
Determining to Proceed.

WHEREAS, At a meeting of the Board of Commissioners of_____ County, Ohio, held in the office of the Commissioners of said county on the _____

day of_____, 19_____, a quorum being present, the improvement of the_____Road, _____Highway No_____ under the provisions of sections 1178 to 1231-11 inclusive of the General Code of Ohio, came on for further consideration; said section of road as described in the preliminary application of this board to the State Highway Department, on the _____day of _____, 19_____, being as follows:

(1)_____

_____

and located in the Township of_____, in all a distance of about _____miles.

WHEREAS, The State Highway Commissioner has approved said application and has caused a map of the following described section of said highway to be made in outline and profile, to-wit: (2)_____ _____

_____

and has caused to be made plans and specifications and an estimate of cost and expense for improving the above described highway, and has transmitted the same to this board, with the certificate of his approval indorsed thereon: Therefore, Be It

RESOLVED, That the section of highway above described in paragraph (2), be improved under the provisions of aforesaid law. That said work be done under the charge, care and superintendence of the State Highway Commissioner, and that said maps, plans, specifications and estimates for this improvement as approved by the State Highway Commissioner, are hereby approved and adopted by this board.

RESOLVED, That the clerk of this board be, and he is hereby directed to transmit to the State Highway Commissioner a certified copy of these Resolutions.

(Signed) Commissioners of

_____ _____County

_____

_____

STATE OF OHIO, County of_____ss:

OFFICE OF COUNTY AUDITOR

This is to certify that I,_____, as Clerk of the Board of Commissioners of the county of_____, have compared the within and foregoing copy with the Resolution Approving Plans and Determining to Proceed adopted by the said Board of Commissioners on the_____ day of_____, 19_____ and recorded in Commissioners' Journal, Volume _____, page_____, and that the same is a true and correct transcript of such Resolution Approving Plans and Determining to Proceed and the whole thereof.

Dated_____19____

Attest: _____

Clerk of Board of Commissioners"

"Received_____ _____County

Pet. No_____ _____No_____Sec_____

Name of Road_____

Final Resolution

WHEREAS, on the_____day of_____19____,

this board adopted a resolution approving plans and determining to proceed under the provisions of Sections 1178 to 1231-11 G. C. in the matter of the improvement of the following described section of highway, to-wit_____
_____
and directing the clerk of this board to transmit a certified copy of said resolution to the State Highway Commissioner; and

WHEREAS, The Clerk has reported to this board that such certified copy has been duly transmitted to said State Highway Commissioner; and

WHEREAS, Funds for the payment of the estimated cost of said improvement other than the proportion and share of said cost that is to be borne by the State have become available, as to which funds the County Auditor has made a certificate, now on file with this board, and here recorded, as follows:

I HEREBY CERTIFY That the money, to-wit $_____, required for the payment of the cost other than that part thereof assumed by the State, of the improvement known as I. C. H. No_____, Section_____, County of _____, is in the treasury to the credit of, or has been levied, placed on the duplicate and in process of collection for the state and county road improvement fund and not appropriated for any other purpose; or is being obtained by sale of bonds of said county issued on account of said improvement, which bonds are sold and in process of delivery.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal as said county auditor, this_____day of_____19_____

(Signed)_____
County Auditor.

(SEAL) _____County, Ohio.

THEREFORE, BE IT RESOLVED, That the sum of_____ Dollars ($_____) being_____ of the total cost and expense of construction (which total estimated cost and expense amounts to $_____), be and the same is hereby appropriated for improving under the provisions of said law, the highway described above; and the County Auditor is hereby authorized and directed to issue his order on the County Treasurer for said sum or part thereof upon the requisition of the State Highway Commissioner, to pay the cost and expense of said improvement, as the same may become due under the provisions of said law. We hereby agree to assume in the first instance the share of the cost and expense over and above the amount to be paid by the state and guarantee the State Highway Commissioner that said money shall be available at such time or times as it may be needed in the construction of said highway.

(Signed)

_____
_____ Commissioners of
_____ _____
County.

STATE OF OHIO } OFFICE OF THE COUNTY AUDITOR.
_____COUNTY, ss: }

This is to certify that I, _____ as Clerk of the Board of Commissioners of the County of_____ _____, have compared the within and foregoing copy with the Final Resolution adopted by the said Board of Commissioners on the_____day of_____

----------, 19----, and recorded in Commissioners' Journal, Volume------ P.------, and that the same is a true and correct transcript of such Final Resolution and the whole thereof.

Dated----------19------

Attest----------

Clerk of Board of Commissioners.

TO THE ATTORNEY GENERAL

I do hereby certify that there has been appropriated from the---------- ----------fund of the State Highway Department of Ohio the sum of $----------to the credit of----------County.

Chief Clerk, State Highway Department.

Dated----------

DEPARTMENT OF THE ATTORNEY-GENERAL·

Pursuant to the requirements of sections 1178 to 1231-11 inclusive of the General Code of Ohio, the foregoing agreement of the Board of Commissioners of---------- County, Ohio, is approved as to form and legality.

Dated.---------- ----------

Attorney General of Ohio.

In addition to the above, there will be provided a blank setting forth the auditor's certificate as it appears in the body of the final resolution as above copied, such blank for auditor's certificate to consist of an original and duplicate, the original to be filed by the auditor with the county commissioners and the duplicate to be forwarded to you by the auditor with the certified copy of final resolution. It is believed advisable to follow this course with reference to the auditor's certificate because of the amendment of section 1218 G. C. by the present general assembly. The original and duplicate blanks covering auditor's certificate may be forwarded by your department at the same time as you furnish to the county officials the form covering final resolution.

Respectfully,
JOHN G. PRICE,
Attorney-General.

780.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS WITHOUT AUTHORITY TO APPROPRIATE REAL ESTATE FOR USE IN UNLOADING ROAD MATERIAL DELIVERED BY RAILROAD.

County commissioners are without authority to appropriate real estate for the purpose of establishing a point for the unloading of road material delivered by railroad.

COLUMBUS, OHIO, November 15, 1919.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR·—Your letter of recent date is received reading as follows:

"One of our improved roads crosses a railroad by an overhead crossing. The railroad at the point being in a cut of several feet in depth, it is impossible to unload stone onto wagons, at this crossing and get out onto the highway.

At the time the highways were improved the contractors leased a strip of land from the adjoining proprietor parallel to the right of way of the railroad and unloaded stone at this point. Unloading at this point has become quite important as another improved highway intersects at a point about a half mile distant, so that this strip has become necessary as a place of unloading road material.

The commissioners desire to continue the use of this strip for unloading material for the maintenance of these two roads. * * * The strip is about twenty rods long and perhaps four rods wide. * * *

Do the commissioners have authority to appropriate this land by proceedings under 7214, 7471, 1195 G. C. or any other provisions for the appropriation of property for road purposes? The commissioners desire to acquire title to this strip of land and make a permanent place for unloading road material. It is located very near the center of the county and is several miles from any existing railroad siding and makes an ideal point for distribution."

It is, of course, a rule of long standing in Ohio that statutes granting the right of eminent domain are to be strictly construed; and this rule has been applied not only as to private corporations but also as to political subdivisions of the state. See Cemetery Association vs. Traction Co., 93 O. S. 161, and cases there cited; Grant vs The Village of Hyde Park, 67 O. S. 166, and cases cited. In the light of this rule, let us consider the three statutes mentioned in your communication.

Section 7214 (106 O. L. 645) reads as follows:

"The county commissioners or township trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county, and also appropriate additional land necessary for cuts and fills together with a right of way to or from the same for the removal of material. If the county commissioners or township trustees, and the owner of such material or land, cannot agree on the price therefor, the county commissioners or township trustees may apply to the probate court or common pleas court of the county in which the same is located, and on receipt of such application, the court shall proceed to assess the value of the material or right to be appropriated in the manner hereinafter provided."

While the mode of expression used in this statute is not all that might be desired, yet clearly its main purpose is to provide for the appropriation of road materials—a purpose which the legislature itself has recognized, in that section 7470 (106 O. L. 650), adopted as part of the same act as section 7214, contains the expression in specifying the procedure for certain rights of appropriation "the same may be done in the manner hereinbefore specified for the condemnation of road materials." Hence, the language appearing in section 7214 "and also appropriate *additional* land necessary for cuts and fills *together with* a right of way to and from *the same* for *the removal* of material" has reference to such incidental or additional land as may be necessary to permit access to the land containing the material appropriated, and is not intended as a general grant of power to appropriate a right of way for the purposes of transporting road material.

Section 7471 reads in part (106 O. L. 650):

"If the state highway commissioner or county commissioners deem it necessary at or near railroad crossings to remove buildings, or other obstructions near such railroad crossing, they shall pass a resolution declaring

it necessary to appropriate such buildings or other obstructions and the ground upon which they are located if they deem it advisable."

(Here follow provisions as to proceedings.)

The obvious purpose of this section is to provide a means of securing a safe railroad crossing, since the language is "to remove buildings or *other obstructions* near such railroad crossing." Hence, there is not to be found in the statute any intent to appropriate a right of way for use as such.

Section 1195 as mentioned in your letter is the former statute numbering of what is now section 1201. The latter section (108 O. L. 485) reads in part:

"If the line of the proposed improvement deviates from the existing highway, or if it is proposed to change the channel of any stream in the vicinity of such improvement, the county commissioners or township trustees making application for such improvement must provide the requisite right of way. If the board of county commissioners or township trustees are unable to agree with the owner or owners of such land or property as may be necessary for such change or alteration, or if additional right of way is required for the same, and the county commissioners or township trustees are unable to agree with the owner or owners of the land or property in question." (Here follow provisions as to the steps to be taken for appropriation.)

The word "improvement" as used in the quotation just made refers to a road improvement to which the state is to contribute a part of the cost. Hence, it is quite plain the right of appropriation granted has reference to additional lands which may be necessary to the road improvement proper and has no bearing upon the matter of road materials.

Two statutes in addition to those named in your letter remain to be considered, —sections 7470 and 2446.

Section 7470 reads (106 O. L. 650):

"The state highway commissioner, county commissioners or township trustees, may, in connection with any improvement, appropriate any drainage rights outside of the line of said highway or any easement, right or interest whatever in any property desired for any proposed improvement, and in case such official or either of them desire to appropriate such drainage right, easements, right or interest in any property in connection with any existing highway, the same may be done in the manner hereinbefore specified for the condemnation of road materials. Any land or property rights required for the construction of a new bridge or for any additions to, or repairs to any existing bridge, may be acquired in like manner."

This section, which appears as part of the so-called Cass highway act, is quite broad in its provision giving the right of eminent domain as to "any property desired for any proposed improvement." However, when we keep in mind that provision has elsewhere been made for appropriation of road materials, the intent of section 7470 when read as a whole is evidently to authorize the taking of such property as is necessary to be made a permanent part of the improvement in order to bring about proper construction, rather than to permit its taking for purposes incidental to actual construction work.

Section 2446 as recently amended (108 O. L. 628) reads:

"When in the opinion of the commissioners it is necessary to procure

real estate, or the right of way, or easement for a court house, jail, or public offices, or for a bridge and the approaches thereto, or other lawful structure, or public market place or market house, and they and the owner or owners thereof are unable to agree upon its purchase and sale, or the amount of damages to be awarded therefor, the commissioners may appropriate such real estate, right of way or easement, and for this purpose they shall cause an accurate survey and description to be made of the parcel of land needed for such purpose, or in case of a bridge, or the right of way and easement required and shall file it with the probate judge. Thereupon the same proceedings shall be had, as are provided for the appropriation of private property by municipal corporations."

Clearly, there is nothing in this section which authorizes appropriation for what may be called an "unloading yard." However, your letter states that "the commissioners desire to acquire title to this strip of land and make a permanent place for unloading road material;" and there is thus involved in your inquiry the proposition whether the commissioners might acquire the land for the purpose of building thereon an unloading platform or shed. Is this authorized by the words "or other lawful structure" as used in the statute?

No citation of authority is needed on the point that county commissioners have only such powers as are given them by statute. Therefore, in considering the purport of the words "lawful structures" we must look to their context for their meaning. It is not to be supposed that the legislature intended to leave to the discretion of the commissioners the matter of determining what is a lawful structure; for in that case the commissioners would have authority to condemn land for the placing thereon of a building of almost any character which appealed to their fancy as being for the public interest. We are thus left to the alternative of concluding that the words in question have reference to such structures as the commissioners are directly authorized by statute to erect,—such, for instance, as a court house, jail, public offices, or bridge, which are specifically named in section 2446, and authority to construct which is expressly given by statute elsewhere than in section 2446. Applying this rule to the situtation stated by you, section 2446 is not to be taken as giving authority to appropriate, since no statute is found which authorizes the county commissioners to erect an unloading platform or shed.

Specific answer to your inquiry is therefore that no authority is vested in the county commissioners to appropriate land for the purposes named in your letter.

Respectfully,

JOHN G. PRICE,

Attorney-General.

781.

PROBATION OFFICER OF JUVENILE COURT—NO AUTHORITY FOR PURCHASE OF AUTOMOBILE FOR USE BY SAID OFFICER—WHEN PROBATION OFFICER MAY USE HIS OWN AUTOMOBILE AND FOR WHAT EXPENSES HE CAN BE REIMBURSED.

1. *There is no statutory authority for the purchase, with county funds, of an automobile for the use of a probation officer of the juvenile court.*

2. *A probation officer may use his own automobile in the course of the performance of his official duties and be reimbursed, in the manner provided by section* 1682 *G. C.,*

for the expense of gasoline and oil paid for by him in connection with such use of said automobile.

COLUMBUS ,OHIO, November 15, 1919.

HON. CLARE CALDWELL, *Prosecuting Attorney, Warren, Ohio.*

DEAR SIR:—You have written this department as follows:

"The chief probation officer in our juvenile court conducts the detention home, and in addition thereto, makes investigations under claims for mothers' pensions.

In this work he has a great deal of use for an automobile. Up to date he has been using his own, without any compensation therefor. He desires to have one purchased by the county commissioners for this work. However, I am at a loss to find any authority under our code for the purchase, unless same can be secured under favor of section 2412-1.

Please advise if in your opinion there is any authority for purchasing an automobile for use by the chief probation officer."

Section 2412-1 G. C. (107 O. L. 585), to which you refer, reads thus:

"That, whenever the county commissioners are of the opinion that it is expedient to purchase one or more automobiles or other vehicles for the use of the county commissioners and county sheriff in order to facilitate the transaction of public county business, they shall adopt a resolution to that effect, and shall file an application in the court of common pleas, setting forth the necessity for such purchase, together with a statement of the kind and number of vehicles required and the estimated cost of each such vehicle. Ten days notice of the time of hearing such application shall be published in a newspaper of general circulation in the county. If upon such hearing of said application the court shall find that it is necessary and expedient to purchase one or more of such vehicles, it shall so order, and shall fix the number and kind of such vehicles, and the amount to be expended for each."

Section 2412-2 G. C. (107 O. L. 586), says:

"When purchased, such vehicles shall be for the use of the county commissioners and county sheriff, such use to be subject to regulation of the county commissioners, and such vehicles shall be used by each of such officials in lieu of hiring vehicles in the manner otherwise provided by law, unless the county vehicles are not available for such use, when vehicles are so purchased by the county commissioners, they may purchase such supplies as may be necessary. Any vehicles heretofore acquired and now owned by the county shall be used as herein provided. All such automobiles or other vehicles shall be plainly and conspicuously lettered as the property of the county. No official or employe shall use or permit the use of any such automobiles or other vehicles or any supplies therefor, except in the transaction of public business of such county."

It is evident that said sections give no authority for the purchase of automobiles or other vehicles for the use of any but the county officials therein named, to-wit: the county commissioners and the county sheriff.

After diligent search I have been unable to find any statute which would authorize the purchase of an automobile with county funds for the use of the chief probation officer or other probation officer of the juvenile court. In the absence of any such statute, the conclusion is of course unescapable that your question must be answered in the negative.

The foregoing is probably sufficient to answer the precise question stated in your letter of inquiry. Inasmuch, however, as your letter emphasizes the fact that the chief probation officer whom you have in mind has been using his own automobile in the performance of his official duties, and without any compensation therefor, it is presumed that you are also desirous of having my views upon this further question. Whether a probation officer using his own automobile in the course of the performance of his official duties may be reimbursed from the county treasury for the expense of such use, and if so, to what extent he may be so reimbursed.

Attention is first called to the fact that ample provision seems to have been made for the payment of the "incidental expenses" of the juvenile court and its officers.

Section 1660 G. C. provides that the summons, warrants and other writs of the juvenile court may issue to a probation officer of such court.

Section 1661 G. C. says:

> "When a summons or warrant is issued to any such officer, the expense in pursuing and bringing the person named therein, before such judge, shall be paid by the county in the manner prescribed by law for the payment of deputies, assistants and other employes of county officers."

Section 1682 G. C. says:

> "Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers, and the costs of transportation of children to places to which they have been committed, shall be paid from the county treasury upon itemized vouchers, certified to by the judge of the court."

Construing the last cited section, the Attorney-General in a former opinion (1917 Atty. Gen. Opin., Vol. II, p. 1362), says:

> "Section 1682 of the General Code makes provision for the expenses of the probation officer, he being considered an officer of the juvenile court."

In an opinion to Hon. F. J. Bishop, prosecuting attorney, Jefferson county, Ohio, the Attorney-General on July 19, 1918 (1918 Atty. Gen. Opin., Vol. I, p. 998), held that the prosecuting attorney may be reimbursed, out of the fund provided by section 3004, G. C., for gasoline and oil paid for by him in connection with the operation of his own automobile upon official business. "As to wear and tear," said the opinion, "I see no way in which a proper estimate of the county's liability could be determined, and for that reason am not convinced that any allowance could be made to you for such purpose from this fund."

No reason is seen why a probation officer may not likewise use his own automobile in the course of the performance of his official duties and be reimbursed, in the manner provided by section 1682 G. C., for the expense of gasoline and oil paid for by him in connection with such use. In many cases such a practice is to be commended as it results in a saving of considerable money to the county, although considerations of economy can not, of course, be taken as a substitute in any way for statutory authority.

Section 1682 G. C. authorizes, as hereinbefore pointed out, the "incidental expenses of the court and its officers." That is, the expenses incident to the performance of some official duty enjoined by statute upon the court or upon some officer of the court. Thus far in our discussion no attention has been paid to the question whether the official duties of the probation officer include the two kinds of work in the performance of which you say your probation officer uses his own automobile, viz., his work of investigating claims for mothers' pensions and his work as a person appointed

to conduct the detention home. We have simply assumed that these things were so included.

That said assumption was proper, appears from the following sections of the General Code:

Section 1683-3 G. C. makes it the special duty of the probation officer, where directed by the juvenile court, to investigate mothers' pension claims, said section reading in part thus:

> "* * *; sixth, a careful preliminary examination of the home of such mother must first have been made under the direction of the court by the probation officer, the agent of an associated charities organization or humane society, or in the absence of such probation officer, society or organization in any county, the sheriff of such county shall make such investigation as the court may direct, and a written report of the result of such examination or investigation shall be filed with the juvenile court, for the guidance of the court in making or withholding such allowance."

That the duty of conducting the detention home may be also placed upon the probation officer by the juvenile court, in its discretion, also seems evident.

Section 1663 G. C., defining the duties and powers of probation officers, says in part:

> "He shall * * * take charge of any child before and after the trial as the judge may direct."

Section 1670 G. C. authorizes the establishment of a detention home where delinquent, dependent or neglected minors under the age of eighteen years may be detained until final disposition:

> "In counties having a population in excess of forty thousand," says said section, "the judge *may* appoint a superintendent and matron who shall have charge of said home, and of the delinquent dependent and neglected minors detained therein."

This language is permissive, merely, and it would seem that even in counties of more than forty thousand the probation officer as an officer of the juvenile court, might properly be placed in charge of said home.

It may be contended, however, that section 1682 G. C. is not applicable to the payment of expenses incurred by the probation officer in discharging his duties under the above quoted provisions of section 1683-3 G. C., for the reason that the last cited section (first enacted in 103 O. L. 878 and reenacted with slight changes in 106 O. L. 436) was not a part of our law at the time section 1682 G. C. (99 O. L. 202, Sec. 40) was enacted, and, therefore, that the phrase "in all such cases," found in section 1682 G. C., could not be taken to include the activities of the probation officer under section 1683-3 G. C.

Upon reflection it is concluded that the contention just stated is not sound. It seems evident that section 1682 G. C. was intended to be a sort of "catch-all" section, giving broad authority for the payment of all fees and costs occasioned by, and the incidental expenses of the juvenile court and its officers incurred in the carrying out of the provisions of the juvenile act.

What is now section 1682 G. C. was section 40 of the original juvenile act, found in 99 O. L. 202. The language of that section, so far as material to our inquiry, was this:

> "And all fees and costs in all cases *coming within the provisions of this act,*

together with such sums as shall be necessary for the incidental expenses of such court and its officers * * * shall be paid," etc.

The codifying commission, it appears, merely condensed the language just quoted, and the words "in all such cases," now found in section 1682 G. C., are made to carry the idea conveyed by the words "in all cases coming within the provisions of this act."

It is also to be borne in mind that the legislature has clearly bespoken for the juvenile act a liberal construction. See section 1683 G. C.

The conclusion is therefore reached that both of the matters mentioned in your letter come within the category of the official duties of the probation officer, and that when the probation officer uses his own automobile in connection with such matters, the expense of gasoline and oil necessary to the operation of such automobile so used is an "incidental expense" within the meaning of section 1682 G. C., for which such probation officer may be reimbursed out of the county treasury in the manner provided by that section.

Respectfully,
JOHN G. PRICE,
Attorney-General.

782.

HUGHES HEALTH BILL—IN CITIES HAVING POPULATION LESS THAN 25,000 GENERAL DISTRICT HEALTH BOARD HAS POWER TO APPOINT LOCAL REGISTRAR OF VITAL STATISTICS.

In cities having a population of less than 25,000, *the genera district health board has power to appoint the local registrar, as provided in section* 15 *of House Bill* 211, *and section* 201 *G. C.*

COLUMBUS, OHIO, November 15, 1919.

Department of State Bureau of Vital Statistics, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

> "Section 201 G. C. provides for the appointment of local registrars in townships, villages and cities, and inasmuch as the Hughes health bill provides for the abolishment of the present health organization in cities under 25,000, I would like to have you clear up the legal points involved.
>
> Section 15 of the Hughes health bill seems to me to confer the power now given these municipal boards of health to the district boards of health. This matter affects registration in a great many cities in the state and I herewith request your office to give an opinion confiding what course of action, if any, should be taken by this bureau."

By personal conference it is learned that your question relates to the power of appointment of local registrars of vital statistics in cities under twenty-five thousand inhabitants not included in municipal health districts, as section 201 G. C., infra, provides that in villages and townships the clerks are *ex officio* local registrars. Section 197 and 201 G. C. and section 15 of House Bill 211 (Hughes health act), are pertinent to your inquiry.

The purpose of sections 197 et seq. G. C. is to establish "a state system of registration of births and deaths," as stated in section 197 G. C.

Section 201 in part provides·

"In villages the village clerk, and in townships the township clerk, shall be the local registrar, and in cities the city board of health shall appoint a local registrar of vital statitics, and each shall be subject to the rules and regulations of the state registrar, the provisions of this chapter and to the penalties provided by law."

Section 15 of house bill 211 in part provides:

"The district board of health hereby created *shall exercise all the powers and perform all the duties now conferred and imposed by law upon the board of health of a municipality*, and all such powers, duties, procedure and penalties * * * shall be constiued to have been transferred to the district board of health by this act."

It should be noted that neither in this section nor in any other section of house bill 211 is there any specific reference to or change in the method of appointing local registrars, as provided in section 201.

Section 15, by its clear and comprehensive grant and transfer to the district board of health of "all the powers and * * * duties now conferred and imposed by law upon the board of health of a municipality," furnishes a complete answer to your inquiry, and as one of the powers and duties then conferred and imposed upon a board of health of a city was to appoint the local registrar, it logically follows that the exercise of this power and performance of this duty must "be construed to have been transferred to the district board of health," as provided by this sction.

Therefore you are advised that in cities having a population of less than 25,000 the general district health board has power to appoint the local registrar, as provided in section 15 of house bill 211, and section 201 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

783.

COUNTY RECORDER—FEE FOR CERTIFYING COPY OF SOLDIER'S DISCHARGE—SECTION 2778 G. C. GOVERNS.

Section 2778 G. C. fixes the recorder's fee for certifying copy of a soldier's discharge at twelve cents for each one hundred words.

COLUMBUS, OHIO, November 15, 1919.

HON. ROBERT E. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department as follows:

"Should the county recorder charge a soldier for a certified copy of his discharge, and if so, what should the charge or fee be?"

Sections 2770, 2779, 2772 and 2778 are pertinent.

Under sections 2770 and 2779 the recorded discharge of a soldier becomes a record in the recorder's office.

Section 2772 requires the recorder on demand and tender of the "fee therefor" to furnish a certified copy "of any record in his office."

Section 2778, in part, is:

> "For the services hereinafter specified, the recorder shall charge and collect the fees provided in this and the next following section * * * for certifying copy from the record, twelve cents for each hundred words."

It is thus clear that the answer to your question is found in section 2778, which fixes the fee as above quoted.

Respectfully,
JOHN G. PRICE,
Attorney-General.

784.

SCHOOLS—DISTANCE FROM RESIDENCE OF PUPILS TO SCHOOL HOUSE—HOW MEASURED—OVER NEAREST TRAVELED PUBLIC HIGHWAY.

Distance from the residence of pupils to the school house to which they are assigned must be measured over the nearest traveled public highway, that is, the highway that is at all times practicable, convenient and accessible to such pupils, and one that can be used by vehicles of travel.

COLUMBUS, OHIO, November 15, 1919.

HON. E. E. LINDSAY, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

> "Where pupils live nearer than two miles to a school to which they have been assigned by measuring along an old established highway which has become impassable for automobiles or vehicles of any sort by reason of gullies and washouts and a part of which is over-grown with grass and weeds, but can be traveled on foot or on horseback, and more than two miles from such school by measuring along a public highway which can be traveled by all sorts of vehicles, will the board of education be relieved from transporting such pupils?
>
> In other words, does the 'nearest traveled highway' in your opinion mean a highway that is actually traveled by the public by modern methods or a highway that may be traveled only on foot or on horseback in its present condition."

Section 7731 G. C., as amended in 107 O. L., page 625, in part reads as follows:

> "In all rural and village school districts where pupils live more than two miles from the nearest school, the board of education shall provide transportation for such pupils to and from such school the transportation for pupils *living less than two miles from the school house by the nearest practicable route for travel accessible to such pupils shall be optional with the board of education.* When transportation of pupils is provided the conveyance must pass within one-half mile of the residence of such pupils or the private entrance thereto. * * *"

The above section means that where it is established that a pupil lives less than two miles from the school house, the board of education of the district shall have the option of providing transportation, whereas if the distance is more than two miles, the board of education must provide transportation. The question before us is as to how this two miles distance from the school house to the residence of the pupil is to be ascertained, because there might be a number of cases in which the residence of the pupil would be less than two miles from the school house if measured in one manner and more than two miles if measured in another manner.

Upon the question as to the proper method to be used in computing such distance from the residence of the pupil to the school house, the courts have spoken in several cases, as indicated herein.

In the case of the Board of Education vs. Board of Education, 23 O. D., 698, Judge Woodmansee said, on page 699:

> "It would not be proper to measure the distance on a straight line 'as the crow flies' across the fields, as the children, without the consent of the owners of the fields, would thereby become trespassers. Besides, under the provisions of the statutes of Ohio the children who reside in school districts in the country, living more than one-half mile (now two miles), from the school, and residing at not a greater distance than one-half mile from a public highway, *are entitled to be carried to school in a public conveyance*, at the expense of the school fund in the district. Necessarily they would be carried thus along the highway. And, whether the children go by public or private conveyance, or whether they walk to and from school, they are expected to go by the *most direct and convenient highway*, and the length of that course determines the distance from home to school."

Possibly the latest decision upon this question regarding the route of travel to be used in computing distance from the home to the school, is the case of Dover Township Board of Education vs. State ex rel. Frederick E. Hershey, et al., decided in the court on June 11, 1919, and reported in the Ohio Law Bulletin for October 20, 1919, at page 562. The second branch of the syllabus in such decision reads as follows:

> "Provision must be made for the transportation of all pupils of legal school age who reside in the territory of a suspended school and live more than two miles by the nearest traveled highway from the nearest school or the school to which they have been assigned."

In arriving at this conclusion the court said:

> "We hold that all pupils of legal school age, who reside in the territory of the suspended school, and who live more than two miles from the nearest school must and shall be transported to such nearest school or the school to which they have been assigned, if the same be more than two miles from where such pupil or pupils live in said rural school district, the said distance to be measured from the school house to where such pupils live *over the nearest traveled public highway.*"

In your inquiry you desire to know as to whether "the nearest traveled public highway" is one that is actually traveled by the public by modern methods or a highway that was established once upon a time but at present can be traveled only on foot or on horse back due to the reason that there are many gullies and washouts in such highway and a part of it is overgrown with grass and weeds.

Speaking of the transportation of pupils living less than two miles from the school

house, the language of the statute (section 7731), is that if such transportation is furnished, it shall be by the nearest *practicable route for travel* accessible to such pupil. In Judge Woodmansee's decision, supra, the court says that children are expected to go by the most *direct and convenient* highway and further indicates that the legislature had in mind the use of a public conveyance, to be furnished at the expense of the school fund in the district, and that the children would *be carried* thus along the highway. The decision of the Tuscarawas court of appeals, however, goes a step farther and says that the distance shall be measured by the nearest traveled public highway; these words analyzed mean, first, that the highway shall be a public highway, which is true in your case even though the same is in an impassable condition from years of neglect. But the decision further says that such public highway must be one that is "traveled," and the court, passing upon this question, as late as the summer of 1919, must certainly have had in mind modern methods of travel, which includes the use of automobiles and other vehicles and could not be restricted to mean a public highway that was not used by the public because of impassable conditions, unless the pupils saw fit to walk on such highway or ride horseback thereon.

Under the provisions of state law, children are transported in various school districts in either school vans or automobile trucks, there usually being a route arranged by the district board of education, which takes in a number of children, thus obviating the use of more than one vehicle, though in isolated instances many boards of education, complying with the law, are compelled to transport to school one, two, three or more pupils who are so situated geographically that their school transportation is compulsory and yet there is no necessity for an established school transportation route in the sense of having to use a truck or van. In providing for school transportation, the general assembly certainly meant that a practical view of the matter should be taken, and that aside from furnishing the vehicle, there was contemplated that such vehicle should travel over roads that are used and are safe for the transportation of children.

You indicate that the road in question could not be used by passenger automobiles or small vehicles carrying persons in a limited number, because of washouts and gullies. How then could any one presume that such a road would be considered a "traveled public highway" whereon it is necessary to use a truck or school van? Can it be said that this highway, as described by you, is either practical or convenient? Clearly the road in question does not come within the limits of either of these descriptions, the same being words used in the law by the courts in passing upon this question.

It is, therefore, the opinion of the Attorney-General that distance from the residence of pupils to the school house to which they are assigned must be measured over the nearest traveled public highway, that is, the highway that is at all times practical, convenient and accessible to such pupils, and one that can be used by vehicles of travel.

Respectfully,
JOHN G. PRICE,
Attorney-General.

785.

SWEET CIDER AND GRAPE JUICE—MANUFACTURE AND SALE UNDER OHIO STATUTE NOT ILLEGAL—VINEGAR—SALE OF SAME NOT PROHIBITED—QUANTITY OF CIDER OR WINE PERSON MAY KEEP IN PRIVATE DWELLING FOR OWN USE NOT SUBJECT OF REGULATION UNDER STATE LAW.

The manufacture of sweet cider and grape juice is not subject to a penalty in the present state of the Ohio law, nor in the sale thereof before it ferments made the subject of penalty.

The sale of vinegar, not for beverage purposes, while regulated with reference to branding and adulteration is not prohibited. The quantity of cider or wine which a person may keep in his bona fide private dwelling for his own use, and not for sale as a beverage, is not the subject of regulation under the present state of the law.

COLUMBUS, OHIO, November 15, 1919.

HON. HOMER HARPER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Your recent communication asking for my opinion as to the state of the law relative to the manufacture of cider and grape juice has been duly received and is as follows:

> "Will you kindly give me your opinion on the following questions:
>
> (1) Whether a person may for compensation make cider and wine for persons who bring their apples and grapes to his mill, the cider and juice of the grapes being removed by the owner within a short time after it is made?
>
> (2) Whether a person may buy apples or grapes and grind or press the same and sell the sweet juice before it ferments?
>
> (3) How much cider or wine may a person make or have and keep for his own use in his dwelling?
>
> (4) Whether a person may make cider or grape juice and keep it until it becomes vinegar and then sell it?"

It is supposed that information as to possible change in the state of the law in pursuance of the abrogation of the previous license policy of the state by the adoption of constitutional prohibition, is the real purpose of your inquiry. You are advised, however, that no change in the law applicable to the manufacture of sweet cider and sweet wine or the sale thereof before it ferments, nor the keeping of the same in one's private dwelling for his own use, nor the sale of vinegar has been recently made to my knowledge.

While it was provided in the recent prohibition amendment to the constitution that the manufacture and sale of intoxicating liquor as a beverage is prohibited, yet no penalty or administrative measures were incorporated in the amendment, it being provided that the legislature shall enact legislation for carrying it into effect, so that in this respect the amendment is not fully self-executing, and no penalty is afforded for enforcing its provisions except to the extent found in the pre-existing statutes of the state.

With reference to the manufacture of cider, grape juice, and even intoxicating liquors generally, there is no general provision of the statutes purporting to penalize or prohibit such manufacture, save certain special provisions in the local option laws which would not be applicable to the manufacture of sweet cider and grape juice, as outlined in your question.

Likewise, the sale of sweet cider and unfermented grape juice is not subject to penalty under any statute in force, to my knowledge; nor am I aware of any statute

regulating the quantity of cider or wine which a person may make and keep for his own use in his private dwelling.

While the sale of vinegar is the subject of regulation in reference to branding and adulteration thereof, as provided in sections 5786 G. C. et seq., yet the sale of vinegar is not prohibited, and when such sale is made in compliance with the regulatory provisions of the statute, your fourth question is answered in the affirmative.

Thus the law on the subject remains the same as prior to the adoption of constitutional prohibition, and you are advised that the statutes so in force do not prohibit the making of sweet cider and unfermented grape juice, nor the purchase and sale thereof; nor is the amount of cider and wine which a person may make or have and keep for his own use in his private dwelling regulated. The sale of vinegar is not prohibited, but is regulated with reference to branding and adulteration, as provided in section 5786 G. C. et seq.

Respectfully,
JOHN G. PRICE,
Attorney-General.

786.

SCHOOLS—TEXT BOOKS—WHAT PRICE PUBLISHERS MAY CHARGE FOR BOOKS REGULARLY ADOPTED—SECTION 4752 G. C. GOVERNS —STATUTE DOES NOT RECOGNIZE ADOPTION OF SCHOOL BOOK FOR SUPPLEMENTARY OR REFERENCE PURPOSE.

1. *Publishers of text books cannot charge more than the Ohio contract price on file with the state school book commission for books regularly adopted.*

2. *When books for use in public schools are regularly adopted by a board of education such adoption is for a period of five years, and the board of education is entitled during such period to the benefit of the price of such text book, as filed by the publisher with the school book commission.*

3. *There is but one method for the legal adoption of books for use in the public schools and that is the method provided in section 4752 G. C. The statutes do not recognize an adoption of a school book for supplementary or reference purposes as against an adoption for school use.*

COLUMBUS, OHIO, November 15, 1919.

HON. F. B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion of the attorney-general upon the three following questions:

> "(1) Have publishers the right to charge more than the Ohio contract price for books regularly adopted, but used for supplementary and reference purposes for a period of five years?
>
> (2) Have publishers the right to charge more than the Ohio contract price for books regularly adopted, but used for supplementary and reference purposes, when no time period of adoption is specified, but the matter is left open?
>
> (3) What constitutes a legal adoption of books for supplementary and reference purposes so that publishers may be required to furnish such books at the Ohio contract price?"

The statutes covering the establishment of the state school book commission

and fixing the manner and method of filing text books by publishers, for the purpose of adoption later by school boards throughout the state, are sections 7709-7715, inc., G. C.

Your first question is whether publishers of text books have the right to charge more than the Ohio contract price for books regularly adopted but used for supplementary and reference purposes for a period of five years. The answer to this question is in the negative, for if a publisher had agreed in writing to furnish books that were adopted by a school board and did not do so, such publisher would be violating the provisions of section 7712 G. C., which provides that under circumstamces where a publisher fails or refuses to furnish books that have been adopted, the board of education which has been refused must at once notify the state school book commission of such failure or refusal and if it is found that there has been a failure or refusal, the state school book commission shall at once notify such publisher and each board of education in the state that such book shall not thereafter be adopted and purchased by boards of education in this state. In addition, the section provides that the publisher shall forfeit and pay to the state five hundred dollars for each failure to furnish books that have been adopted by a board of education at the prices agreed upon at the time of contract, such prices being not in excess of those filed with the state school book commission in the office of the superintendent of public instruction at Columbus.

It is therefore apparent that publishers have no right to charge more than the price listed with the state school book commission to any board of education which adopts such text book or text books. The law does not recognize any distinction as to what constitutes supplementary and reference purposes in the use of a text book. The only reference in the law is to text books and *Webster* defines a text book as:

> "A volume, as of some classical author, on which a teacher lectures or comments; hence any manual of instruction; an educational treatise; a school book."

The *Century Dictionary* defines a text book as:

> "A book used by students as a standard work for a particular branch of study."

It would seem, therefore, that if the books have been regularly adopted in the manner provided in section 4752 G. C., the question as to the way in which they were to be used in class work, whether with each recitation or intermittently, does not enter. Where a publisher has listed a book with the state school book commission and such book has been later adopted by a board of education, the publisher must furnish such book at a price not exceeding the maximum price filed with the text book commission at the time of purchase.

Coming to your second question, you ask whether publishers have the right to charge more than the Ohio contract price for books regularly adopted but used for supplementary and reference purposes, when no time period of adoption is specified but the matter is left open. You indicate in this question that the books you have in mind have been *regularly adopted* by a board of education, but that no time period of adoption is specified and the matter is left open.

There is but one method of legal adoption of books in Ohio, which is that provided for in section 4752 G. C., which reads:

> "* * * Upon a motion to adopt a resolution * * * to adopt any text book, the clerk of the board shall publicly call the roll of the members composing the board and enter on the records the names of those voting

'aye' and the names of those voting 'no.' If a majority of all of the board vote aye, the president shall declare the motion carried. * * *"

Section 7713 G. C. reads:

"At a regular meeting, held between the first Monday in February and the first Monday in August, each board of education shall determine by a majority vote of all members elected the studies to be pursued and *which of such text-books so filed shall be used* in the schools under its control. But no text-books now in use or hereafter adopted shall be changed, nor any part thereof altered or revised, nor any other text-book be substituted therefor for five years after the date of the selection and adoption thereof, as shown by the official records of such boards, except by the consent at a regular meeting, of five-sixths of all members elected thereto. Books so substituted shall be adopted for *the full term of five years.*"

From a reading of the above section, it is noted that a regular adoption operates for the full term of five years and there can not be, under the provisions of section 7713 G. C., a regular adoption in which the time period could be stated as less.

Coming to your third question, you desire to know what constitutes a legal adoption for supplementary and reference purposes, so that publishers may be required to furnish such books at the Ohio contract price.

The statutes creating the state school book commission of Ohio, consisting of the governor, the secretary of state and the superintendent of public instruction, do not recognize a distinction between books used strictly as text books and those which you indicate may be books for supplementary and reference purposes. Throughout the sections the word "text-book" occurs, but in more frequent instances it is simply the word "books." It is important to notice that there is a distinction between the work conferred on the state school book commission, as regards this act, and the duty that is later conferred on boards of education under such act. The state school book commission created in section 7710 G. C. does not adopt anything. Its power is limited by the language of the statute in these words:

"* * * *shall fix the maximum price* at which such books may be sold to or purchased by boards of education, *as hereinafter provided.* * * *"

Following the fixing of such maximum price, the publisher "notifies the superintendent in writing that he accepts the price fixed, and agrees in writing to furnish such book during a period of five years at that price, such written acceptance and agreement *shall entitle the publisher to offer* the book so filed *for sale to such boards of education.*"

A reading of the statutes in question indicates that before any board of education can legally demand that books be furnished to such board, at the price filed with with the state school book commission, the board itself has a duty to perform—that is, adopting such book for use in its district. Thus we have the following excerpts from the statutes, indicating that an adoption is contemplated in order to have the benefits of the law:

"Sec. 7709. * * * before such books may be lawfully adopted and purchased by any school board, * * *."

Sec. 7711. * * * A board of education shall not adopt or cause to be used * * *.

Sec. 7712. If a publisher * * * fails or refuses to furnish *such books adopted* as herein provided to any board of education * * * such

books shall not *thereafter be adopted and purchased by boards of education.* * * *.

Sec. 7713. * * * which of such text-books so filed shall be used * * *. * * * no text-books now in use or hereafter adopted * * * (and again) for five years after the date of *the selection and adoption thereof*, as shown by the official records of such boards, * * *.

Sec. 7716. When pupils remove from any district, and have text-books of the *kind adopted* in such district and not the kind adopted in the district to which they remove, * * *."

It will thus be seen that there is contemplated by the law an adoption prior to the purchase, and that such adoption shall be had by the board of education which desires to avail itself of the price fixed by the state school book commission. As indicated heretofore, there is but one section of the statutes which bears upon the manner of adopting a text book, that appearing in section 4752 G. C., supra.

By section 7710 G. C., the state commission fixes the maximum price at which such books may be sold to or purchased by boards of education "as hereinafter provided," and the maximum price thus fixed for purchases by the board of education is only for purchases "as hereinafter provided." The method "hereinafter provided" occurs in section 7713 G. C., supra, and these two sections jointly provide for obtaining the contract price on the basis of the publisher agreeing to furnish (section 7710) "during a period of five years at that price" and (section 7713) for the reciprocal consideration of the board of education adopting a book for five years, with the possible exception of substitution at a regular meeting by five-sixths of all the members elected to the board, and as to this exception it may be mentioned that practically all the school boards of Ohio are now what are known as small school boards, so that five-sixths of any board is substantially requirement for a unanimous vote to change the books in question and the corresponding security, in practice, to the publisher of a full five-year contract. It will be noted that while the publisher is bound under the section heretofore quoted to furnish the books for a period of five years at the price contracted for which may not exceed the maximum price fixed by the state commission, at the same time the board of education can abrogate the contract any time during the five years by a five-sixths vote of its members. It thus will be seen that this statute is in the interest of the public, but a one-sided or unfair interpretation can not be given to it.

There is a distinction between the adoption of a text book as contemplated in the statutes and the approval of such book for use in public schools. A book might be approved for use upon the recommendation of the superintendent or on the report of a committee of the board of education, but this would not be an adoption in the sense that is mentioned in section 4752, supra, because the board of education could approve the use of such book and not be bound for any specific time, while if the same was adopted, under the language of the statutes such adoption would hold for five years, unless during such five years the book in question was supplanted by another book upon a five-sixths vote of the board of education, counting all its members.

It would seem, therfore, that a board of education which had adopted a text book that was listed with the state school book commission in the manner provided by the text book law would be entitled to the benefits of the prices filed with such commission, such prices being filed by the publishers as being effective to such boards of education as adopt the text book or text books in the manner provided by law.

On the other hand, a board of education which had merely approved the use of a certain book could hardly demand the full rights of a board of education that had adopted the book for a period of five years, for the former board of education would be presenting little consideration to the publisher, in return for the price quoted and filed with the state school book commission.

The law contemplates that the board shall do certain things for the publisher in order that he may know what supplies to purchase, that the books may not be required to be furnished at a loss to the publisher.

The requirements of section 4752 G. C., as to the manner of adopting a text book are mandatory and should be strictly followed. Bearing upon the language of this section, which language formerly occurred in section 3982 R. S., the supreme court of Ohio spoke as follows:

> "The authority of boards of education like that of municipal councils, is strictly limited. They both have only such power as is expressly granted or clearly implied, and doubtful claims as to the mode of exercising the power vested in them are resolved against them."
>
> Board of Education vs. Best, 52 O. S., 152.

As far as can be ascertained, the courts of this state have never had any occasion to pass upon the direct question as to what was a text book for "supplementary use," but in the state of Michigan, where school books are required to be listed in practically the same manner as in Ohio, the following language is pertinent as bearing upon the question at hand:

> "A resolution of a board of education to purchase certain text books for 'supplementary use' in the schools shows that there is no intention of adopting the books within the sense of the statute and the purchase is illegal and void. * * * The language of the statute is 'adopt.' Books are adopted when such action as the statute provides is taken * * * the sole authority for purchases for supplementary use is in this statute relative to adoption."
>
> Attorney-General ex rel. Marr vs. Board of Education of Detroit, 133 Mich. 681.

It would seem that the publisher would be glad to furnish books at the regular Ohio contract price, provided he has a regular adoption of his book in the manner prescribed by the Ohio statutes, for the consideration moving to him for having submitted the reduced price to the state school book commission is the practical certainty of a five-year contract which enables him to purchase supplies and gauge his requirements with some degree of accuracy.

Even though a book is adopted by a board of education, such adoption does not carry with it a purchase, for the purchase must follow adoption to secure the price filed with the school book commission. The publisher runs the risk of selling many or few of the text books in question in a particular district, even after adoption, though in a general sense adoption usually means that there will be purchases to follow.

If a board of education, by merely approving a book or by acquescence permitting it to be used in the schools of the district, demanded as its right the price filed by the publisher with the school book commission, it would be demanding something for which it had not given, in the eyes of the statute, anything in return, or at least that which is contemplated—that is, the adoption, in legal manner, of the book in question.

Where a board of education complies with the statute in adopting a book,it is clearly entitled to the benefits of the text book law, but another board of education which declines to adopt, but yet merely desires to use intermittently, would hardly be in a position to demand the same consideration as the board of education which had complied with the statute in carrying out its part of the statute in adopting in the manner provided by law.

The statutes providing for the filing by the publisher, with the state school book commission, of his maximum price also obligate the publisher to sell at the lowest price for five years, notwithstanding changes in conditions and greatly increased costs due to abnormal conditions, not anticipated at the time such price was filed, and such statutes obligate the board of education to make such sales possible at the lowest price by practical assurance to the publisher that a book regularly adopted will be used for five years and that the publisher will not be cut off short of that period. Yet this latter can occur by a five-sixths vote of the board of education.

The protection to the publisher contemplated in this act is that part of the statute which provides for an adoption in a legal way of the book which he has submitted to the school book commission for use within the state. A mere occassional purchase of a book from the publisher by a board of education, which may not result in any further purchase at all, is not the protection to the publisher which the statutes contemplate. If a board of education chooses to depart from the statutory method of purchasing books prescribed by the legislature for its use—that is, by adoption (section 4752 G. C.) and purchase—then they have little right to expect the benefits of the contract price obtainable through compliance with the statute.

In answer to your questions, therefore, it is the opinion of the Attorney-General that:

1. Publishers of text books can not charge more than the Ohio contract price on file with the state school book commission for books regularly adopted.

2. When books for use in public schools are regularly adopted by a board of education, such adoption is for a period of five years, and the board of education is entitled, during such period, to the benefit of the price of such text book as filed by the publisher with the school book commission.

3. There is but one method for the legal adoption of books for use in the public schools and that is the method provided in section 4752 G. C. The statutes do not recognize an adoption of a school book for supplementary or reference purposes as against an adoption for school use.

Respectfully,
JOHN G. PRICE,
Attorney-General.

787.

DOG REGISTRATION LAW—COUNTY COMMISSIONERS REQUIRED TO PROVIDE FOR EXPENSES INCIDENT TO ADMINISTRATION OF SAID LAW—LIMITATION ON APPROPRIATIONS—HOW MADE.

County commissioners acting under the provisions of the dog registration law, sections 5652 G. C. et seq. as amended and supplemented in 108 Ohio Laws, are obligated to provide by appropriation from the dog and kennel fund for the several elements of expense incident to the administration of said law, such appropriations in the aggregate, however, to be limited to 35 per cent. of the proceeds of the dog and kennel fund for the calendar year for which the appropriations are made.

The appropriations for the several objects involved in the administration of the law should be made separately and the amount thereof determined only by the necessities for proper administration of the law, subject, of course, in the aggregate to the 35 per cent. maximum limitation, and such appropriations being applicable to the specific purposes

under the law, should be kept separate and distinct from the general "deputy and clerk hire funds" of the auditor's and sheriff's offices.

COLUMBUS, OHIO, November 15, 1919.

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

GENTLEMEN—You recently requested my opinion upon the matters set forth in your communication as follows:

"This bureau has made a ruling from the accounting sandpoint that where the commissioners make a special allowance to the sheriff out of the county fund for the purpose of catching dogs in conformity to opinion Nos. 229 and 556, that the auditor and county treasurer open separate accounts on their ledgers of this appropriation, to be designated as the "sheriff's dog catcher fund," in order that check can be made of its expenditure to see that it was used for the purpose for which it was set aside and that it be not merged with the sheriff's fee or clerk hire funds as provided under section 2980-1 G. C. Are we correct in so doing?

We desire to call your attention to the proviso portion of section 5652-13 G. C., as amended in house bill No. 493, passed by the legislature May 9, 1919; approved by the governor June 5, 1919; and filed in the office of the secretary of state June 6, 1919. Hence, effective September 5, 1919. We would ask if said section 5652-13 as amended must be read with section 5652-8 G. C., also amended in the same bill? We desire your written opinion as to how the commissioners should apportion amount not to exceed 35 per cent. of the gross receipts of said dog and kennel fund in any calendar year. The dog law assumes that dogs should be registered before the first of January for the following year although the law provides continuous registration throughout the year or as soon as a dog becomes over three months of age. Under the 35 per cent. provision can this amount be based upon the collections of the preceding year or must this be estimated upon the possible collections of the current year? In other words, when shall this amount be set aside? And shall separate ledger acccounts be kept of each of these divisions?

The first part of section 5652-13 G. C. provides that the defraying of the cost of furnishing of blanks, records, tags, nets and other equipment necessary to carry out the enforcement of the provisions of the laws relative to the registration of dogs shall be paid from the collections of the dog taxes. Is this apart from the 35 per cent. mentioned in the proviso portion of this section or is it to be included within that percentage and must this all be provided for before any sheep claims or other payments are to be made from the funds?

We take it that this appropriation shall be used for four purposes as clearly expressed; for registration, which would affect the county auditor's office; possible providing extra clerk hire outside of the provisions of section 2980-1; for seizing, which would apply to the sheriff; for impounding and destroying dogs, which would apply to the pound keeper or humane society, if such arrangement was made with such society. What we desire your opinion on is whether the amount thus set aside must be specifically and separately appropriated for the various purposes for the use of the various officers mentioned entirely outside of the provisions of section 2980-1 G. C."

The previous opinions Nos. 229 and 556, to which you refer, considered certain provisions of the statutes relative to the registration of dogs, and your first inquiry now submitted related to the administration application of the principles announced in said opinions.

In opinion No. 229, which was directed to Hon. H. W. Kuntz, prosecuting attorney, Zanesville, Ohio, under date of April 23, 1919, it was held that the provision embodied in section 5652-8 G. C. that "county commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provisions of this act" was not to be construed as a mere adoption by reference of the provisions of section 2980 and 2980-1 G. C. governing the appropriation of deputy and clerk hire from the several county officers fee funds, but on the contrary, was in itself a substantive authorization to the board of county commissioners to appropriate funds necessary for carrying out the provisions of the dog registration law in which that section is found.

In opinion No. 556 the question was whether deputy sheriffs employed for the performance of the duties cast upon the sheriff's office in connection with dog registration were to be regarded as in the nature of special deputies of limited authority. That opinion which was directed to Hon. George W. Sheppard, prosecuting attorney, Portsmouth, Ohio, under date of August 7, 1919, pointed out that under the dog registration act certain duties are conferred upon the sheriff's office in addition to those existing by virtue of previous laws, and that to the extent necessary for the discharge of such duties, the sheriff is authorized to employ an additional deputy or deputies. It was further said:

> "And likewise it is made the duty of the county commissioners to cooperate in the matter to the extent of providing the funds for the employment of such additional deputies. Neither the duty nor the authority of the county commissioners in relation to providing this additional fund extends beyond a provision sufficient for the enforcement of the act in question, and likewise the extent of the authority of the sheriff for providing deputies to be compensated under this cumulative provision is measured by the necessities arising under the law."

It was thus pointed out that while the deputies so employed were not classified by any apparent policy of the law as special deputies of limited authority, but possessed the same general attributes of the regular deputies of the sheriff's office, yet the authority for both the appointment and the compensation is referable solely to the special duties in connection with administration of the dog registration law, and is commensurate therewith.

Coming now to a consideration of your first inquiry, it is noted that you regard the promulgation of a ruling of your department, for purposes of accounting that the auditor and county treasurer open separate accounts on their ledgers of the appropriation made in pursuance of the statutes as considered in the former opinions, said accounts to be designated as the "sheriff's dog catcher fund," and that such fund be maintained separate and distinct from the sheriff's fee fund or clerk hire fund as provided in section 2980-1 G. C.

The conclusions announced in the previous opinions clearly indicated that the appropriation authorized under the dog registration law was in no sense to be regarded as an augmentation of the so-called "deputy and clerk hire fund" governed by section 2980-1, but on the contrary, was one for the special purpose and application outlined in said opinions as abstracted above.

Therefore, in the proper administration of the fund so appropriated under the registration law, it would seem to be highly desirable, if not imperative, that the fund be not merged with other funds administered in compliance with distinct and independent provisions of the law.

In view of this fact and of the broad authority vested in the bureau of inspection and supervision of public offices by the provisions of section 274 G. C. et seq. it is not perceived that the ruling is an improper one.

Section 279 provides:

"A separate account shall be kept for each appropriation made or fund created by each taxing body, or legislative body, showing date and manner of payment therefrom, name of person or organization paid, and for what purpose paid * * *"

You are therefore advised that the ruling referred to is considered in accord with the spirit and policy of the law.

Your reference to certain amendments of the so-called dog registration law as enacted at the recent session of the general assembly, and the questions based thereon require a somewhat comprehensive discussion of the provisions of law in force.

The amendments referred to are certain sections of house bill No. 493, and particularly the provisions of sections 5652-8 and 5652-13, and your question involves an interpretation of the clause providing for a limitation of appropriation from the dog and kennel fund to 35% thereof.

Section 5652-8 provides:

"County commissioners shall provide for the employment of deputy sheriffs necessary to enforce the provisions of this act, shall provide nets and other suitable devices for taking dogs in a humane manner, and, except as hereinafter provided, shall also provide a suitable place for impounding dogs, and make proper provision for feeding and caring for the same, and shall also provide humane devices and methods for destroying dogs. Provided, however, that in any county in which there is a society for the prevention of cruelty to children and animals, incorporated and organized as provided by law, and having one or more agents appointed in pursuance to law, and maintaining an animal shelter suitable for a dog pound and devices for humanely destroying dogs, county commissioners shall not be required to furnish a dog pound, but the sheriff shall deliver all dogs seized by him to such society for the prevention of cruelty to animals and children at its animal shelter, there to be dealt with in accordance with law, and the county commissioners shall provide for the payment of reasonable compensation to such society for its services so performed out of the dog and kennel fund. Provided further, that the county commissioners may with the approval of the sheriff, designate and appoint any officer regularly employed by any society organized as provided by sections 10062 to 10067, inclusive, of the General Code, to act as deputy sheriff for the purpose of carrying out the provisions of this act, if such society whose agent is so employed, owns or controls a suitable place for keeping and destroying dogs."

Section 5652-13 provides:

"The registration fees provided for in this act shall constitute a special fund known as the dog and kennel fund which shall be deposited by the county auditor in the county treasury daily as collected and be used for the purpose of defraying the cost of furnishing all blanks, records, tags, nets and other equipment necessary to carry out and enforce the provisions of the laws relating to the registration of dogs, and for the payment of animal claims as provided in sections 5840 to 5849, both inclusive, of the General Code, and in accordance with the provisions of section 5633 of the General Code. Provided, however, that the county commissioners by resolution shall appropriate sufficient funds out of the dog and kennel fund said funds so appropriated not to exceed 35% of the gross receipts of said dog and kennel fund in any calendar year, for the purpose of defraying the necessary expenses of registering, seizing, impounding and destroying dogs in accordance with the provision of section 5652 and supplemental sections of the General Code."

A broad general survey of the provisions for application of the dog and kennel fund as provided in the original act and the amendments thereto as embodied in the sections noted, discloses that it is to be appropriated to the payment of the expenses incident to the administration of the dog registration law; the payment of claims for injuries or loss occassioned to animals by dogs; the support of humane societies and to the uses of the county board of education.

The question you raise relates to the appropriations from said fund for the various expenses incident to the administration of the dog registration law itself, and it is to be determined whether the appropriations for such purpose are limited in the aggregate to 35% of the fund; how such 35% is to be ascertained and the appropriation made for a given year, and details incident thereto.

It is noted that section 5652-8 as amended, is substantially in the same form as the original section considered in previous opinions referred to, with reference to casting the duty upon the county commissioners to provide the funds for employment of deputy sheriffs necessary to enforce the provisions of the act, and further, it is provided that the commissioners shall provide nets and other suitable devices for taking dogs, and shall provide a suitable place for impounding dogs and make proper provisions for feeding and caring for same and for their destruction in accordance with the provisions of the act. The provision for impounding, caring for and destroying of the dogs may be made with a humane society in counties where such society exists, and in that event, the commissioners shall provide for payment of reasonable compensation to such society for its services, payable out of the dog and kennel fund.

Section 5652-13 further authorizes the payment from the dog and kennel fund of the cost of furnishing blanks, records, tags, nets and other equipment necessary to carry out and enforce the provisions of the act. These provisions are followed by the clause "provided, however, that the county commissioners by resolution shall appropriate sufficient funds out of the dog and kennel fund, said funds so appropriated not to exceed 35% of the gross receipts of said dog and kennel fund in any calendar year, for the purpose of defraying the necessary expenses of registering, seizing, impounding and destroying dogs in accordance with the provisions of section 5652 and supplemental sections of the General Code." From consideration of this latter clause it is readily apparent that the preceding language relative to the purposes to which the fund is applicable is not to be considered as the complete and unrestricted appropriation of such funds, but is to be read in connection with the clause last quoted, and such several provisions construed consistently.

It is noted the appropriation to be made by the commissioners as set forth in the last clause of section 5652-13 embraces under general terms all of the purposes more specifically enumerated in the preceding provisions for charging the dog and kennel fund with the expense of its administration, so that all such provisions are to be read as subject to the maximum limitation of 35% of the fund, and you are advised that the appropriations for the various items of expense incident to the administration of the dog registration law are limited in the aggregate to 35% of the gross receipts of the dog and kennel fund.

The dog and kennel fund is a special fund to be accumulated from the registration fees, fines, costs, etc., accruing under the provisions of the dog registration act, and clearly is to be maintained as a separate and independent fund.

With reference to the order of its distribution, it clearly appears that the application of the fund for the expense incident to the administration of the law is to have priority over its application to live stock claims, and a final distribution to the humane society and the county school board fund. This is disclosed particularly by the provisions of section 5652-13 of the act, which after setting forth that the fund shall be used for defraying costs and expenses incurred in carrying out the provisions of the act, and for payment of animal claims, continues with the proviso that the county commissioners shall appropriate not to exceed 35 per cent. of such fund in any

calendar year for the purpose of defraying the expense of the various matters involved in the administration of the act elsewhere enumerated, so that it is determined that the commissioners are charged with the appropriation of a sufficient amount for the purposes of administration of the act, not to exceed, however, 35 per cent. of the gross receipts of the funds in any calendar year, from which it follows that it is only the balance remaining after such appropriation that is charged with the payment of animal claims, and the distribution to the humane society and county school board fund.

With reference to the calculation of the 35 per cent. of the fund in a given year, it must be said that a somewhat difficult problem is confronted. From a careful analysis of the pertinent provisions of the act I am of the opinion that the 35 per cent. which may be appropriated for a given year is not to be based upon the proceeds of the previous year, but rather the proceeds of the year for which the appropriation is made.

In practical operation, no doubt, the bulk of the proceeds of registration fees, which is the principal source of the fund, would come into the treasury on or before the first of January, it being provided in section 5652 of the act that the registration shall be made annually before the first day of January for the following year, and thus a substantial part of the fund will be available for appropriation for the expenses to be incurred during the calendar year.

Of course, the dog and kennel fund in practice will be further augmented at intervals during the entire year by the accumulation of fines and penalties under the act, and also by additional registrations of dogs, it being provided by section 5652-2 that at any time a dog shall become subject to registration the owner shall make application for such registration accompanied by the fees therefor.

The only practicable way of administering this provision, in my opinion, is to so order the appropriations from the funds for administrative expense that in the aggregate they shall not exceed 35 per cent. of the final proceeds for the calendar year, which for practical purposes no doubt may be accomplished by anticipating the accumulations into the fund in incurring administrative charges against it and making successive appropriations as the funds shall be accumulated.

What has been said in the previous opinions of this department referred to and abstracted above, relative to the duties of the county commissioners in providing funds for employment of deputy sheriffs and the method of administering that function is likewise applicable to the appropriations to be made for the other items of expense chargeable to the fund.

It is contemplated that there shall be an appropriation or appropriations by the county commissioners from this special dog and kennel fund for the several administrative charges provided in carrying the law into effect, and while such appropriation in the aggregate are limited to 35 per cent. of the gross receipts of the fund, yet it is made the duty of the county commissioners to provide appropriations for the various measures authorized in the administration of the law, and the duty of appropriation, as said in connection with the question considered in the previous opinions, is measured by the needs for properly carrying out the purpose of the law, subject of course to the maximum limitation of 35 per cent. So that as a practical matter, in a full observance of the various provisions of the law it will be incumbent on the board of commissioners to make separate appropriations for the several items of expense to be incurred in the administration of the dog registration law, and in accord with what has been previously said with reference to the appropriations for deputy sheriffs, the several appropriations so made have no connection whatever with the general fee fund or deputy and clerk hire fund maintained under favor of sections 2980 and 2980-1 G. C.

It is believed that this outline is in accord with the spirit and policy of the act, and will determine the various inquiries involved in your communication.

Respectfully,

JOHN G. PRICE,
Attorney-General.

788.

AGRICULTURE—COUNTY COMMISSIONERS ARE AUTHORIZED TO MAKE APPROPRIATIONS FOR "DEVELOPMENT OF AGRICULTURE AND COUNTRY LIFE"—HOW QUALIFIED—DISBURSEMENTS HOW MADE.

Under section 9921-6 *G. C. the commissioners of a county are authorized to make a general appropriation for "the development of agriculture and country life," the application of which is addressed to the discretion of the trustees of the Ohio State University, and their disbursement of the funds so appropriated for the employment of "assistant county agents," "home demonstration agents" or "leaders of boys' and girls' agricultural clubs" would not constitute a violation of the authority conferred under the provisions of section* 9921-1 *et seq., G. C.*

COLUMBUS, OHIO, November 15, 1919.

HON. ALFRED VIVIAN, *Dean, College of Agriculture, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I have your recent communication requesting my opinion as follows:

"I respectfully request from you an opinion on the following matter relative to section 9921-6 of the General Code, namely:

Is there anything in said section to prevent the county commissioners from appropriating money to be used in the employment of assistant county agents, home demonstration agents, or leaders of boys' and girls' agricultural clubs?

Explanation—Section 9921-4 provides that the county commissioners may appropriate $1,500 a year toward the employment of a county agent. The work of the county agents has grown so rapidly that there are now several counties that feel that this work should be increased in scope. Since the law was passed permitting the use of money for county agents, the work for the women, under what is known as a home demonstration agent, has been introduced, and there has also been a great demand for the work among boys and girls in the agricultural clubs.

Those who wrote section 9921-6 intended to give the county commissioners authority to appropriate additional money either for boys' and girls' club leaders, home demonstration agents or assistant county agents. This section was adopted by the present legislature and under it three counties have already appropriated money for the salary of a leader of boys' and girls' clubs only to be notified by their county attorneys that money appropriated under said section could be used for a home demonstration agent and for no other purpose.

There are at least three other counties sufficiently interested in this work with boys and girls that are now ready to make the appropriations but after the experience of the three counties mentioned above they feel that it is desirable to have an opinion from you before proceeding with the appropriation.

Since the money has already been appropriated in three counties and these counties are anxious to get the work started as soon as possible, I respectfully petition an opinion from you at the earliest possible date."

The question which you thus present requires a construction of certain provisions of section 9921-6 as enacted by the recent session of the general assembly known as House Bill No. 257. That section provides:

"The county commissioners of each and every county of the state in addition to the powers conferred in section 9921-4 of the General Code are hereby authorized and empowered to make additional appropriations annually to further the development of agriculture and country life in the county including the employment of a home demonstration agent and the county commissioners of said county or counties are authorized to set apart and appropriate said sum of money and transmit the same to the state treasurer who shall place it to the credit of the agricultural extension fund to be paid for the purpose aforesaid by warrant issued by the auditor of state on voucher approved by the Ohio State University. If for any reason it shall not be used as contemplated in this act, it shall revert to the county from which it came. The home demonstration agent shall acquaint herself with conditions in the county to which she is assigned, and as far as practicable, respond to invitations to visit homes and gardens, give practical and useful information with reference to the selection and preparation of foods for persons both in health and sickness, the feeding of infants, the preservation and storage of foods, the choice of fabrics and making of garments, the arrangement and installation of household mechanical devices, and the choice and repair of household furnishings and decorations. She shall co-operate with the United States department of agriculture, the Ohio agricultural experiment station, and other public agencies to the end that the women of the county may have at hand the services of these agencies. She shall have an office in which bulletins and other printed matter and records of value to housewives may be consulted and through which the agent may at all times be reached as she travels from home to home in the discharge of her duties. After having appropriated under this section and a home demonstration agent having been employed for the county, the county commissioners shall appropriate under this section in each succeeding year for five years not less than one thousand dollars."

This section is supplemental to sections 9921-1 to 9921-5 G. C. inclusive, and in arriving at the proper determination of the question you present, it is necessary to consider the entire provisions of the law governing the county agricultural extension work together.

The question now presented for determination no doubt arises out of the language of the supplemental section providing the purpose for which additional appropriations may be made, in the following language:

"To further the development of agriculture and country life in the county, including the employment of a home demonstration agent."

The original sections as enacted in the 105-106 session laws of the general assembly may be classed broadly as having for their purpose the development of agriculture and country life. It is true that the activity so inaugurated was to be conducted so far as said original sections provided, through the medium of the county agricultural agent, and that authority to appropriate money on the part of the county commissioners was limited to appropriations "for the maintenance, support and expense of a county agricultural agent." The duties of the agent were outlined in such a way as to characterize the activity as one for the development of agriculture and country life.

By the supplemental section (9921-6), it is now provided that in addition to the powers conferred by the previous enactment on county commissioners, they shall be empowered to make additional appropriations annually "to further the development of agriculture and country life in the county," and by the language of the supplemental section, the employment of a home demonstration agent is included in the project so authorized.

Without the reference to the employment of the home demonstration agent it would hardly be contendable that the application of the additional funds whose appropriation is authorized is ascertained or limited in detail, but is rather general, and no doubt addressed to the discretion of the disbursing authority in considerable measure.

Considered in this light, about the only other sourse of limitation upon the application of such additional appropriations would have to be found in the limitation of the original section to the application of the appropriation for employment of county agricultural agents.

However, the natural import of the language of the supplemental section does not at all lead to the conclusion that the additional appropriations here authorized are to be regarded as simply authorizing an increased fund for salary and expenses of county agricultural agent, but on the contrary, purport to provide funds for the further development of agriculture and country life without stipulating or limiting in detai the method by which such development is to be brought about, and consequently such funds expended.

The fact that this phrase is followed by the language "including the employment of a home demonstration agent" does not import, in my judgment, a limitation or restriction of the more general language which has gone before, but rather indicates that the particularization with reference to the home demonstration agent does not exhaust the full purpose for which the appropriation may be made. If the general authority provided includes the authority to employ a home demonstration agent, the natural conclusion would be that it must be a larger authority, and not being otherwise particularized, I reach the conclusion that there is a somewhat general authority granted in the section, the administration of which is reposed in the disbursing authority.

The appropriations authorized by the supplemental section are to further the development of agriculture and country life in the county, including the employment of a home demonstration agent, and such appropriations are to be transmitted to the state treasurer who shall place it to the credit of the agricultural extension fund to be paid for the purpose aforesaid. Section 9921-1, which is a part of the original act relating to the subject of county extension work, provides that "the trustees of the Ohio State University shall expend, in accordance with law, all moneys in the state treasury to the credit of the agricultural extension fund."

From the provisions that have been considered, you are advised that the application of funds appropriated generally for "furthering the development of agriculture and country life" by the commissioners of any county and transmitted to the state treasurer, is a matter addressed in the first instance to the discretion of the trustees of the Ohio State University, and it is not now apparent that their determination to apply such funds in the employment of assistant county agents, home demonstration agents or leaders of boys' and girls' agricultural clubs, would be an abuse of discretion as a matter of law.

Respectfully,
JOHN G. PRICE,
Attorney-General.

789.

SCHOOLS—REQUIREMENTS OF SCHOOL DISTRICTS TO OBTAIN STATE AID—ENUMERATION AND NOT DAILY ATTENDANCE GOVERNS —FAILURE TO DISCONTINUE SCHOOL WHOSE AVERAGE DAILY ATTENDANCE IS LESS THAN TEN DOES NOT PREVENT DISTRICT FROM RECEIVING STATE AID—STATE AID GRANTED TO SCHOOL DISTRICTS AS A WHOLE—SECTION 7730 G. C., HOUSE BILL No. 348 (108 O. L. 704) MAKES NO PROVISION FOR WEAK SCHOOL DISTRICTS TO BE APPLIED TO TRANSPORTATION OF PUPILS OF SCHOOLS THAT HAVE BEEN SUSPENDED.

1. *School districts entitled to state aid must have a number of persons of school age equal to at least twenty times the number of teachers employed therein; under section 7597 G. C. the school enumeration in the whole district is the factor and not the daily attendance in any particular school.*

2. *Where either the county board of education or the local district board of education has failed to discontinue a school whose average daily attendance was less than ten for the preceding year, as provided in section 7730 G. C., such failure does not prevent the district from receiving state aid for other schools therein, since state aid is granted to school districts as a whole, which comply with the state aid law, and not to certain schools in such district.*

3. *Section 7730, as amended by the act effective September 22, 1919, house bill 348, makes no provision for state aid to weak school districts to be applied to the transportation of pupils of schools that have been suspended.*

COLUMBUS, OHIO, November 15, 1919.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for the opinion of this department upon the following statement of facts:

> "Section 7730 of the Wenner bill, H. B. 348 (108 O. L. 704) enacted by the eighty-third general assembly in 1919, provides:
>
> 'Whenever the average daily attendance of any school in the school district for the preceding year has been below ten, the county board of education shall direct the suspension and thereupon the board of education of the village or rural district shall suspend such school.' If a school, the average daily attendance of which was below ten, the preceding year, is not suspended in accordance with the provisions of this section, is the district in which the same is located entitled to state aid for teachers of such a school?
>
> If the school is suspended, may the board of education receive state aid for the transportation of the pupils of such school who live more than two miles from the school to which they have been assigned."

Section 7730 G. C., as last amended by the present general assembly, and effective September 22, 1919, reads as follows:

> "The board of education of any rural or village school district may suspend temporarily or permanently any or all schools in such village or rural school district because of disadvantageous location or any other cause. Whenever the average daily attendance of any school in the school district for the preceding year has been below ten the county board of education shall direct the suspension and thereupon the board of education of the village or rural

school district shall suspend such school. Whenever any school is suspended the board of education of the district shall provide for the transfer of the pupils residing within the territory of the suspended school to other schools. Upon such suspension the board of education of such village or rural district shall provide for the conveyance of all pupils of legal school age who reside in the territory of the suspended district and who live more than two miles from the school to which they have been assigned, to a public school in the rural or village district or to a public school in another district. Notice of such suspension shall be posted in five conspicuous places within such village or rural school district by the board of education within ten days after the resolution providing for such suspension is adopted. Wherever such suspension is had on the direction of the county board of education, then upon the direction of such county board, and in other cases upon the finding by the board of education ordering such suspension that such school ought to be re-established, such school shall be re-established. If at any time it appears that the average daily attendance of enrolled pupils residing within the territory of the suspended school as it was prior to such suspension is twelve or more, then, upon a petition asking for re-establishment signed by a majority of the voters of the said territory, the board of education may re-establish such school."

The intent of the above section is that following the end of a term of school in a district and before arrangements are made for the continuation of such school, the county board of education shall direct the suspension of the schools if the average daily attendance for the preceding school year was below ten. Your question is understood to be relative to a school in which the attendance was below ten for the preceding school year, but such school was not suspended in accordance with the provisions of section 7730, above quoted. It must be remembered that section 7730, supra, appearing in house bill 348, the Wenner school law, was effective on September 22d, or practically after all district schools for the year 1919-1920 had begun.

The law which would have been in force during the summer of 1919, that is to say, the period after the school term ended in a school district, and before the beginning of the new school year in September, 1919, would be section 7730, as it appears in 107 O. L., page 638. The language of the law on this subject, as it existed prior to September 22d, when the Wenner school law went into effect, read as follows:

"Section 7730. When the average daily attendance of any school for the preceding year had been below ten, such school shall be suspended and all of the pupils of legal school age, who reside in the territory of the suspended district, transferred to another school or schools when the county board of education so directs the board of education of the village or rural district in which said school is located * * *."

It will be noted that this language in the old law is not radically different from that appearing in section 7730, as amended in the Wenner school law, effective September 22, 1919. It is, therefore, apparent that this language was really carried into the Wenner school law, which you quote, and that the same practical requirements mentioned in section 7730 of the Wenner school law, house bill 348, were in vogue during the entire year of 1919. You indicate that the preceding year showed such school to have an attendance below ten in number and desire to know whether, if it is not suspended in accordance with the provisions of law, the district in which the same is located is entitled to state aid for teachers in such district.

Your attention is invited to section 7597 G. C., which reads as follows:

"No district shall be entitled to state aid, as provided in sections 7595,

7595-1 and 7596, unless the number of *persons of school age in such district* is at least twenty times the number of teachers employed therein, and the schools in such district are maintained at least eight months of the year. (104 v., 165.)"

From the above section it is noted that a district, in order to receive state aid must have at least twenty pupils to each teacher and the contemplation is that the district asking for state aid maintain the schools in the district at least eight months of the year. The school you have in mind had an attendance of less than ten the preceding year and is one of the schools located in such district which makes request for state aid.

Applications for state aid for weak school districts are made by the district board of education and the district is the unit to be considered by the state auditor in approving such application and making his allotment of state aid. If the district making the application shows that it has a school enumeration, that is, persons of school age which equal or exceed a number twenty times the number of teachers employed, such district is entitled to state aid if it has complied with the provisions of the state aid law mentioned in sections 7594-1, 7595, 7595-1, 7595-2, 7595-3, 7595-4, 7595-5, 7596, 7596-1 and 7597 G. C. No consideration can be given to the question of daily attendance in the schools of such district, the requirement being that the district must show that in the whole district there is a school enumeration that is equal in number to twenty times the number of teachers, and the fact that in one particular school there was less than such required number, ought not to militate against the other schools in such district receiving state aid. Under the provisions of section 7730 G. C., it is mandatory upon the county board of education to direct the discontinuance of a school within the county, if such school, during the preceding year, showed a daily attendance of less than ten, such order of discontinuance to be carried out by the district board of education; but if neither of these boards have carried out the provisions of section 7730, as regards the particular school in question, the other schools within the district should not be made to suffer on account of such dereliction in their consideration for state aid under another section of the statutes, the idea of the law being that the district is the unit which makes the application for state aid and must show the requirements regarding school population as a district, following which state aid is rendered to the district for its board of education to disburse to the several schools in its discretion, under the law, rather than granting state aid to any particular school in such district. In the question at hand the provisions of section 7597 G. C. apply, in that the district, if it can show persons of school age in the proper number rather than daily attendance, should receive state aid if other provisions of the law under the sections heretofore cited, are complied with.

Coming to your second question, you inquire if the school is suspended, may the board of education receive state aid for the transportation of pupils of such school who live more than two miles from the school to which they have been assigned. Bearing upon this point, attention is invited to the fact that section 7730, which appears in house bill 406, Freeman law, effective August 18, 1919, was repealed by new section 7730 G. C., which appears in house bill 348 (Wenner school law), effective September 22, 1919, and section 7730, as it now reads and as amended above, contains no provision for state aid in the transportation of pupils of suspended schools. Under these circumstances, while the legislature made such provision in the first section 7730 that was enacted, the same provision was omitted in the later enacted section 7730, and which must be considered as the final expression of the general assembly upon the matter, and until further legislation is had upon the subject the state auditor cannot allow any state aid for transportation of pupils in suspended schools to be paid from the state funds.

It is, therefore, the opinion of the Attorney-General that:

1. School districts entitled to state aid must have a number of persons of school age equal to at least twenty times the number of teachers employed therein; under section 7597 G. C. the school enumeration in the whole district is the factor and not the daily attendance in any particular school.

2. Where either the county board of education or the local district board of education has failed to discontinue a school whose average daily attendance was less than ten for the preceding year, as provided in section 7730 G. C., such failure does not prevent the district from receiving state aid for other schools therein, since state aid is granted to school districts as a whole, which comply with the state aid law, and not to certain schools in such district.

3. Section 7730, as amended by the act effective September 22, 1919, house bill 348, makes no provision for state aid to weak school districts to be applied to the transportation of pupils of schools that have been suspended.

Respectfully,
JOHN G. PRICE,
Attorney-General.

790.

APPROVAL, PROPOSED AGREEMENT BETWEEN THE OHIO BOARD OF ADMINISTRATION AND THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY FOR CONSTRUCTION OF SIDE TRACKS ON PRISON FARM NEAR LONDON, OHIO.

COLUMBUS, OHIO, November 15, 1919.

The Ohio Board of Administration, Columbus, Ohio.

GENLEMEN:—Acknowledgment is made of the receipt of your recent letter transmitting proposed agreement between your board and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, for the construction of side tracks on the prison farm near London, Ohio, for the approval of this department.

By personal conference it is learned that the primary purpose of this agreement is to facilitate the economic purchase and delivery of material for the building of the new penitentiary, agreeably to the provisions of the new prison act, enacted in 103 O. L., 249. Consideration of these facts leads this department to the conclusion that the subject matter of this contract is incidental to and necessary for carrying out the power expressly granted in that act. Consideration of this act, together with sections 1832, 1835, 1838, 1862 and 1865, sections 2314 to 2332, inclusive, and sections 14 and 15 of the appropriationg act in 107 O. L., 346, and also the appropriating acts in the same volume, pages 234 and 309, lead to the further conclusion that such a contract is within the power of the board of administration in the construction of the new penitentiary. That such funds are in the treasury available for the discharge of the proposed agreement and not otherwise appropriated is evidenced by the certificate of the state auditor hereto attached. In this connection, however, the provisions of section 22 of article 2 may properly be referred to. This section in part provides that:

"No appropriation shall be made for a longer period than two years."

If this appropriation certificate is not effective to embrace the entire consideration involved in the agreements in the contract, then by reference, this section being read into the proposed agreement, results in its being so construed as making the agreement as to maintenance beyond the two-year period subject to appropriations being made

by the general assembly. However, I am informed that this does not present any practical difficulty and in view of this fact, the proposed agreement, as thus construed, is hereby approved as to form.

Respectfully,
JOHN G. PRICE,
Attorney-General.

791.

COUNTY COMMISSIONERS—SALARY—HOW COMPUTED FOR COMMISSIONERS IN COUNTIES WHERE TAX DUPLICATE IS LESS THAN FIVE MILLION DOLLARS—SEE SECTION 3001 G. C. AS AMENDED, 108 O. L. 926—SUPPLEMENTAL TO OPINION No. 623, SEPTEMBER 12, 1919.

Section 3001 *G. C., as now amended, fixes the yearly compensation of commissioners of counties whose tax duplicates in December,* 1909, *were five million dollars, or less, at seven hundred and fifty dollars.*

Such section, as amended, became effective October 10, 1919, *and it is not applicable to officers whose terms began prior to that date.*

In a county whose tax duplicate for December, 1909, *and for December,* 1910, *was less than five million dollars (questions arising from vacancies not considered), each commissioner was entitled to receive, from* 1912 *to* 1919, *both inclusive, a compensation of eight hundred and sixty-two dollars and fifty cents; and those serving terms beginning prior to October* 10, 1919, *may continue to draw that sum until the end of such terms.*

COLUMBUS, OHIO, November 17, 1919.

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

GENTLEMEN:—You advise that in a certain county in Ohio the tax duplicate in December, 1909, and in 1910, was less than five million dollars, and that for subsequent years it has been in excess of that amount. You inquire to what compensation its commissioners were entitled prior to the enactment of amended section 3001 G. C. in June, 1919, what they are to receive under the amended section, and when the latter became effective.

My opinion No. 623, rendered to you on September 12, 1919, sets out the statutes applicable since 1904 and I shall not quote them here. As I then advised you, the commissioners of a county whose tax duplicate did not exceed five million dollars in December, 1909, are entitled, under the present provisions of section 3001 G. C., to an annual compensation of seven hundred and fifty dollars.

Senate bill No. 100, containing this amended section, having been neither approved nor vetoed by the governor, was filed in the office of the secretary of state on July 11, 1919 and became effective on October 10, 1919. Consequently it is not applicable in its present form to commissioners who took their office prior to that date.

Ohio Const., Art. II, Sec. 20.
State ex rel. vs. Raine, Auditor, 49 O. S. 580.
State ex rel. vs. Lewis, 15 N. P. (N. S.) 582.

But it would govern the compensation of one chosen to fill a vacancy occurring after that date.

State ex rel. vs. Tanner, 27 O. C. A. 385.

Prior to June, 1911, the compensation of a commissioner of a county in which, on the 20th of December of the preceding year, the aggregate of the tax duplicate was five million dollars or less, was seven hundred and fifty dollars.

In June, 1911, the statute was amended so as to provide:

> "Sec. 3001. The annual compensation of each county commissioner shall be determined as follows:
>
> In each county in which on the twentieth day of December, 1911, the aggregate of the tax duplicate for real estate and personal property is five million dollars or less, such compensation shall be nine hundred dollars, and in addition thereto, in each county in which such aggregate is more than five million dollars, three dollars on each full one hundred thousand dollars of the amount of such duplicate in excess of five million dollars. That the compensation of each county commissioner for the year 1912, and each year thereafter, shall not in the aggregate exceed 115 per cent. of the compensation paid to each county commissioner for the year 1911. * * * Such compensation shall be in full payment of all services rendered as such commissioner and shall not in any case exceed four thousand dollars per annum. Such compensation shall be in equal monthly installments from the county treasury upon the warrant of the county auditor."

In State ex rel. vs. Lewis, 15 N. P. (N. S.) 582, the court, construing this statute, held that the compensation of a commissioner for the year ending September, 1912, in a county in which for the year 1911 it was seven hundred and fifty dollars, was eight hundred and sixty-two dollars and fifty cents, or one hundred and fifteen per cent. of seven hundred and fifty dollars. And the compensation being limited to one hundred and fifteen per cent. of the amount drawn in the official year ending in September, 1911, remained unchanged until affected by the last amendment.

State ex rel. vs. Lewis, supra, is exactly in point here, and, having been, as I understand, affirmed by the court of appeals, and having been referred to with approval by my predecessor in Opinions of the Attorney-General for 1918, Vol. I, p. 199, as well as in my own opinion No. 623, I think it is controlling. True, the construction adopted practically reads out of the statute the minimum of nine hundred dollars, but that point was presented to the court and considered by it. The opposite conclusion would have nullified the limitation which was a later provision in the statute.

It is also well settled that laws providing for the compensation of public officers must be strictly construed and only such compensation allowed as is clearly expressed.

> Debold vs. Trustees, 7 O. S. 237.
> Richardson vs. State, 66 O. S. 108.
> Thornley vs. State, 81 O. S. 108.
> State ex rel. vs. Stone, 92 O. S. 63.
> State ex rel. vs. Kleinhoffer, 92 O. S. 163.
> 29 Cyc. 1226.

It is therefore my conclusion that:

(a) Section 3001 G. C., as now amended, fixes the yearly compensation of commissioners of counties whose tax duplicates in December, 1909, were five million dollars, or less, at seven hundred and fifty dollars.

(b) Such section, as amended, became effective October 10, 1919, and it is not applicable to officers whose terms began prior to that date.

(c) In a county whose tax duplicate for December, 1909, and for December, 1910, was less than five million dollars (questions arising from vacancies not considered), each commissioner was entitled to receive, from 1912 to 1919, both inclusive,

a compensation of eight hundred and sixty-two dollars and fifty cents; and those serving terms beginning prior to October 10, 1919, may continue to draw that sum until the end of such terms.

Respectfully,
JOHN G. PRICE,
Attorney-General.

792.

MUNICIPAL CORPORATION—WITHOUT AUTHORITY TO LEVY AGAINST CONTIGUOUS LANDS ALL OR ANY PART OF COST OF REAL ESTATE PURCHASED FOR PURPOSE OF EXTENDING A STREET.

Municipalities are without authority to levy against contigous lands all or any part of the cost of real estate purchased for the purpose of extending a street.

COLUMBUS, OHIO, November 17, 1919.

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

GENTLEMEN:—Your communication of recent date is received reading as follows:

"We respectfully request your written opinion upon the following matters:

Statement of Facts.

The city of X, Ohio, has a number of so-called 'dead-end streets' which the city council proposes to abolish by purchasing property for street purposes and connecting these dead ends with other streets. It is thought that this action would be a great benefit to the property located in the vicinity of these dead ends.

Question 1. Can the cost of the property and expense of improvement be legally assessed against the property, abutting or not, considered benefited by the improvement?

Question 2. Can any portion of the cost of improvement be so assessed, and if so, what portion of the expense?"

The general statute authorizing improvements by a municipality for which an assessment against contiguous lands may be made, is section 3812, which so far as bearing upon street improvements, reads as follows:

"Section 3812 (107 O. L. 629). Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost and expense connected with the improvement of any street, alley, * * * public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, water courses, water mains or laying of water pipe * * *."

Plainly, there is no provision in the foregoing which permits of an assessment for extending a street through the medium of purchasing lands; nor has any such authority been found elsewhere in the General Code.

Passing reference may be made to section 3896 which reads as follows:

"The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when acquired by purchase, or the value thereof as found by the jury, when appropriated, the costs and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

Clearly, this statute is not a grant of power, but merely a definition of items which may be included in the cost of an improvement for which an assessment is elsewhere authorized. It should be added that the scope of said section 3896 has in effect been limited in certain respects upon principles announced by the supreme court in the case of City of Dayton vs. Bauman, 66 O. S. 379.

Hence, the answer to both your questions is in the negative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

793.

APPROVAL, CERTAIN LEASES, LAND AT LOGAN, BUCKEYE LAKE AND NEW COMERSTOWN.

COLUMBUS, OHIO, November 18, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 6, 1919, transmitting leases, in triplicate, for my approval, as follows:

	Valuation.
"To John Springer of Logan, Ohio, canal property in the city of Logan, Ohio, for warehouse purposes	$ 300 00
To Robert F. Wolfe, Columbus, Ohio, lease for use as park and pasturage on the water front of Buckeye Lake, at Buckeye Lake	1,000 00
To Dent L. Lydick, New Comerstown, Ohio, canal property in New Comerstown, Ohio, for store and warehouse purposes	800 00
To W. M. Brode of New Comerstown, Ohio, canal property in New Comerstown, Ohio, for store and warehouse purposes	1,000 00
To John Graham, Logan, Ohio, a portion of the abandoned Hocking Canal, near Falls Mills in Mills township, Hocking county, for agricultural purposes	200 00

I have carefully examined said leases, find them correct in form and legal, and am therefore returning the same to you with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

794.

DISTRICT TUBERCULOSIS HOSPITAL—COUNTY COMMISSIONERS HAVE NO AUTHORITY TO BORROW MONEY TO CONTRIBUTE TO CURRENT EXPENSES OF SUCH A HOSPITAL WHERE TAX LEVIES INSUFFICIENT.

The county commissioners of a county which is a member of a tuberculosis hospital district have no authority to borrow money to contribute to the current expenses of the hospital in case the tax levies for the year prove insufficient.

COLUMBUS, OHIO, November 19, 1919.

HON. THOMAS F. HUDSON, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—I acknowledge receipt of your letter of recent date requesting the opinion of this department upon the following question:

> "The district tuberculosis hospital for the counties of Clark, Madison, Greene and Champaign is located near Springfield, Ohio.
>
> The boards of commissioners of said counties have made annual assessments of taxes to defray the expense of maintenance of said hospital, but the number of patients have more than doubled within the last year, thereby compelling the trustees to purchase additional equipment, bedding, supplies, etc., in order that the patients therein might have proper care and attention.
>
> At a meeting of the board of trustees of said hospital in Springfield yesterday, it developed that there was not sufficient funds to meet the monthly pay-roll.
>
> The board of trustees requested me to ask your opinion as to the authority of the board of commissioners of the several counties to borrow money or issue bonds to defray the necessary expenses of maintenance of this hospital until the time for the next annual assessment of taxes for such purpose."

No authority such as is inquired about in your letter has been found. Power is vested in the commissioners by section 3152 G. C. to borrow money for the purpose of payment of the county's apportionment of the first cost of a district tuberculosis hospital and the cost of any betterments or additions thereto. No other similar power is expressly given to the commissioners of a member county in the district tuberculosis hospital act. The latter part of the section just mentioned contains the following provision:

> "A statement shall be prepared quarterly (evidently by the board of trustees of the district hospital, who through the superintendent are to have 'entire charge and control of the hospital,' Sec. 3151) showing the per capita daily cost for the current expenses of maintaining such hospital, * * * and each county in the district *shall pay its share of such cost* as determined by the number of days the total number of patients from such county have spent in the hospital during the quarter, but the sum paid by patients from such county for their treatment therein shall be deducted from this amount. The boards of commissioners of counties jointly maintaining a district hospital for tuberculosis shall make annual assessments of taxes sufficient to support and defray the necessary expense of maintenance of such hospital."

These provisions are capable of two constructions: First, that each county is

to pay its share at all events out of whatever funds it may have on hand; and, second, that each county is to pay its proportionate share in the manner pointed out in the section by making a levy sufficient to provide for the same.

As reflecting upon the true interpretation of section 3152, if not modifying that section itself, sections 3152-1 and 3153 must be taken into account. The first of these sections provides in part:

> "All taxes levied by the county commissioners of any county under the provisions of section thirty-one hundred and fifty-two shall, when collected, be paid over to the trustees of the district tuberculosis hospital upon the warrant of the county auditor, at the same time that school and township moneys are paid to the respective treasurers, (i. e., after each semi-annual settlement of taxes); and the board of trustees shall receipt therefor and deposit said funds to its credit in the bank * * * to be designated by it * * *; and thereupon said funds may be disbursed by said board of trustees for the uses and purposes of said district tuberculosis hospital, *and accounted for as provided in the foregoing sections.*"

Section 3153, referred to, provides in part that: the trustees shall in April

> "file with the joint board of county commissioners a report of their proceedings with reference to such district hospital, and a statement of all receipts and expenditures during the year, and at such time shall certify the amount necessary to maintain and improve the hospital for the ensuing year."

From these sections it is clear that the word "pay" as used in section 3152 does not import general liability on the part of the county but is merely used to designate a basis of apportionment of a fund to be raised in the manner stated in the same and succeeding sections. In other words, the intent of the first sentence which has been quoted is to provide the basis on which the contributing counties shall make their respective contributions. Then the sections go on to create machinery to raise the necessary funds. That machinery contemplates an annual estimate based, doubtless, upon the experience of the past as disclosed by the quarterly statement, and leading to an annual levy of taxes by the several boards of county commissioners for the purpose of raising the necessary funds.

This conclusion being reached, it is clear that the legal result of a need for funds on the part of the board of trustees of the hospital is through proper machinery to give rise to a duty on the part of the commissioners of each county to make a tax levy; that result is not the incurring of general liability by the county as such. In other words, the county does not owe a debt in the nature of an obligation enforcible against it in any way, nor can the commissioners be compelled by mandamus to do anything other than levy a tax.

These remarks have been indulged for the purpose of disposing of the question as to whether or not the commissioners could take the action suggested in your letter under favor of section 5656 G. C. which authorizes the commissioners to borrow money or issue bonds for the purpose of extending the time of payment of any obligation which the county from its limits of taxation is unable to pay at maturity. The conclusion arrived at leads to a negative answer to this question.

The only other general section under which county commissioners may borrow money is section 2434 G. C. which will not be quoted. It is sufficient to observe that it does not give authority to borrow money for any such purpose as that referred to in your letter.

For all these reasons the answer to the question which you submit is in the negative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

795.

COUNTY TREASURER—NOTICE OF TAX RATES REQUIRED BY SECTION 2648 G. C. TO BE PUBLISHED—WHEN SAME SHOULD BE RE-PUBLISHED WHEN RATES RE-ADJUSTED.

It is lawful (though perhaps not indispensable) that the notice of tax rates required by section 2648 G. C. to be published should be re-published where the rates are re-adjusted after the notice has been once given.

COLUMBUS, OHIO, November 19, 1919.

HON. R. A. KERR, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I hasten to answer your letter of November 11th in which you submit certain questions respecting the effect of a favorable vote of the electors on the submission of the question authorized to be submitted by sections 6926-1 et seq. of the General Code, as recently enacted. One of your questions is, it is believed, fully covered by an opinion addressed to the tax commission of Ohio, a copy of which you have. The remaining question may be stated as follows:

> Where the county road levy has been exempted from the fifteen mill limitation in accordance with the approval of the electors and, as held in the opinion referred to, the tax rates for the ensuing year are revised accordingly, but it happened that the county treasurer has given notice as required by law of the rates levied for the various purposes, should not such notice be given again?

The section requiring the giving of notice of the tax rates is as follows:

Section 2648 G. C.:

> "Upon receiving from the county auditor a duplicate of taxes assessed upon the property of the county, the county treasurer shall immediately cause notice thereof to be posted in three places in each township of the county, one of which shall be at the place of holding elections in such township, and also be inserted for six successive weeks in a newspaper having a general circulation in the county. Such notice shall specify particularly the amount of taxes levied on the duplicate for the support of the state government, the payment of interest and principal of the public debt, the support of state common schools, defraying county expenses, repairing of roads, keeping the poor, building of bridges, township expenses and for each other object for which taxes may be levied on each dollar valuation."

It is the opinion of this department that compliance with this section would require the repetition of the notice. In effect, the revision of the rates even after the duplicate is in the hands of the treasurer for collection would constitute a new delivery of the "duplicate of taxes assessed."

Whether or not the section is merely directory, so that failure to comply with it would not invalidate the tax levies, need not be considered. Even a directory statute should be complied with, and the expenditure of funds for legal advertising, etc., involved in such a compliance would be perfectly legal. For example, failure to publish a proclamation of election would not invalidate the result of the election if it were duly held, and no one were actually prejudiced by such failure. But the mere fact that a notice intended for the benefit of the public may not be so vital as that its omission will invalidate a proceeding, does not militate against the view that it is the duty of the public officers to give the notice.

Though inclining to the view therefore that the omission of the notice specified in section 2648 G. C. may not be vital, you are advised that it is the duty of the treasurer to give such notice as required in that section and in section 6252 G. C. (see State vs. Commissioners, 7 N. P., 239), in the event that the tax rates are revised after the first notice has been given, and that this being the case the treasurer is authorized to incur the expense involved in giving such notice.

Respectfully,
JOHN G. PRICE,
Attorney-General.

796.

SCHOOLS—PRIOR TO ENACTMENT OF HOUSE BILL No. 348, 108 O. L 704, NO AUTHORITY FOR TRANSFER OF TERRITORY FROM EXEMPTED VILLAGE SCHOOL DISTRICT OR CITY SCHOOL DI TRICT TO SCHOOL DISTRICT OF A COUNTY SCHOOL DISTRICT.

Prior to the enactment of house bill No. 348, amending section 4696 G. C., there was no provision under the laws of the state for the transfer of territory from an exempted village school district or a city school district to a school district of the county school district, and attempted transfers of school territory from an exempted village school district or a city school district to a school district of the county school district prior to September 22, 1919, were without authority of law.

COLUMBUS, OHIO, November 19, 1919.

HON. F. M. CUNNINGHAM, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for the opinion of this department on the following statement of facts:

> "The Lebanon village school district comprises the village of Lebanon and the larger part of Turtlecreek township, in which Lebanon is located; said district is independent of the control or supervision of the county superintendent or county board of education.
>
> Last July certain territory within said district owned by the U. B. people, and known as Otterbein Home property was detached from the Lebanon village school district, upon application by said home, and with the consent of the Lebanon village school district, and formed into a rural district.
>
> At the time said territory was transferred, the board of education, Lebanon village school district, and the Otterbein Home adjusted the question of indebtedness upon said district, and the same was approved by resolution of the board.
>
> At the August settlement of the auditor of the county the funds raised

by taxation for the Lebanon village school district was placed to the credit of said district, no division or proportionment of the funds being made between the district and the detached territory.

There does not seem to be any statutory provision specifically covering the question as to whether there shall be a division of the funds upon territory being detached from a village district, which is not under the control of the county board.

Please let me have your opinion as to whether a proportionate division of the funds received at the August settlement can be legally made, and if so under what provision of the Code."

From an analysis of the above statement of facts, it seems that the Lebanon village school district, to which is attached the larger part of Turtlecreek township, is an exempted village school district and one that is independent of the control and supervision of the county superintendent or county board of education. You further indicate that during last July, 1919, certain territory within the exempted Lebanon village school district was detached and transferred by the board of education of Lebanon village school district to the Otterbein Home rural school district under the jurisdiction of the county board of education.

Section 4696 as in effect July, 1919, read as follows:

"A county board of education may transfer a part or all of a school district of the county school district to an adjoining exempted village school district or city school district, or to another county school district, provided at least fifty per centum of the electors of the territory to be transferred, petition for such transfer. Provided, however, that if at least seventy-five per cent. of the electors of the territory petition for such transfer, the county board of education shall make such transfer. No such transfer shall be in effect until the county board of education and the board of education to which the territory is to be transferred each pass resolutions by a majority vote of the full membership of each board and until an equitable division of the funds or indebtedness be decided upon by the boards of education acting in the transfer; also a map shall be filed with the auditor or auditors of the county or counties affected by such transfer."

The above section is the only statute speaking of the transfer of school territory wherein is mentioned an "exempted village school district" or "city school district," and while such statute provided that a part or all of the school district of the county school district could be transferred by the county board of education to an exempted village school district or city school district, no provision appears therein for any transfer of school territory from an exempted village school district or a city school district back to a contiguous rural school district in the county after such school territory had been once attached to an exempted village school district or city school district for school purposes.

The above condition obtained during all the period prior to the amendment of section 4696 G. C. at the present session of the legislature, and under the provisions of house bill 348, section 4696 G. C., as newly amended, reads as follows:

"A county board of education may transfer a part or all of a school district of the county school district to an adjoining exempted village school district or city school district or to another county school district upon the petition of a majority of the freeholders residing in the territory to be transferred and make an equitable division of the funds and indebtedness between said districts; and a county board of education may accept a transfer of territory from an adjoining exempted village school

district, city school district or another county school district and annex same to a school district of the county school district. When territory is to be transferred from an exempted village school district, city school district or another county school district, the board of education of the district from which such territory is to be transferred shall pass a resolution by a majority vote of the full membership of such board asking for such transfer, and file the same with the county board of education of the county school district to which such territory is to be transferred. Such transfer shall not be complete until the county board of education of the county in which such transfer is to be made shall pass a resolution by a majority vote of the full membership of such board, accepting such transferred territory and such county board shall make an equitable distribution of the funds and the indebtedness between the district from which and to which such territory is transferred; nor shall any transfer mentioned in this section be complete until a map shall be filed with the county auditor of the county or auditors of the counties affected by such transfer. When territory is so transferred the legal title of the school property, both real and personal, shall become vested in the board of education of the school district to which such territory is transferred."

But this section was not effective until on and after September 22, 1919, and a transfer or an attempted transfer made prior to September 22, 1919, could not be covered by the language of the amendment. It seems that the very fact that old section 4696 made no provision for the transferring of territory from a city school district or an exempted village school district back to the adjoining rural district, was the very reason that the section in question was amended to take care of such situations which arise, as in the case at hand. Thus under the provisions of section 4696 G. C., as newly amended, the provisions are very plain for the making of a transfer of this kind, while before such amendment was in effect on September 22, 1919, there was no provision under the statutes whereby territory within the bounds of a city school district or an exempted village school district could be detached to an adjoining rural school district.

It is therefore the opinion of the Attorney-General that prior to the enactment of house bill 348, amending section 4696 G. C., there was no provision under the laws of the state for the transfer of territory from an exempted village school district or a city school district to a school district of the county school district, and attempted transfers of school territory from an exempted village school district or a city school district to a school district of the county school district prior to September 22, 1919 were without authority of law.

Respectfully,
JOHN G. PRICE,
Attorney-General.

797.

SCHOOLS—DISTRICT SUPERINTENDENT—NO AUTHORITY TO INCREASE COMPENSATION DURING TERM OF SERVICE FOR WHICH ELECTED—COMPENSATION FIXED AT TIME OF HIS ELECTION.

The appointing authority provided in section 4739 G. C., whose duty it is to elect the district superintendent of schools, has no power to increase the compensation of such district superintendent during the term of service for which he was elected. Under the

provisions of section 4743 G. C., the compensation of such district superintendent shall be fixed at the time of his election and such compensation cannot be changed after the appointment has been accepted by the person so elected.

COLUMBUS, OHIO, November 19, 1919.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent request for an opionion upon the following statement of facts:

> "In May, 1918, the presidents of the boards of education of Pleasant, Oak Run, Range and Paint townships, Madison county, Ohio, said townships formerly supervisory district No. 2, met in accordance with the law and elected C. S. Dennis, of Mt. Sterling, Ohio, as district superintendent of the above district for a term of two years at a salary of $1,800 per year. On August 23, 1919, the presidents of these same boards of education met and by unanimous vote increased the salary of said superintendent four hundred and fifty dollars.
>
> "Shall the county auditor of Madison county upon an order issued by the county superintendent and signed by the president of the county board of education for the increased monthly salary issue a warrant upon the county treasury to be paid from funds in the hands of the county board of education, the said increase in salary to be taken care of next year by increased taxation on the townships composing said district and said money returned to the county board of education fund, or shall it be paid causing a deficit in the townships composing said district? There is money sufficient in the county board of education fund to take care of it this year."

Your question is whether the county auditor shall pay from the funds in the hands of the county board of education an increase in salary of a district superintendent, such increase having been made during the term for which such district superintendent was elected, and further as to how this increase in salary shall be taken care of by the townships composing the supervision district of said superintendent.

Before considering the matter as to how the townships should take care of the increase in salary made to a district superintendent during the term for which he was elected, it is well in the first instance to consider the question as to whether such district superintendent can be increased in salary during his term.

Section 4743 G. C. reads as follows:

> "The compensation of the district superintendent shall be fixed at the same time that the appointment is made and by the same authority which appoints him; such compensation shall be paid out of the county board of education fund on vouchers signed by the president of the county board. The salary of any district superintendent shall in no case be less than one thousand dollars per annum, half of which salary not to exceed seven hundred and fifty dollars shall be paid by the state and half by the supervision district, except where the number of teachers in any supervision district is less than forty in which case the amounts paid by the state shall be such proportion of half the salary as the ratio of the number of teachers employed is to forty. The half paid by the supervision district shall be pro-rated among the village and rural school districts in such district in proportion to the number of teachers employed in each district."

It will be noted by the provisions of the above section that the compensation

of the district superintendent *shall be fixed at the same time* that the appointment is made and by the same authority which appoints him, which means that when a district superintendent is elected in a supervision district by the joint votes of the presidents of the several school districts in such supervision district, he shall be elected for a definite time, which may be one, two or three years, provided the first election of such superintendent in that particular district had been for a term of one year, and his compensation shall be fixed by the presidents who perform the duty of electing him, and such compensation shall be fixed at the same time that the appointment is made.

Section 4744-2 reads as follows:

> "The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendent and for contingent expenses, as may be certified by the county board. Such moneys shall be placed in a separate fund to be known as the 'county board of education fund.' The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the county snd district superintendents of such county school district for the next six months. Upon receipt by the state auditor of such certificate he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount; which shall be placed by the county auditor in the county board of education fund."

The above section provides that the county auditor shall have received prior to the first day of August of each year the certificate from the county board of education as to the number of district superintendents employed and their compensation, along with the certification as to the compensation of the county superintendent. This certification is made to the auditor in order that the amounts to be apportioned to each district for the payment of its share of the salary of a district superintendent may be properly entered on the records and provided for in the allotment of school funds. It would thus be seen that promiscous increases of salary for district superintendents made at any time during the calendar year would have a tendency to disturb the original certificate made by the county board of education to the county auditor prior to the first day of August in each year.

Attention is invited to opinion 2069, appearing at page 1855, Vol. 2, Opinions of the Attorney-General for 1916, wherein it was held:

> "There is no power in the appointing authority provided by section 4739 G. C., 104 O. L., 140, to increase the compensation of a district superintendent during the term of service for which he was elected, and his compensation fixed pursuant to the provisions of section 4743 G. C., 104 O. L., 142, after the appointment has been accepted by the person so elected."

After holding that district superintendents are not officers and are, therefore, not subject to the provisions of section 20, article 2 of the constitution, the Attorney-General further said:

> "The presidents of the village and rural boards of education and the members of such boards, when in joint session, are, however, in the employment of the district superintendents, subject to the familiar rule that public officers, in the discharge of their official duties, have only such powers as are expressly conferred by law or are necessary to the proper performance of duties imposed or the exercise of powers conferred by express provision of law.

"The particular officers referred to, in the employment of district superintendents, and the fixing of their compensation, pursuant to sections 4739 and 4743 G. C., supra, have not conferred upon them the general power to contract and be contracted with, as in the case of boards of education, under the provision of section 4749 G. C.

There is found no express statutory provision authorizing the presidents of the board of education of rural and village districts, or the members of such boards in joint session, authorized by section 4739 G. C., supra, to increase or decrease the compensation of a district superintendent, *after the same has once been determined,* pursuant to the provisions of section 4743 G. C., supra, and the same *accepted by the person so elected,* and it is not believed that the exercise of such power is in the way necessary to a proper performance of the duties imposed by law upon such officers in respect to the election of and determining the compensation of district superintendents."

Speaking of the certification to be made by the county board of education to the county auditor prior to August 1st, in each year, as provided under section 4744-2 G. C., the then Attorney-General further said:

"I am aware of no authority to make a second certification under this section and am of the opinion that when a certification has once been made to the county auditor, according to the provisions of section 4744-2 G. C., supra, no subsequent certification may be made for that year."

In opinion No. 334, addressed to Hon. Donald F. Melhorn, prosecuting attorney, Kenton, Ohio, under date of June 2, 1917, a later Attorney-General, upholding the view taken by his predecessor, further said:

"Following the reasoning of said opinion (2069), the term, then, of the district superintendents who were elected in 1914 would extend, as above noted, to August 31, 1915. How, then, could any district superintendents receive another or a different salary covering the said period. If the same district superintendents were re-elected, they had already been paid for said time, or at least their contract covered said period. * * * The various presidents or members of the boards of education who made up the supervision district were without authority to enter into contracts covering a period which was included in the contracts previously entered into. * * * The officers who employed such district superintendents could exercise only such powers as are conferred upon them by law. They had no authority to make a contract overlapping any other contract. The money having been paid thereon, recovery of the same back can be had."

Section 4743 G. C., supra, has not been amended in any wise since it was enacted in 104 O. L., page 133, and containing the language in the text upon which the two opinions by former Attorneys-General were based.

Section 4744-2, providing for the certification by the county board of education to the county auditor of the number of district superintendents and the compensation of the county superintendent prior to the first day of August of each year, was amended in 108 O. L., 233, but such amendment was that the local expense of the normal school in the county should be also certified by the county board of education at the time of the regular August certification.

There has been no change in the law that the salary of the district superintendent shall be fixed by the appointing authority at the same time that the appointment is made, and it is therefore the opinion of the Attorney-General that the appointing

authority provided in section 4739 G. C., whose duty it is to elect the district superintendent of schools, has no power to increase the compensation of such district superintendent during the term of service for which he was elected. Under the provisions of section 4743 G. C., the compensation of such district superintendent shall be fixed at the time of his election and such compensation cannot be changed after the appointment has been accepted by the person so elected.

Respectfully,
JOHN G. PRICE,
Attorney-General.

798.

TOWNSHIP CLERK—SECTIONS 12910 AND 12912 G. C. DO NOT PROHIBIT HIS EMPLOYMENT BY TOWNSHIP TRUSTEES ON TOWNSHIP ROAD WORK, ETC.—LIMITATION OF SECTION 3308 G. C. NOT APPLICABLE TO SERVICES OUTSIDE SCOPE OF HIS OFFICIAL DUTIES—DETAILED STATEMENT AS TO SERVICES REQUIRED BY SECTIONS 3304 AND 3316 G. C.—WHEN MAXIMUM ANNUAL COMPENSATION TO TOWNSHIP CLERK IS ALLOWABLE.

1. *Sections* 12910 *and* 12912 *G. C. do not prohibit the employment of a township clerk by the trustees of his township for the rendition of personal services on township road work, ditch work and miscellaneous work.*

Whether such employment is prohibited if it involves the furnishing by the clerk of material.—Quaere.

2. *The limitation of section* 3308 *G. C. upon maximum annual compensation of the township clerk does not apply to services outside the scope of his official duties.*

3. *By virtue of sections* 3304 *and* 3316 *G. C. a detailed statement as to services rendered the township is required as a basis for payment for such services.*

4. *The maximum annual compensation to a township clerk permitted by section* 3308 *G. C. may be allowed by the township trustees at the end of the year if in the exercise of a sound discretion the trustees find that such maximum represents reasonable compensation for services rendered.*

COLUMBUS, OHIO, November 19, 1919.

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

GENTLEMEN:—Receipt is acknowledged of your communication reading as follows:

"We respectfully request your written opinion upon the following matters:

We are respectfully referring you to section 3308 of the General Code, as well as section 3298-12 G. C., and would say that under date of July 11, 1916, the Attorney-General held that the compensation under section 3298-12 G. C., was subject to the limitation fixed by section 3308 G. C.

1. May the township clerk legally be employed by the township trustees to do road work, ditch work or miscellaneous work?

2. If so, is not the amount that he may draw from the township treasury for all and any kind of work subject to the limitation of section 3308 G. C.?

3. Are not the township trustees obligated to fix by resolution what his general compensation shall be per annum subject to the limitation of section 3308 of the General Code? Or may they without any resolution at the close of the year allow the maximum?

4. Should not a detailed account be rendered of miscellaneous services and work if legal, allowing consistent verification by the State department?"

On personal conference with your bureau, it has been ascertained that the purport of your first inquiry is whether the provisions of sections 12910 and 12912 G. C. prohibit the employment of the township clerk by the trustees of his township for the rendition of personal services in the construction, maintenance and repair of roads ditches, and the doing of other general township work along those lines.

Said two sections read as follows:

"Sec. 12910. Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years."

"Sec. 12912. Whoever, being an officer of a municipal corporation or member of the council thereof or the trustees of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office."

Very plainly, the mere furnishing of personal services is not such an activity as would come within the prohibition of being "interested in a contract for the purchase of property, supplies or fire insurance," set out in section 12910. Even if that proposition were the subject of doubt, the doubt is removed by reference to the terms of section 12912, which specifically cover the case of being interested in the profits of services for the township. Inasmuch as section 12912, so far as it relates to townships, refers only to the township trustees, and does not include the clerk, the conclusion follows that the two sections in question do not prohibit the employment of a township clerk by the trustees of his township for the rendition of personal services on work of the character indicated in your letter. Hence the answer to your first question is in the affirmative.

It should be understood that the conclusion just stated relates only to the rendition of personal services, and does not pass upon the question whether the township clerk is prohibited by section 12910 from an employment by the township trustees involving the furnishing by the clerk of material, such as gravel or stone, in connection with personal services.

Your second question has reference to section 3308 G. C. which in its form as amended in 107 O. L., 651, reads as follows:

"The clerk shall be entitled to the following fees, to be paid by the parties requiring the service: twenty-five cents for recording each mark or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superin-

tendent; for keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow. In no one year shall he be entitled to receive from the township treasury more than two hundred and fifty dollars."

You refer in connection with this section to an opinion of this department of date of July 11, 1916. Said opinion is found in Opinions of Attorney-General for 1916, Vol. II, p. 1184. The conclusion reached in that opinion was that the compensation provided for in section 3298-12 G. C. as it appeared in 106 O. L., 592, was subject to the limitation of $150 for any one year, as provided in said section 3308 before its amendment in 107 O. L. Said section 3298-12 related to the keeping by the township clerk of a record of township road proceedings.

The effect of your second question is to inquire whether the principles underlying said opinion are such as to lead to the conclusion that the limitation of $250 in section 3308 is applicable to services rendered by the township clerk of the character mentioned in your first question.

Of course, taken alone, the last sentence of section 3308 "in no one year shall he be entitled to receive from the township treasury more than $250," would prohibit the township clerk from drawing more than that amount in any one year from the township treasury under any conditions whatsoever. However, it is a familiar rule of construction that a statute should be read as a whole, and that the terms of a statute are to be considered in the light of their context and subject matter rather than literally. Keeping this rule in mind, the conclusion plainly follows from a reading of the section that the limitation of $250 is applicable to the township clerk only as to services rendered in his capacity as clerk. Such services as the clerk might legally render outside of the scope of his official duties are subject to payment in the same way as would be the services of any other employe of the township.

Hence the answer to your second question is in the negative.

Your fourth question will next be taken up because of its relation to services of the character referred to in questions 1 and 2.

No statute has been found which defines with any degree of certainty the procedure to be followed by the township authorities in their allowance and payment of accounts. However, sections 3304 and 3316 are here quoted respectively as follows:

"Section 3304. Immediately after the township officers have made their annual settlement of accounts, the clerk shall make and enter in the record of the proceedings of the trustees, a detailed statement of the receipts and expenditures of the township for the preceding year, if any, the amount of money received and expended for such purposes in each such district in the township, and the receipts and expenditures of the township board of education. He shall state from what source the moneys were received, to whom paid, for what expended, and in detail all liabilities, if any. On the morning of the first Tuesday after the first Monday in November, each year, the clerk shall post a copy of such statement at each place of holding township elections in the township. A township clerk refusing or neglecting to make, enter and publish such detailed statement, shall be liable to a fine of not less than twenty-five nor more than thirty dollars, to be recovered before any justice of the peace of the township, and paid into the school fund of the township.

Section 3316. No money belonging to the township shall be paid out by the treasurer, except upon an order signed personally by at least two of the township trustees and countersigned personally by the township clerk."

It goes without saying that the township clerk cannot make up a detailed state-

ment of receipts and expenditures for the preceding year unless the accounts which make up those expenditures are rendered in such detail as to show exactly what the expenditure is for. An account merely for "miscellaneous services" explains nothing so far as proper entries on the township books are concerned, and might include activities reaching into every public function which the township is authorized to perform, at the same time failing to indicate the particular fund out of which the charge is properly payable. The plain intent of section 3304 will not be subserved unless all accounts rendered to the township trustees show the precise nature of the services rendered or work done, and the purposes to which such services or work were put.

It will be noted that by the terms of section 3316 the township clerk must personally countersign all orders on the treasurer before that officer is authorized to pay them; hence the clerk should not only be advised of the details making up the account which is to be paid through the medium of the order, but also is provided with a means of requiring that accounts be rendered in detailed form.

For these reasons the answer to your fourth question is given in the affirmative.

Your third question relates only to such services as are performed by the clerk in the course of his official capacity and does not include those services embraced within the intent of your remaining questions.

The first part of section 3308 relates to fees to be paid to the clerk by parties requiring the service. The latter part of said section relates to compensation to the clerk for services rendered the township in his official capacity and reads as follows:

> "For keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow."

The phraseology just quoted imports the idea of an allowance for services after they are rendered rather than before. The township trustees may not be in position to know in advance what services will be required in a given year; and the services of the clerk may differ materially in volume in one year as compared with another. Hence, the only construction which we may give the statute is that the allowances for services were intended by the legislature to be left to the sound discretion of the township trustees, subject to the limitation of $250.00. Plainly, the township clerk is not placed on a salary basis, and to hold that the township trustees must by resolution fix the general compensation for the year would be almost tantamount to holding that the township clerk is to be on a salary basis. Besides the question would remain, what services would "general compensation" include?

It is also to be noted that the expression appears "for any other township business the trustees require him to perform," thus indicating a certain discretion in the township trustees in the matter of calling on the clerk for particular services which the trustees may find in the interest of the township.

Upon the whole, therefore, there is nothing in section 3308 to warrant the conclusion that there is a duty on the part of the township trustees to fix in advance the general compensation of the clerk. Neither is there anything in the statute which forbids the trustees at the close of the year from allowing the maximum. It is presumed, of course, that the trustees will not act arbitrarily, but that in whatever allowance they make they will exercise a sound discretion looking on the one hand to the public interest, and on the other to the value and nature of the services rendered by the clerk.

Your third question is, therefore, answered by the statement that the township trustees are not obligated to fix by resolution the general annual compensation of the clerk, and that such township trustees may, at the close of the year, allow the maximum

sum named in section 3308, provided that such trustees in the exercise of a sound discretion find that such maximum represents reasonable compensation for services rendered.

Respectfully,
JOHN G. PRICE,
Attorney-General.

799.

MUNICIPAL CORPORATIONS—LEGAL HOLDER OF PAST DUE MUNICIPAL BONDS AND COUPONS FOR PAST DUE INTEREST UPON MUNICIPAL BONDS IS ENTITLED TO COLLECT INTEREST THEREON FROM TIME THEY ARE PROPERLY PRESENTED FOR PAYMENT UNTIL ACTUAL PAYMENT IS RECEIVED.

The legal holder of past due municipal bonds and coupons for past due interest upon municipal bonds is entitled to collect interest thereon from the time they are properly presented for payment until actual payment is received.

COLUMBUS, OHIO, November 19, 1919.

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

GENTLEMEN:—We have your letter of October 29, 1919, requesting opinion as follows:

"*Statement of Facts.*

The cashier of the Union Deposit Bank of Maumee, Ohio, was also treasurer of the village of Maumee. Bonds and coupons were presented for payment. The village had no funds on deposit by the sinking fund to cover the same. The bank paid out the money to redeem the bonds and coupons presented at maturity without municipal funds to cover, charging the payment to the account of the bank. Later when the municipality had procured funds to cover the bank charged the municipality interest as follows:

'*Interest Paid on Overdue Bonds.*

Check	Time Overdue	Bonds	Rate	Bond Rate	Amount
295	Feb. 1, 1918—Sept. 10, 1918	$3,000 00	6%	5%	$109 98
296	Feb. 1, 1918—Sept. 10, 1918	1,000 00	6%	5%	36 36
297	Mar. 1, 1918—Sept. 10, 1918	1,380 00	6%	4½%	43 70
298	Aug. 1, 1917—Sept. 10, 1918	370 42	6%	5%	24 67
299	Mar. 1, 1918—Sept. 10, 1918	2,000 00	6%	4½%	63 34
315	Apr. 1, 1918—Oct. 5, 1918	520 00	6%	5%	25 00
320	Apr. 1, 1918—Oct. 5, 1918	385 50	6%	5%	11 56
					$314 61'

Question: Can the bank legally charge the village interest on moneys paid under the conditions set forth herein?"

The recital in your letter that the Union Deposit Bank of Maumee, Ohio, upon

presentation of these bonds and interest coupons paid for them and charged the payment so paid to the account of the bank, indicates that the transaction was considered by the bank and carried on its books as a purchase of such securities from the legal holders thereof, and in answering your question, I am considering the bank as a purchaser for value of overdue bonds and interest coupons.

As further authority for this assumption, I have a letter from Mr. A. F. Mitchell, president of the Union Deposit Bank of Maumee, Ohio, in which he makes the direct statement that these bonds and interest coupons were purchased by the bank and carried as bank property until their subsequent redemption by the village of Maumee.

Your inquiry does not particularly describe the bonds and interest coupons in question and I take it that they were valid obligations of the village of Maumee, containing the recitals usually found in such instruments.

Such being the case, the legal holder thereof was entitled to receive payment upon proper presentation when due and in default of such payment by the village to collect interest upon the amount due until payment was received.

I am, therefore, of the opinion that the Union Deposit Bank of Maumee, being the legal holder of the bonds and interest coupons referred to in your letter, was entitled to collect interest on the same from the time they were properly presented for payment when due until they were paid.

As to the rate of interest which the bank was entitled to charge, I call your attention to sections 8303, 8304 and 8305 of the General Code, which are as follows:

> "Section 8303. The parties to a bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per cent per annum, payable annually.
>
> Section 8304. Upon all judgments, decrees, or orders, rendered on any bond, bill, note, or other instrument of writing containing stipulations for the payment of interest in accordance with the provisions of the next preceding section, interest shall be computed till payment at the rate specified in such instrument.'
>
> Section 8305. In cases other than those provided for in the next two preceding sections, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, or settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of a contract, or other transaction, the creditor shall be entitled to interest at the rate of six per cent. per annum, and no more."

Under sections 8303 and 8304 G. C., above quoted, the bank was only entitled to interest upon the unpaid bonds at the rates respectively stipulated in the several bonds.

Upon the unpaid interest coupons, assuming that they were of the usual form and provided for the unconditional payment of a sum stated at a date certain, interest was properly computed and collected, under said section 8305 G. C., at the rate of six per cent. per annum.

As it appears from your letter that these interest payments were for interest accruing prior to October 5, 1918, the question of whether the Union Deposit Bank of Maumee was authorized to purchase the overdue securities mentioned in view of the provisions of the new banking act, house bill No. 200, filed in the office of the secretary of state, April 12, 1919, is not material as such banking act did not become effective until July 12, 1919.

Respectfully,
JOHN G. PRICE,
Attorney-General.

800.

MUNICIPAL CORPORATION—NON-CHARTER CITY MAY BUY WATER WORKS FROM PRIVATE COMPANY BY ISSUING BONDS FOR FIRST PAYMENT UNDER SECTION 3939 G. C., AND CONTRACTING TO PAY REST OF PURCHASE PRICE FROM EARNINGS OF WATER WORKS—MAY LEGALLY ISSUE MORTGAGE BONDS SECURED ONLY UPON UTILITY AND ITS REVENUES.

1. *A non-charter governed municipality may buy a water works from a private company by authorizing and issuing bonds for the first payment under section* 3939 *G. C., and contracting to pay the rest of the purchase price from the earnings of the water works.*

2. *Such a municipality may legally issue bonds under section* 3939 *G. C. to make the initial payment and issue mortgage bonds secured only upon the utility and its revenue under article* 18, *section* 12, *of the constitution for the payment of the rest of the purchase price of such water works.*

COLUMBUS, OHIO, November 19, 1919.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

> "We are enclosing copy of communication to Mr. B. F. Robinson, president of council, Bucyrus, Ohio, and respectfully request your written opinion upon the following matters:
>
> 1. In a non-charter governed city, may a municipality buy a water works from a private company by authorizing and issuing bonds for the first payment and contracting to pay the balance at fixed intervals from the earnings of the water works?
>
> 2. May a municipality legally issue bonds to make the first or initial payment and issue mortgage bonds secured only upon the utility and its revenues to cover the balance?
>
> 3. Is there any legal way to purchase such water works, making only a partial payment?"

Acknowledgment is also made of the receipt of a copy of the communication from your bureau to the president of the city council of Bucyrus, Ohio. It is suggested that while your questions are separately stated and numbered, they are all intimately affected by the consideration of and answer to question No. 1.

Sections 4, 5 and 12 of article 18, section 11 of article 12, sections 3939, 3940, 3806 and 3809 are pertinent.

Section 4, article 18, in part provides:

> "*Any municipality* may acquire, construct, own, lease and operate * * * any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants."

Section 5 provides that any municipality exercising the powers granted in section 4, "shall act by ordinance, and no such ordinance shall take effect until after thirty days from its passage." Then follows provision for a referendum on such ordinance.

Section 12 of article 18 is as follows:

> "Any municipality which acquires, constructs or extends any public

utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure."

Section 11 of article 12, adopted at the same time as the above quoted sections (1912), provides that no bonded indebtedness of a political subdivision of the state shall be incurred unless

"in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually *by taxation* an amount sufficient to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity."

Section 3939 (106 O. L., 536) authorizes the city council, in the manner therein stated, to issue and sell bonds

"in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent per annum, as said council may determine, and in the manner provided by law, for any of the following specific purposes; * * *

(11) For erecting or purchasing water works for supplying water to the corportion and the inhabitants thereof."

Section 3940 limits the amount of such bond issue to "one per cent of the total value of all property in such municipal corporation." At this point it may be observed that prior to the adoption of section 12, article 18, municipal corporations, by delegated power from the general assembly, in sections 3939 and others, already had the authority to acquire and operate water works and to issue bonds in payment thereof. The amendment, however, does not enlarge the power but rather places it beyond the control of the general assembly and is a direct grant of power not from the general assembly, which theretofore was necessary (see Board of Health vs. Greenville, 86 O. S., 24) ,but is a direct grant from the people in "a new distribution of governmental power, * * * made by the people," as held in Fitzgerald vs. Cleveland, 88 O. S., 360.

This direct grant, then, from the people of Ohio, contains express authority to acquire a water plant. Authority to issue bonds for the entire cost price of construction or purchase was also granted by sections 3939 and 3940 up to one per cent of the taxable property. By the terms of section 3949 this limitation may be exceeded where the net income of the plant is sufficient to meet the sinking fund requirements.

The question of the validity of this section, because of its apparent conflict with section 11, article 12, may be noted (but not decided) in this, that said section 11 prohibits the incurrence or renewal of any bonded indebtedness, unless in the legislation authorizing it "provision is made for *levying and collecting annually by taxation* an amount sufficient to pay interest and redeem the bonds at maturity." It is to be noted that the constitutional requirement is that this sinking fund shall be levied and collected "annually by taxation." Section 3949 contemplates the creation and maintenance of such sinking fund from the revenues of the water plant. However, section 12, article 18, adopted by the people at the same time section 11 was adopted

authorizes the issuance of the bonds beyond the one per cent limitation, where the payment of such bonds is secured only by the utility and its income. The same apparent conflict exists between sections 11 and 12, unless the latter, being more special in its nature, is to be regarded as an exception to the former. Such a conflict is avoidable also by construing the special or limited indebtedness of the municipality on the mortgage bonds issued under section 12 and section 3949 G. C. as not being a "bonded indebtedness" in the sense in which that term is used in section 11. This latter construction is adopted by this department. This does not affect or impair the application of section 11 to bonded indebtedness, and gives meaning to section 12. In view of the authority contained in the last section, so far as the present question is concerned, it is unnecessary to further discuss or determine the implied repeal of section 3949 by the adoption of section 11, article 12. To keep in mind the effect of the adoption of these constitutional amendments, it must be remembered that they are self-executing and apply to "any municipality," whether charter or non-charter.

Section 3806 (Burns law) in part provides:

> "No contract * * * *involving the expenditure of money,* shall be entered into * * * unless the auditor * * * first certifies to council * * * that the money required for such contract * * * is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose."

With this preliminary survey of the law applicable to your inquiries, they may now be considered separately.

In question 1 you inquire:

> "In a non-charter governed city, may a municipality buy a water works from a private company by authorizing and issuing bonds for the first payment and contracting to pay the balance at fixed intervals from the earnings of the water works?"

This project may be said to involve two principal acts:

(1) The issuance of bonds for the initial payment under section 3939, and (2) a contract for deferred payments out of the net income.

The authority to issue bonds for water works (see further discussion in answer to your second question) clearly exists and, subject to the limitations of section 3940, the requirements of the constitution as to the sinking fund and general laws as to the tax rate limitations, authority to contract for the purchase is equally clear, but it may be said that this authority is subject to the impediments of section 3806 (supra).

In the scheme contemplated, the deferred payments are not to be made from funds raised by taxation, but are to come from the net income of the utility. It is at once obvious that the auditor cannot certify that such money is in the treasury or in process of collection. But is such certificate necessary?

In Kerr vs. Bellefontaine, et al., 59 O. S., 464, the court held that that part of the statute which limits its application to contracts, ordinances or orders, for or involving "the expenditure of money," applies only to money raised by taxation. Holding that the statute did not apply in that case, the court held:

> "The fund from which the plaintiff is entitled to satisfaction of his demand, *is not raised by taxation.* It is derived from the operation of the gas works and made subject to the order of the board, whose authority is so limited that they can make valid contracts only for appliances and supplies for the gas works to which the fund is devoted."

In Comstock vs. Nelsonville, 61 O. S., 288, the rule is more clearly and definitely stated. As appears on page 294 of the opinion:

"The section is general in its terms, but the object of the general assembly evidently was to compel municipalities to have the money in the treasury before appropriating or spending it. *This can only apply to money raised, or to be raised by a levy on the general tax list of the municipality.*"

and again on page 296 it is said that this section (then 2702) did not apply,

"for the further reason that by necessary implication said section has reference to money of the municipality, that is, money raised, or ultimately to be raised, by a levy on the general tax list, and *does not cover or refer to moneys of individuals*, that is, money to be raised by an assessment on the property along the improvement."

On page 297 this holding is characterized as protecting

"the treasury and the general tax payer and at the same time enables needed local improvements to be made without detriment to the municipality and is in accordance with the intention of the general assembly in passing the Burns law."

In the contemplated scheme to carry out the second part of the project, no money raised by levy on the taxable property of the municipality is used for the deferred payments, and in view of these and other decisions, construing the Burns law in this regard, this department is of the opinion that on the facts as contemplated in your inquiry, the Burns law is inapplicable.

It is therefore concluded that in the manner pointed out, and subject to the limitations indicated, the proper answer to your first question is an affirmative one.

Your second question is:

"May a municipality legally issue bonds to make the first or initial payment and issue mortgage bonds secured only upon the utility and its revenues to cover the balance?"

Consideration of the purpose of the sections and constitutional provisions above quoted and considered, suggests no reason why the municipality may not utilize either of these methods in acquiring a water plant. This seems free from doubt. But the question as presented here is whether the authority and power of both of these separate provisions may be utilized in part and conjunctively. On one side it may be claimed that the power to issue bonds under sections 3939 et seq. and section 12, article 18 of the constitution, carries with it authority to issue bonds to provide part payment for a water works plant. This on the theory that the lesser power is included in the greater power. On the other side of this question it may be claimed that to legally exercise the authority contained in section 3939, viz., to issue bonds for the purpose of "erecting or purchasing water works," the bond must be for the entire cost of such water works, and that this section contemplates that the issuance of such bonds, of itself, will result in the acquisition of such utility and that a complete and exclusive means of such acquisition is here provided. This section, however, relates to the grant of powers to municipalities; in it the legislature was concerned with *the purposes or objects* for which power to issue bonds was there granted. It may be plausibly argued that the later adoption of section 12, article 18, supra, was not without significance in this connection. This section, adopted at the same time as sections 4 and 5 of article 18, rather indicates that bonds up to the bond limitation may be issued under section 3939, and if this does not raise sufficient money, the rest of the money necessary may be raised by issuance of mortgage bonds secured only by the property and its revenues. This section reads:

"Provided that such mortgage bonds issued *beyond the general limit* of bonded indebtedness prescribed by law shall not impose any liability upon such municipality."

Would this not seem to indicate that with authority to acquire water works clearly granted, without restriction (except as to the extent of bond issues) in previously enacted sections, it was thus intended to provide for the acquisition of such water works in cases where the bonds issuable under section 3939, et seq., were insufficient, by providing the balance of the funds requisite to such acquisition could be raised by mortgage bonds secured only on the property and its income, as above pointed out? No decision on this precise question has been found, but the case of Platt vs. Toledo, 21 O. C. D., 305 (12 O. C. C. (n. s.) 279) is similar in principle. In that case it was claimed, as stated in page 306:

"It is said that there are two substantial reasons why this issue should be enjoined; first * * * and also that there is no authority given by law for the issuance of bonds to construct anything but a completed bridge."

The court held on page 307:

"We are disposed * * * to hold that the council * * * may authorize contracts to be entered into and provide the means for their fulfillment, for the completion of parts of such structures as the statute says they may provide means to pay for, by the issue of bonds or otherwise. We think that this contention that the council was powerless to issue bonds for the construction of a bridge without making provision for the construction of a draw or other method of completely spanning the stream, should not be sustained, and we adhere to the decision made in this respect upon the other trial between the same parties."

The Ohio circuit court reports do not disclose the reporting of the other trial between the same parties. In this case it was claimed that the amount of the bond issue (up to the bond limit) was so manifestly insufficient to complete the bridge that it fairly raised the question of the power of council to issue bonds for an incompleted part of a specifically authorized improvement, viz., the construction of a bridge. The foot note, page 305, indicates that a petition in error was dismissed by the supreme court in Platt vs. Toledo, 54 Bull., 106. In this case (page 306), referring to the former circuit court's holding on this branch of the plaintiff's case, the court say:

"In that case, the opinion in which was announced by Judge Kinkade, it was said, in substance, that the court saw no reason to hold that the contention of the plaintiff in that regard was correct."

With clear authority granted to acquire and issue bonds for a water works, no reason is apparent to this department at this time why the power to acquire and issue bonds for the whole consideration for such water works does not include and carry with it the power to issue bonds for such part thereof as council deems necessary for the attainment of such purpose, and consistent with this conclusion, supported by the Toledo case, this department is of the opinion, in the absence of judicial decision to the contrary, that the answer to your second query should be in the affirmative.

Because of the intimate relation of your third question to question one, it is considered that the discussion and conclusion reached in the latter question settles the third question and necessarily results in an affirmative answer thereto.

Respectfully,
JOHN G. PRICE,
Attorney-General.

801.

BANKS AND BANKING—WHO HAS AUTHORITY TO DETERMINE CORPORATE NAMES OF BANKING INSTITUTIONS WHERE THERE IS SIMILARITY OF SAME—SUPERINTENDENT OF BANKS MAY NOT REVOKE HIS CERTIFICATE OF APPROVAL OF NAME AFTER ARTICLES OF INCORPORATION HAVE BEEN RECORDED BY SECRETARY OF STATE.

1. *By virtue of the provisions of section* 710-44 *G. C.*, 108 *O. L.* 91, *the duty of determining whether or not an objectionable name has been selected by an institution desiring to be incorporated to do a banking business, devolves solely upon the superintendent of banks (subject to the right of appeal to a board composed of the governor, the superintendent of banks and the attorney-general), although the secretary of state may with entire propriety call the superintendent's attention to what his records disclose as to the appropriation of such name or similar names by other institutions.*

2. *The superintendent of banks, having certified his approval of a name selected by such institution, may not revoke his certificate after its articles of incorporation have been recorded by the secretary of state, upon the ground that he has subsequently reached a different conclusion as to the propriety of such use of the name adopted (cases in which such certificate was obtained by fraud, misrepresentation or deception or was issued under a mistake of fact not considered).*

COLUMBUS, OHIO, November 19, 1919.

HON. PHILIP C. BERG, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You have addressed to me for consideration the following communication:

> "Will you advise this department whether the statutory discretionary authority as to the similarity of the corporate names of banking corporations and banking institutions seeking to be incorporated is lodged—(first) in the superintendent of banks exclusively, by virtue of section 710-44, General Code; (second) jointly in the superintendent of banks and the secretary of state of Ohio, by virtue of sections 710-44 and 8628, General Code, of Ohio; (third) if lodged in the superintendent of banks exclusively, at what stage in the proceedings for the incorporation of a bank, etc., under section 710, General Code, does the right to exercise such discretion cease to exist?"

Section 710-41 G. C., a part of the Graham banking act, effective July 11, 1919, sets forth general provisions relating to the organization of banking corporations. They need not be quoted here.

Section 710-42 G. C. contains this language:

> "* * * The secretary of state shall forthwith transmit to the superintendent of banks a copy of such articles of incorporation and shall not record the same until duly authorized so to do by the superintendent of banks as hereinafter provided."

Section 710-44 G. C. is as follows:

> "Upon receipt of a copy of the articles of incorporation of such proposed bank, the superintendent of banks shall at once examine into all the facts connected with the formation of such proposed corporation including its location and proposed stockholders and if it appears that such corporation, if formed, will be lawfully entitled to commence the business of banking,

the superintendent of banks shall so certify to the secretary of state, who shall thereupon record such articles of incorporation. But the superintendent of banks may refuse to so certify to the secretary of state, if upon such examination and investigation he has reason to believe that the proposed corporation is to be formed for any other than legitimate banking business, or that the character and general fitness of the persons proposed as stockholders in such corporation, are not such as to command the confidence of the community in which such bank is proposed to be located or that the public convenience and advantage will not be promoted by its establishment, or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already adopted, or appropriated by an existing bank in this state, or so similar thereto as to be likely to mislead the public, unless the place of business of such proposed corporation is to be located in a county other than the one in which the corporation bearing such similar name is then doing business and the corporation so adopting such name adds thereto the words 'of .....' (Indicating thereby the name of the city, village or township in which its place of business is situated.)"

Section 710-45 G. C. provides that if the superintendent of banks withholds such certificate, an appeal may be taken to a board composed of the governor, the superintendent of banks and the Attorney-General, whose decision in the matter shall be final.

The language of section 710-46 G. C. is:

"Upon receipt of such certificate from the superintendent of banks the secretary of state shall record said articles of incorporation; one copy thereof, duly certified by the secretary of state shall thereupon be furnished to the incorporators of such corporation, and one copy to the superintendent of banks, to be by him filed in his office. All certificates thereafter filed in the office of the secretary of state relating to such corporation shall be recorded, and a certified copy thereof forthwith furnished to the superintendent of banks and filed in his office."

Section 710-52 G. C. provides that banking corporations shall be created, organized, governed and conducted and their directors chosen in all respects in the same manner as provided by law for corporations organized under the general corporation laws of this state, in so far as the same shall not be inconsistent with the provisions of the banking act.

After the articles of incorporation of the proposed banking corporation have been subscribed and acknowledged, they are to be filed in the office of the secretary of state and a copy thereof transmitted forthwith to the superintendent of banks. Section 710-42 G. C.

The superintendent of banks is to determine whether or not the proposed corporation "is lawfully entitled to commence the business of banking" and if it appears to him that it is, he must so certify to the secretary of state. He may refuse to make such certificate if the name of the proposed corporation is likely to mislead the public as to its character or purpose, or so simulates one already adopted by another bank as to be deceptive. If he does certify that the institution may commence business, "the secretary of state shall record said articles of incorporation." Section 710-46 G. C.

Under the provisions of section 8628 G. C., relating to the organization and powers of corporations generally, it is provided that:

"Section 8628. The secretary of state shall not file or record any articles

of incorporation wherein the corporate name is likely to mislead the public as to the nature or purpose of the business its charter authorizes, nor if such name is that of an existing corporation, or so similar thereto as to be likely to mislead the public, unless the written consent of the existing corporation, signed by its president and secretary, be filed with such articles."

I am of the opinion that the duty of determining whether or not an objectionable name has been selected by a banking corporation devolves upon the superintendent of banks alone. Section 8628 is, as I have said, a general section, while those quoted from the banking act relate to a particular class of corporations and are in that sense special in their nature. Then they are of more recent enactment and as to the organization of banks supersede section 8628, if not consistent with it.

Section 710-44 G. C. expressly makes it the duty of the superintendent to refuse to certify if the name selected is likely to mislead the public or is unduly similar to that adopted or appropriated by an existing bank. Clearly he must decide whether or not such objections exist and it would seem therefore that the secretary of state could not also determine such controversies because there might be a disagreement between the two officers. Then the duty of the secretary of state to record the articles, when approved by the superintendent of banks, seems to be mandatory under section 710-46 G. C. He is not given discretion to refuse because he may disagree with the superintendent of banks. But it would be entirely proper for the secretary of state, when transmitting the articles of incorporation to the superintendent of banks, to call attention to the use or appropriation of similar names by other corporations, and for the superintendent of banks to have the records of the secretary of state examined before issuing his certificate.

I therefore conclude that the duty of determining whether or not there is an objectionable similarity between a name proposed and one already adopted or appropriated by another institution devolves solely upon the superintendent of banks (subject to the right of appeal), though the secretary of state may with entire propriety call attention to what his records disclose as to such names.

If the superintendent finds that the name proposed is improper, when should he signify his disapproval of it? As noted above, if he is satisfied that the institution should be permitted to begin business, he shall so certify to the secretary of state and the articles of incorporation are thereupon to be recorded. Clearly the law contemplates that the superintendent of banks should reach his conclusion before the articles of incorporation become a part of the public records.

I am not prepared to say that if fraud or deception were practiced upon the superintendent in securing his certificate or some excusable mistake had been made, the certificate and the recording of the articles could not be questioned. But it is my view that under ordinary circumstances the superintendent of banks would not have the right to revoke or recall a certificate after the articles had been recorded. The certificate of the superintendent of banks, approving the name selected, would not prevent another institution, whose name had been unfairly and improperly appropriated, from preventing the use of it by injunction or from resorting to remedies generally available in unfair trade or competition cases. The following expression of the court in Shoe Co. vs. Shoe Co., 9 O. D. (N. P.) 579 and 582, considering section 8628 G. C., is pertinent:

"But the Ohio statute gives the secretary of state no power to hear testimony or summon witnesses and makes no provision for notice to parties interested or the public generally that the secretary of state has under consideration the question of identity or similarity of certain corporate names. Under such circumstances it is not to be seriously considered that it was the intention of the legislature to make the finding of the secretary of state so

conclusive that the courts cannot review it when a case is properly presented which requires such a review."

I am therefore of the opinion that the superintendent of banks, having certified his approval of a name selected by such institution, may not revoke his certificate after its articles of incorporation have been recorded by the secretary of state, merely because he afterward reaches a different conclusion as to the legality of the use of such name by the institution.

Respectfully,
JOHN G. PRICE,
Attorney-General.

802.

APPROVAL, ABSTRACT OF TITLE OF PREMISES LOCATED IN MADISON COUNTY NOW STANDING IN THE NAME OF IVA F. DALBEY.

COLUMBUS, OHIO, November 19, 1919.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of your recent communication submitting for my examination an abstract of title of premises located in Madison county, the purchase of which is under contemplation by the state, the title now standing in the name of Iva F. Dalbey.

The premises in question are described as follows:

"Beginning at a stone northeast corner of William Cryder's land, formerly Warner land; thence with the line of said land S. 3° 45″ W. 15.55 chains (Chain four poles) to a stone southeast corner of said Cryder in the center of the London and South Charleston pike; thence with the center of said pike N. 68° 30″ E. 3.25 chains to an iron rod corner of the Knowles land (formerly Gray land); thence with three consecutive lines of said land N. 3° 45″ E. 31.80 chains to a stone; thence N. 86° 15″ W. 3.07 chains to a wild cherry tree; thence N. 2° E. (original call north) 26.28 chains to a stone corner of said Knowles in the line of John Thompson and in the original line of Peter Helphenstein's Survey Number 4513; thence with said line and line of Thompson S. 83° W. 22.40 chains to a stone in said line and corner of said Thompson; thence with two lines of said Thompson S. 2° 15″ W. 9.50 chains to a stone; thence S. 83° W. 5.20 chains to a stone northeast corner of Harry Armstrong in the line of aforesaid Thompson; thence with the east line of said Armstrong S. 1° 40″ W. 31.06 chains to a stone corner of said Armstrong; thence with the lines of said Armstrong, Kirkwood Cemetery lands and William Cryder aforesaid, passing a stone corner of Armstrong and the northwest corner of said cemetery at 5.15 chains east 27.13 chains to the place of beginning and containing one hundred and twenty acres, being part of Peter Helphensteine's Survey Number 4513, being the same premises conveyed by Harry H. Armstrong and wife to Iva Armstrong, September 24, 1898."

Upon examination of the abstract submitted, which bears date of November 1, 1919, I find that it evidences legal title to the above described premises at the date of said abstract in Iva F. Armstrong, who is shown by affidavit embodied in the abstract to be the same person as Iva F. Dalbey (by marriage with W. J. Dalbey).

The abstract is exceptionally complete and I do not find from my examination thereof evidence of defect or infirmity of title worthy of note, nor are liens or clouds against the title disclosed in the abstract.

It is shown that there are no unsatisfied mortgages or assessment liens appearing upon the records of the county against the premises and that all taxes due have been paid, including the June installment for the present year. Of course, the taxes for the year 1919, although assessed in the name of the present owner, have become a lien upon the premises and therefore should be adjusted as against the purchase price.

Accordingly, you are advised that the title as disclosed by the abstract is approved.

Very respectfully,
JOHN G. PRICE,
Attorney-General.

803.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN SUMMIT COUNTY.

COLUMBUS, OHIO, November 19, 1919.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of November 19, 1919, enclosing for my approval final resolution on the following improvement:

> "Cuyahoga-Falls-Chagrin Falls road, I. C. H. No. 91, Section 'Hudson,' Summit county."

I have carefully examined said resolution, find it correct in form amd legal, and am therefore returning the same to you with my approval endorsed thereon in accordance with section 1218 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

804.

APPROVAL, BOND ISSUE, CITY OF NORWOOD, OHIO, IN THE SUM OF $30,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 24, 1919.

805.

APPROVAL, BOND ISSUE, VILLAGE OF EAST PALESTINE, OHIO, IN THE SUM OF $27,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 24, 1919.

806.

APPROVAL, LEASE, MIAMI AND ERIE CANAL AT CARTHAGE, HAMILTON COUNTY, OHIO, TO THE CHATFIELD MANUFACTURING COMPANY.

COLUMBUS, OHIO, November 25, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—The receipt is acknowledged of lease in triplicate form covering use of water from the Miami & Erie Canal, at Carthage, Hamilton county, Ohio, by the Chatfield Manufacturing Company.

I note that the rent stipulated is $864.00 per year.

I have examined the lease in question, find it correct in form and legal, and I am therefore returning it with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

807.

APPROVAL OF RESOLUTIONS FOR SALE TO UNITED STATES OF AMERICA OF CERTAIN ABANDONED CANAL LANDS AT CAMP SHERMAN, CHILLICOTHE, OHIO, APPRAISED AT $500.00.

COLUMBUS, OHIO, November 25, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—The receipt is acknowledged of your letter of November 24th, transmitting in duplicate, copies of resolution providing for the sale to the United States of America of certain abandoned canal lands now occupied by the government as a military camp known as Camp Sherman in the suburbs of Chillicothe, Ohio.

I note that you have found that the land covered by the resolution is not required for the use, maintenance or operation of any of the canals of the state, and that you have appraised the same at $500.00.

I have examined the resolution and found it correct in form and legal, and I am therefore returning same to you with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

808.

INHERITANCE TAX—CONSTRUCTION OF SECTION 5348-2 G. C.—PROHIBITION AGAINST TRANSFER ON BOOKS OF COMPANY OR ISSUANCE OF NEW CERTIFICATE FOR SHARES OF STOCK PASSING FROM A DECEDENT WITHOUT CONSENT OF TAX COMMISSION—EXCEPTION OF CORPORATION—WHEN TRANSFER ENDORSED IN BLANK—PRESENTED AFTER DEATH OF SUCH OWNER.

Subject to the qualification that the corporation in question must have exercised due care so that if there were anything about the circumstances of the case to put it on its in-

quiry in relation to the transfer, it would be at fault did it not make such inquiry, a corporation transferring on its books, and without knowledge of the facts, a share of stock the certificate for which, indorsed in blank by the owner of record, is presented to it for transfer after the dea h of such owner of record, is not liable for any inheritance tax which might become due in respect of such share, if it should subsequently develop that the share was transferred without consideration, in contemplation of the death of the donor.

COLUMBUS, OHIO, November 25, 1919.

HON. ROBERT E. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—I have your letter of recent date requesting opinion of this office upon the following question:

> "Where an Ohio corporation receives for transfer a certificate of stock from A, a resident of another county in Ohio, which certificate stands on its books in the name of B, also a resident of another county, and is endorsed in blank by B, and the corporation has no knowledge of any facts or circumstances other than the above; if it should subsequently appear that the transfer from B to A was made without consideration and in contemplation of the former's death, which actually occurred before the presentation of the certificate for transfer, would the corporation be liable for the taxes, under section 5348-2 G. C., because it, in ignorance of any of these facts, and acting in good faith, transferred the stock without notifying the tax commission of Ohio or the county auditor?"

I enclose herewith copy of opinion (No. 684) addressed to Hon. Frank F. McGuire, inspector of building and loan associations, relative to the interpretation of section 5348-2 G. C. In this opinion the question suggested by you is raised but not decided. The ground work of the discussion necessary to answer the question which you submit is, however, found in that opinion, if it be established that the first sentence of the section is to be interpreted like the second sentence thereof is interpreted in the opinion to Mr. McGuire. That is to say, the first sentence of section 5348-2 G. C. is in terms a prohibition against the transfer on the books of the company or the issuance of new certificates for shares of stock passing from a decedent, without the consent of the tax commission.

The second sentence is in terms a like prohibition against the transfer of assets other than the stock of the company making the transfer. It is held in the opinion referred to that the prohibition in the latter case has not the effect of making such transfer absolutely illegal, but that the sanction for the enforcement of the prohibition is found in the sentence which provides that:

> "Failure to comply with the provisions of this section shall render such safe deposit company, trust company, *corporation*, bank or other institution, person or persons, liable for the amount of the taxes and interest due under this subdivision of this chapter on the succession to such securities, deposits, assets or property. Such liability may be enforced by action brought by the county treasurer in the name of the state in any court of competent jurisdiction."

On the question thus arising, it is the opinion of this department that the provision last quoted is to be read in connection with the first sentence of this section as well as in connection with the second sentence thereof; so that the only consequence of a violation of the first sentence is liability for the taxes to be recovered in a separate action, the validity of the transfer itself being unimpeached thereby.

This question is not entirely free from doubt. Because of the failure of the two sentences last above quoted to mention "shares of stock" by name, an argument might be built up to the effect that these provisions relate only to the enforcement of the prohibition contained in the second sentence. However, according to the terms of the uniform stock transfer law found in our General Code, sections 8673-1 to 8673-22, inc., the transfer described in sections 5348-2 G. C. would be perfectly legal.

It is well established law that statutes *in pari materia*, whatever their order of enactment, will be construed together and full effect given to each, rather than that one of them will be interpreted as a limitation upon or derogation of the other.

Having regard to the manifest purpose of section 5348-2 G. C., as more fully discussed in the other opinion referred to, a copy of which is herewith enclosed, it is most reasonable to interpret that section not as in derogation of the substantive rights of the immediate parties to the transfer of stock, and therefore *pro tanto* amendatory of the stock transfer act, but merely as a means of securing payment of the inheritance tax. This result can be perfectly achieved by giving to the sentences which have been quoted from section 5348-2 G. C. the interpretation to which they are easily susceptible (inasmuch as they refer to "this section" as an entirety), and holding, as has been previously held in this opinion, that the only effect of making a transfer of shares or issuing a new certificate, in violation of the first sentence of the section, is to render the offending corporation liable for the taxes due on account of the succession to the shares (not, as pointed out in the other opinion, the entire taxes due on account of the successions arising out of the estate of the decedent, nor even the entire tax on account of such successions to the particular successor).

Your letter seems to assume the correctness of all that has been heretofore set forth and it has been included in this opinion merely to complete the discussion of all questions which are even incidentally involved. That is to say, you assume that the only effect of non-compliance with section 5348-2 G. C., on the part of a corporation whose stock has been transferred in apparent violation thereof, would be to subject the corporation to liability for the taxes.

You then inquire whether such liability exists under circumstances like those stated by you, which clearly show good faith and want of knowledge of the facts, which give rise to original liability for the tax, on the part of the transferring corporation. This was the question suggested but not decided in the other opinion. Coming now to the decision of that question, it is the opinion of this department that in such case liability would not exist; or, to put it perhaps more technically, a suit to enforce the payment of the tax against the corporation could be successfully defended by showing the facts upon which good faith and want of knowledge could be predicated.

Although the statutes of many states contain provisions essentially similar to those of section 5348-2 G. C., no decision interpreting such provisions has been found. The constitutionality of such statutes is sustained in National Safe Deposit Co. vs. Stead, 232 U. S. 58.

It would seem that if in practice any harsh or arbitrary construction had been put upon provisions like these, some question would ere now have arisen, and authority would be available. I take it, therefore, that either there has been small necessity for resort to the secondary liability of the transferring corporation or the safe deposit company, as the case may be, or else that such liability has been enforced only in case of flagrant violation of the law.

Dealing, therefore, with a case of first impression, this opinion will be limited to the precise facts stated by you. It is clear that in the case you put, the actual transfer of the stock certificate, entitling the transferee to have the shares transferred on the books of the company or to have new certificates issued to him therefor, took place *inter vivos*. The case is not one where the corporation is asked to transfer on its books or issue a new certificate of stock for shares belonging to the estate of a deceased person and devolving upon some one else only by virtue of death. In such a case at

common law and under the stock transfer act as well, the corporation would be liable to the estate of the decedent if it should transfer the shares or issue new certificates for them, without administration. That being the case, it could hardly be contended that any hardship is involved in imposing upon the corporation the duty to see to it that due administration is had before transferring the shares on its books, and then not transferring to the administrator without the consent of the tax commission; for the duty imposed by section 5348 G. C. is but a slight enlargement of the duty imposed by the general law.

However, in the case you submit the transfer is one that does not involve the necessity for administration, because, as previously stated. it actually took place *inter vivos* and becomes taxable only if and because made in contemplation of death. Whether or not a succession occurs through a transfer in contemplation of death and therefore becomes taxable under paragraph 3 of section 5332 G. C., is always a question of fact. Probably the burden is on the state or its representative to show the facts which subject the succession to taxation. It is conceivable that the corporation mignt be a party to the transaction and thus have full knowledge of the facts, in which event a question would arise as to whether it would make itself liable by transferring the shares or issuing new shares without the consent of the tax commission. But that is not the case which you state.

Where the corporation is in ignorance of the facts, as it may well be, and the shares presented to it for transfer bear the indorsement of the donor, showing conclusively that the transfer took place *inter vivos*, it is the opinion of this department that suit to enforce the liability provided for in section 5348-2 G. C., on the theory that the corporation had violated the first sentence thereof, could be successfully defended against. The principle which is believed to be applicable to this case is that suggested in the other opinion, to which reference has been made. The contingent liability of the corporation for the tax is not original. Personal liability is imposed by section 5336 G. C. upon the executors or trustees and upon the successors. Even here there is an original and a secondary liability, the successors being primarily or ultimately liable, and the executor or personal representative being secondarily liable.

The liability of the corporation then is, as suggested in the other opinion, in the nature of a penalty for its failure to comply with the law. It is to be enforced, therefore, subject to principles which apply to the enforcement of other penalties; and the statute providing for it is to be interpreted like other statutes of a similar nature are interpreted.

It is, of course, familiar law that penal statutes are to be strictly construed. This rule is subject to two qualifications: First, that the manifest object of the statute is not to be defeated by strict construction; and second, that there must be some doubt as to the meaning of the statute before there is anything whatever to construe (Slingluff vs. Weaver, 66 O. S. 621). However, it must be also understood that the character of a statute as penal or remedial is not determined solely by reference to its criminal or civil character. That is to say, penal statutes include "all statute which command or prohibit certain acts and establish penalties for their violation, (36 Cyc. 1181) even though the penalty when recovered does not inure to the benefi of the public. On the contrary,

> "laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good are not, in a strict sense, penal acts, although they may inflict a penalty for their violation."
>
> Id., 1183.

In this case before proceeding further with the discussion it must be determined whether an act which does impose a penalty in the nature of a punishment for a wrong to the public, as this statute does, comes within the class of penal statutes or is re-

moved therefrom by consideration of the fact that its main purpose is to secure the collection of the public revenue. Here we must remember that revenue laws are themselves not remedial in character—not founded upon any permanent public policy but, on the contrary, are subject in their entirety to the rule of strict construction.

36 Cyc. 1189.

The rule is stated in the text cited as follows:

> "The doctrine of the strict construction of revenue statutes * * * should be applied with due regard to the intention of the legislature as expressed in the statute, and with a view to promoting the object of the statute; and especially those provisions of the statute which are intended to prevent fraud should receive a liberal construction."

These principles are believed to be correct and, as stated, the first task in the consideration of the question which you submit is to apply them to the statute under consideration. Is it a statute to prevent fraud? Undoubtedly it is to some extent. But its scope goes considerably beyond these bounds, and it may with accuracy, I think, be described as a statute the purpose of which is to secure the collection of the public revenue. There would be no "fraud" involved on the part of a corporation in transferring a share of stock on its books in accordance with a duly executed indorsement, nor even in transferring such a share to an executor or administrator of a deceased stockholder. These acts are not fraudulent in themselves; they are perfectly innocent even as reflecting on the assessment and collection of the inheritance tax. To be sure, in the case of non-residents especially, such transfer might prove to be a step in a process undertaken with intent to defraud the state of its revenues and actually succeed in so doing. But this would be the only fraudulent aspect of even such a transaction. The transfer itself, as has been hereinbefore pointed out, is essentially an innocent act and indeed the mere exercise of a legal right.

Consideration being given, then, to the fact that the liability imposed upon the corporation or financial institution by section 5348-2 is a tertiary liability aimed to secure the state, rather than a primary liability for the taxes in the first instance, the conclusion is reaffirmed that the statute, if open to any construction at all, is subject to strict construction unless that construction will defeat its manifest object.

This leaves the two further questions previously suggested, which will be taken up in their order.

First: Is the statute susceptible to any "interpretation" at all? It provides in that part of it which is involved in your inquiry that

> "No corporation organized or existing under the laws of this state, shall transfer on its books or issue a new certificate for any share or shares of its capital stock belonging to or standing in the name of a decedent or in trust for a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, without," etc.

The crux of the question which is here encountered is presented by the word "decedent." What are the implications of this word? Does it connote an objective fact, or a state of mind with respect to such fact? In other words, does this language clearly import a prohibition directed against the corporation from acting in case the facts are thus and so, or only against acting in case it knows or by the exercise of due care should know that they are so? Putting it in still another way: Does the corporation act at its peril?

On careful consideration it appears that this question cannot be satisfactorily considered or answered without considering also the next question above suggested, viz.: as to the purpose for which the requirement was made by the legislature. Without citing cases, which are in great confusion on the subject, the general trend of the

authorities may be said to be to the effect that if the legislative purpose would be thwarted in the preponderant number of probable cases by construing a statute like the one under consideration so as to condition the prohibited act upon knowledge or intent, such a construction will be rejected and the statute will be interpreted so as to place the burden of ascertaining the objective facts upon the persons to whom it applies.

Instances of the application of this principle are afforded by cases under the food and drug laws. The following is quoted from the opinion of Shauck, J., in *State* vs. *Kelly*, 54 O. S. 166-178, 179:

> "The act is not a provision for the punishment of those who sell adulterated food or drugs, because of any supposed turpitude prompting such sales or indicated by them. * * * It is 'an act to provide against the adulteration of food and drugs.' It is a plan devised by the general assembly to protect the public against the hurtful consequences of the sales of adulterated food and drugs, those consequences being in no degree increased by the vendor's knowledge, or diminished by his ignorance, of the adulteration of the articles which he offers for sale. * * * If this statute had imposed upon the state the burden of proving the purpose of the vendor in selling an article of food or his knowledge of its adulteration, it would thereby have defeated its declared purpose. * * *"

The statute involved in that case provided that

> "No person shall within this state * * * offer for sale or sell any drug or article of food which is adulterated."

It will be seen that the question is quite similar to the one involved in your inquiry, the trend of the court's reasoning is further illustrated by Judge Shauck's quotation from the case of *Commonwealth* vs. *Murphy*, 42 N. E. 574, as follows:

> "Considering the nature of the offense, the purpose to be accomplished, the practical methods available for the enforcement of the law, and such other matters as throw light upon the meaning of the language, the question in interpreting a criminal statute is whether the intention of the legislature was to make knowledge of the facts an essential element of the offense, or to put upon everyone the burden of finding out whether his contemplated act is prohibited, and of refraining from it if it is."

The concluding paragraph of Judge Shauck's opinion is as follows:

> "In the enactment of *this* statute it was the evident purpose of the general assembly to protect the public against the harmful consequences of the sales of adulterated food and drugs, and, to the end that its purpose might not be defeated, to require the seller at his peril to know that the article which he offers for sale is not adulterated, or to demand of those from whom he purchases indemnity against the penalties that may be imposed upon him because of their concealment of the adulteration of the articles."

On the other hand, laws regulating the sale of intoxicating liquor under the constitutional authority then existing to "provide against the evils resulting from the traffic in intoxicating liquors" and, of course, referable to such a legislative motive were otherwise construed. The earlier cases adopted the rule that in spite of the absence of the word "knowingly" or its equivalent in statutes of this character, such stat-

utes would be construed as if such word had been actually employed so that the prosecution would have to allege and prove guilty knowledge (Miller and Gibson vs. State, 3 O. S. 475), though, of course, knowledge might be inferred from circumstances.

Later on, however, this rule was modified so as to dispense with the necessity of allegation and proof of guilty knowledge on the part of the prosecution, but to permit the defendant to show want of knowledge to rebut the prima facie case established by the prosecution on proof of the objective facts.

Crabtree vs. State, 30 O. S. 382;
Farrell vs. State, 32 O. S. 456.

I cannot find that this last line of cases has been overruled or modified in any reported case, though it is my impression that the trend of decision in this class of cases is toward the Kelly case. Be that as it may however, the mere statement of these various rules shows that statutes like the one under consideration in this opinion are to be regarded as susceptible to interpretation. That is to say, such statutes are sufficiently doubtful in meaning to call into play the principles which determined the various decisions of the courts in the cases mentioned.

It is concluded therefore that the connotation of the word "decedent" in section 5348-2 is sufficiently uncertain to justify the further inquiry into the purpose and intent of the legislature with a view to its interpretation. At this point it may be well to repeat the rule, which is that where such uncertainty appears, and the statute is penal, as this one is, it will be construed favorably to the person or corporation who would be subject to the penalty unless to do so would defeat the declared or otherwise manifest purpose of the law.

Now the purpose of section 5348-2 has already been roughly described. It is to secure the collection of revenue. To this end a duty is cast upon the corporation to act so as to protect the interests of the state. The thing which would happen should the desired action not be taken, for good reason or otherwise, would be the loss of revenue which another person is primarily liable to pay to the state. This is no such consequence as would attend the promiscuous sale of adulterated food. It is not even such a consequence as would attend the illegal sale of intoxicating liquor or the sale of such liquor to persons in the habit of becoming intoxicated. It is not even the kind of a consequence that would ensue from the innocent remarriage of a person having a husband or wife living but supposed to be dead, as in *Commonwealth* vs. *Murphy*, supra. In other words, the collection of the revenue is not an end in behalf of which a legislative intent to provide for action at peril can be at least as plausibly inferred as would be the prevention of the class of evils suggested by the cases encountered. That this last statement is true is proved, it is believed, by the strict construction given to revenue acts themselves, especially where such acts constitute special impositions or excises as distinguished from general property taxes levied under constitutional provisions, like article XII, section 2 in its present form. That is to say, where the revenue act as a whole is susceptible to a strict construction in favor of the tax payer, it would be going too far to hold that an ancillary provision like section 5348-2 should be given liberal interpretation in favor of the state and against the corporation, which is not even primarily liable for the taxes.

But there is another point of view from which questions of statutory construction like that under consideration have been approached. This point of view is suggested by the celebrated criminal case of *Regina* vs. *Prince*, L. R. 2, C. C. R. 154. In that case, the facts of which need not be stated, the court took cognizance of the quality of the act actually committed by the defendant as reflecting upon the probable intent of the legislature to make it an act at peril. The act was highly immoral in itself, and if certain facts existed was declared to be criminal. The court applied the statute in such manner as under these circumstances to place upon the defendant the burden of discovering whether or not such additional circumstances existed.

This test is one which could be satisfactorily applied, for example, to the food and drug cases, or even to the liquor cases, though it would produce a result opposite to that actually arrived at by the supreme court of this state in the latter class of cases. Selling food is in itself not an immoral act, of course, but one directly affecting the health of the people. The business of selling intoxicating liquors is in itself one attended by more or less public evil. In both cases the addition of certain circumstances—adulteration in the one, and, for example, the fact that the purchaser of the liquor is in the habit of getting intoxicated in the other—make the acts penal. Under such circumstances it is reasonable to assume that the legislature intended to prohibit such acts at all events, and thereby to place upon the actor the burden of satisfying himself that the facts introducing the criminal element are not present.

But transferring stock properly presented for transfer on the books of the corporation is not an act which in itself is attended by any possible deleterious consequence to the public.

Moreover, I think we must take cognizance of a fact already alluded to, namely, that in the vast majority of cases which would arise under section 5348-2 G. C. the corporation would have knowledge apparent on the face of the papers presented to it or the records in its possession that a death had occurred, and indeed that the transfer requested was made necessary by that death. The case which you submit is one which would occur very infrequently, to say the least, in the natural course of events. Shall we assume that the legislature intended to provide against such cases, or that the policy of the legislature is such as to dictate such an interpretation of the statute? It seems to me unreasonable so to hold. The legislature did indeed fail to use the word "knowingly" and hence in an action to enforce the penalty a prima facie case would be made out by allegation and proof without a showing of facts from which knowledge would be inferred. But when the legislature acted it doubtless was taking cognizance of the normal or typical case—the one which would occur perhaps ninety-nine times out of a hundred, in which a certificate of stock would be presented for transfer with the indorsement of an executor or administrator thereon, or in which an executor or administrator would request a transfer to the estate of shares standing in the name of a deceased person. This being true, and the kind of transfer described by you being an inherently innocent act—not subversive of any public policy—it seems to follow that it should not be regarded as within the contemplation of the statute.

In other words, though in an action against a corporation by the county treasurer, under favor of section 5348-2 G. C., a prima facie case might be stated by the treasurer by merely showing that a taxable succession had occurred and that the corporation had failed to get the consent of the tax commission to the transfer of the shares, yet evidence would be admissible on behalf of the corporation to show its want of knowledge of the facts making the succession taxable, the exercise of due care on its part and such other facts as might show good faith.

Subject, therefore, to the qualification that the corporation in question must have exercised due care so that if there were anything about the circumstances of the case to put it on its inquiry in relation to the transfer, it would be at fault did it not make such inquiry, it is the opinion of this department that a corporation transferring on its books, and without knowledge of the facts, a share of stock the certificate for which indorsed in blank by the owner of record, is presented to it for transfer after the death of such owner of record, is not liable for any inheritance tax which might become due in respect of such share, if it should subsequently develop that the share was transferred without consideration, in contemplation of the death of the donor.

The importance of the qualification expressed in the foregoing paragraph and elsewhere in this opinion must not be overlooked. In the case you put, for example, a very slight alteration of the facts as stated would be sufficient to put the corporation upon its inquiry. For example, if the corporation knew that B, the deceased person, was dead when the certificate bearing his endorsement was presented to it

for transfer, this of itself would be enough, in the opinion of this department, to make it incumbent upon the corporation to make inquiry as to whether or not the delivery and endorsement of the share was a commercial transaction as distinguished from a gift. In short, knowledge of the fact of death would open up to the corporation an inquiry which it would then be its duty to make. The above answer is therefore confined to the circumstances as actually stated by you, from which statement it does not appear that the corporation when it transferred the stock on its books even knew that B was dead.

In so holding, however, I do not mean to intimate that the statute does not apply at all to such a state of affairs. The section has been heretofore described for purpose of discussion as one designed to secure the collection of the state's revenue. This is to be done, as the section shows on its face, by securing the consent of the tax commission before the transfer is made. The latter part of the section, which is of similar purport, affords two methods of securing the state's revenue, in that not only is consent required, but enough of the assets of the decedent to pay the tax is to be retained unless the consent is given.

What is the purpose in getting the consent of the commission? For we must remember that when the consent is obtained the duty of the corporation is discharged and all liability under it is avoided. It seems clear that the answer to this question is that the purpose in requiring the commission's consent to be secured is to give information to the taxing authorities as to the existence of a taxable succession and an opportunity to them to act so as to protect the state's interests.

This being true, it seems to me that the spirit of the section at least requires the corporation, which has innocently made a transfer of its stock under the very exceptional circumstances mentioned by you, to notify the tax commission after the transfer is made if and when the true facts come to its attention. In this way a substantial compliance with the section would be effected. As to whether or not failure so to notify the commission would give rise to liability under the latter part of the section, no direct opinion is, however, expressed as none is required by the statement of facts which you make.

Respectfully,
JOHN G. PRICE,
Attorney-General.

809.

JUDGES OF COURTS OF APPEALS—ALLOWANCES FOR EXPENSES—SECTION 2253 G. C., 108 O. L. 374, CONSTRUED.

1. *The act of April* 17, 1919 (108 *O. L.* 374), *amending section* 2253 *G. C., whereby the allowance to judges of the courts of appeals for expenses incurred in holding court in counties in which they do not reside was increased from* $300 *to* $600 *in any year, inures to the benefit of the judges in office at the time the act became effective.*

2. *The year referred to in the act is the official year of the term which begins on February 9th.*

3. *Judges of the courts of appeals are entitled to be reimbursed for expenses actually incurred during the official year up to* $600, *irrespective of the time during the year the expenses were incurred.*

4. *Whether or not section* 20 *of article* 11 *of the state constitution applies to judges of the courts of appeals, query.*

COLUMBUS, OHIO, November 25, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date calling attention to the recent amend-

ment of section 2253 G. C. (108 O. L. 374; H. B. No. 20), and inquiring whether or not the $300 increase in the allowance to judges of the courts of appeals for expenses incurred in holding court in counties in which they do not reside inures to the benefit of the judges in office at the time the amendatory law became effective, was duly received.

The statute as amended reads as follows:

> "In addition to the annual salary and expenses provided for in sections 1529, 2251, 2252-1, each judge of the court of common pleas and of the court of appeals, shall receive his actual and necessary expenses, not exceeding three hundred dollars in any one year for a judge of the court of common pleas and not exceeding six hundred dollars in any one year for a judge of the court of appeals, incurred while holding court in a county in which he does not reside, to be paid from the state treasury upon the warrant of the auditor of state, issued to such judge; each judge of the court of common pleas who is assigned by the chief justice by virtue of section 1469, to aid in disposing of business of some county other than that in which he resides, shall receive ten dollars per day for each day of such assignment, and his actual and necessary expenses incurred in holding court under such assignment, to be paid from the treasury of the county to which he is so assigned upon the warrant of the auditor of such county, and the amount allowed herein for actual and necessary expenses shall not exceed three hundred dollars in any one year for a judge of the court of common pleas nor six hundred dollars for a judge of the court of appeals."

Original section 2253 applied exclusively to the judges of the courts of common pleas, and the maximum amount for expenses was limited to $150.00. The first amendment of that section was made by the act of April 29, 1913 (103 O. L. 405-419). The amendment brought the judges of the courts of appeals within its provisions and fixed the maximum allowance to both classes of judges at $300.00 per year. The section was again amended by the act of February 16, 1914 (104 O. L. 251), but in a respect not material to the present inquiry. The third and last amendment was made by the act of April 17, 1919 (108 O. L. 374; H. B. No. 20), and increased the amount of the allowance to judges of the courts of appeals to $600.00 a year.

Under the authority of previous opinions of former attorneys-general hereinafter referred to, the increased allowance for expenses inures to the benefit of the judges of the courts of appeals in office at the time the amendatory act became effective, and such judges are entitled to be reimbursed for expenses actually expended during the present official year of the term which began on February 9, 1919 (section 1514 G. C.), but not to exceed the maximum amount of $600.00 for the year.

In 1914 Opinions of Attorney-General, Vol. 1, p. 241, it was held that the allowance to the judges of the courts of appeals made by the act of April 29, 1913, was not a change in salary or compensation within the inhibition of section 20 of article II of the state constitution applicable to officers generally; and in 1915 Opinions of Attorney-General, Vol. I, p. 206, the holding was that the increase in the allowance made to the judges of the courts of common pleas by the same act was not violative of section 14 of article IV prohibiting an increase in the compensation of judges of the courts of common pleas, and that consequently judges in office at the time the amendatory act became effective were entitled to the benefit of the increased allowance. Whether or not section 20 of article II of the state constitution applies to judges of the courts of appeals, and prohibits the general assembly from increasing their salary or compensation during their terms of office, is a debatable question in view of section 14 of article IV, and the recent decision of the supreme court in Fulton vs. Smith, 99 O. S. 230, Ohio Law Reporter of September 1, 1919. See also State vs. Board of Educa-

tion, 21 G. C. 785, 786, wherein it was said that section 20 of article II refers to officers created by the general assembly. Courts of appeals are created, and the term of office of the judges are fixed by section 6 of article IV of the constitution. See also 1915 Opinions of Attorney-General, Vol. 1, p. 206, 218, to the effect that section 14 of article IV only, and not section 20 of article II, applies to judges of the courts of common pleas.

In 1914 Opinions of Attorney-General, Vol. 1, p. 71; 1915 Opinions of Attorney-General, Vol. 1, p. 368; and in 1916 Opinions of Attorney-General, Vol. 1, p. 143, it was held that the year referred to in section 2253 G. C. was not the calendar year, nor the fiscal year, nor the year beginning when the law went into effect, but, to quote the exact language of those opinions, referred to the "year of the term of office," the "official year of the term," or the "official year."

In 1914 Opinions of Attorney-General, Vol. 1, p. 71, it was held that the judges were entitled to be reimbursed for expenses actually incurred during the official year up to the maximum allowance irrespective of the time during the year the expenses were incurred, and that it is not required that the expenses be apportioned between the amount that was allowed prior to the amendment and the amount allowed by the amendment.

Respectfully,
JOHN G. PRICE,
Attorney-General.

810.

APPROVAL, BOND ISSUE, VILLAGE OF NEW LEBANON, MONTGOMERY COUNTY, OHIO, IN THE SUM OF $15,700.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 25, 1919.

811.

APPROVAL, BONDS, COLUMBIANA VILLAGE SCHOOL DISTRICT, COLUMBIANA COUNTY, IN THE SUM OF $10,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 25, 1919.

812.

APPROVAL, BONDS, VILLAGE OF EAST PALESTINE, COLUMBIANA COUNTY, IN THE SUM OF $7,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 25, 1919.

813.

DISAPPROVAL, BONDS, PAULDING COUNTY, OHIO, FOR IMPROVEMENT OF JOINT COUNTY ROADS IN THE SUM OF $26,000.00.

COLUMBUS, OHIO, November 25, 1919.

Inaustrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE: Bonds of Paulding county, in the amount of $26,000.00, for the improvement of joint county road between Van Wert and Paulding counties—being five bonds of $4,000.00 each and two bonds of $3,000.00 each.

I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue, and decline to approve the validity of said bonds for the reason that the county commissioners failed to publish for the required length of time before the hearing of objections to said improvement the notice required by section 6912 G. C. The hearing was held July 30, 1919; the notice was published in the Paulding County Republican on July 17th and 24th, and in the Van Wert Bulletin on July 18th and 25th. Two full weeks, or fourteen days should have intervened between the first publication and the date of hearing.

In the case of *Fenner* vs. *City of Cincinnati*, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held: (quoting from the syllabus)

> "Where a statute provides that municipal bonds can only be issued 'After advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same report, p. 342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C., and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

For the reason just stated I am of the opinion that the bonds above described are not valid obligations of Paulding county and advise you to decline to accept them.

Respectfully,

JOHN G. PRICE,

Attorney-General.

814.

DISAPPROVAL, BONDS, AUGLAIZE COUNTY, OHIO, IN THE SUM OF $148,000.

COLUMBUS, OHIO, November 25, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—

RE: Bonds of Auglaize county, in the amount of $148,000, for the improvement of I. C. H. No. 168—being 16 bonds of $7,500 each and 4 bonds of $7,000 each.

I have examined the transcript of the proceedings of the county commissioners and other officers of Auglaize county relative to the above bond issue, and decline to approve the validity of said bonds because the amount of the bond issue is in excess of the engineer's estimate of the cost and expense of said improvement. The estimate of the county's share of the cost and expense of improving section "B" is $67,000; the estimate of the county's share of improving section "C" is $74,000, making a total for both sections of $141,000; the bond issue is for $148,000. Section 1223 of the General Code, under authority of which these bonds are issued, authorizes the issuance of bonds only to the extent of the estimated cost and expense of said improvement.

I therefore advise you to decline to accept the bonds.

Respectfully,
JOHN G. PRICE,
Attorney-General.

815.

ROADS AND HIGHWAYS—AUTOMOBILES—"WIDTH OF TIRE SURFACE" AS USED IN SECTION 7248 G. C. CONSTRUED—JUSTICES OF PEACE ARE VESTED WITH EXAMINING JURISDICTION ONLY IN MATTER OF VIOLATION OF SECTIONS 7246 TO 7249 G. C.

1. *The expression "width of tire surface" as used in section 7248 G. C. in reference to tires of rubber or other similar substance means (a) as to solid tires the width that comes in contact with the road, without any addition or allowance for expansion at point of contact; and (b) as to pneumatic tires, the perpendicular distance between planes touching the extreme edges of the tire and parallelling the plane of the wheel to which the tire is attached.*

2. *Justices of the peace are vested with examining jurisdiction only, and not with final jurisdiction, in the matter of violations of sections 7246 to 7249 G. C.*

COLUMBUS, OHIO, November 26, 1919.

HON. G. B. FINDLEY, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication asking an interpretation of section 7248 as appearing in 107 O. L. 140, and also inquiring whether a justice of the peace has final jurisdiction in the matter of violation of said section.

Said section 7248 reads as follows:

"No person, firm or corporation shall transport over the improved public streets, highways, bridges or culverts within this state, in a vehicle propelled by either motor or muscular power, a burden, including weight of load and vehicle, greater than the following:

In vehicles having iron or steel tires three inches or less in width a load of five hundred pounds for each inch of the total width of tire surface on all wheels. When the tires on such vehicles exceed three inches in width an additional load of eight hundred pounds shall be permitted for each inch by which the total width of the tire surface on all wheels exceeds twelve inches;

In vehicles having tires of rubber or other similar substance a load of eight hundred pounds for each inch of the total width of tire surface on all wheels. The provisions of this section shall not apply to iron or steel tire horse drawn vehicles when in use upon the streets or thoroughfares of cities or upon the streets and thoroughfares of villages, except such streets and thoroughfares therein as have been or may hereafter be improved by the state or county."

These provisions are to be read in connection with sections 7246 and 7247, prohibiting a load of more than twelve tons except in certain instances by special permit.

A penalty for the violation of the provisions of said sections is provided by section 13421-17 (107 O. L. 69) reading as follows:

"Any person violating any of the provisions of sections 7246 to 7249 inclusive of the General Code shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars."

In connection with your inquiry you state that:

"Thus far all trucks apprehended are equipped with solid tires of rubber and similar material and the manner and way in which we determine whether such trucks are overloaded is by measuring the 'total width of tire surface on all wheels' and by tire surface we take it that the law means that part of the tire which actually comes in contact with the road, in other words, the bearing surface or tread."

You ask in the course of your letter "What measurement shall govern if it appears that the width of the rubber tire increases upon its point of contact with the road?"

It is believed that the statute upon its face disposes of any claim that an alleged violator is entitled to the advantage, so to speak, of the expansion of a rubber tire at point of contact. It has been seen that the statute makes a distinction between vehicles having iron or steel tires and those having tires of rubber or other similar substance. To state this distinction concretely, let us take for example a four-wheeled vehicle having steel tires four inches in width on all wheels, a total tire surface of sixteen inches. For the first twelve inches, there is permissible a load of 6,000 pounds; and for the remaining four inches an additional load of 800 pounds per inch, or 3,200 pounds, thus giving, for the vehicle supposed, a total permissible load of 9,200 pounds, including weight of load and vehicle. Taking this same vehicle and supposing it to be equipped with rubber tires of the same width, the total load allowable is 12,800 pounds, 800 pounds to each inch of tire surface.

The greater load thus allowed for the rubber tired vehicle is certainly to be accounted for in part by the very fact that rubber tires will expand at point of contact; for it is readily understood that the expansion of iron or steel tires at point of contact is so minute as to be hardly susceptible of calculation. True, the principal difference

between iron or steel tires and rubber tires is that less shock to the road results from the use of rubber tires; but plainly one of the factors entering into the lessening of shock is the expansion of the rubber tire at point of contact.

Hence, considering this distinction made by the legislature in favor of rubber tires, a conclusion that a further allowance is to be made on account of expansion is unjustified as going beyond the scope of what was intended by the legislature. Further, as a practical proposition, we are not at liberty to indulge the assumption that the legislature intended to cast on enforcing officials the duty on the one hand of making minute measurements of expansion, or on the other hand, of setting up in different localities shifting and arbitrary allowances for expansion.

Upon the whole, then, such difficulty as may arise in the practical application of the statute comes not from the fact of expansion, but rather in determining whether the expression "total width of tire surface on all wheels" is so rigid that it may not be applied to the measurement of both solid rubber tires and pneumatic tires. It is of course a matter of common knowledge that there is an essential difference between these two types of tires. Their appearance and construction are entirely dissimilar. Their effect upon road surface must be considered from entirely different angles; for it is plain enough that as between two loads of equal weight, a much greater shock to the road and consequent wear and tear upon it will result from the load borne upon solid tires than from that borne upon pneumatic tires of width at point of contact equal to that of the solid tires, since the pneumatic tire by reason of its inflation serves in the greater degree as a cushion in relieving the road of shock.

Mention of these differences may possibly in a narrow sense be irrelevant to a consideration of your inquiry, since you state that all trucks thus far apprehended in your county have been equipped with solid tires. However, a fair consideration of the statute must proceed upon the theory that while it does not make any distinction in terms between solid rubber tires and pneumatic tires, it was nevertheless intended to provide for both classes, since both were well known to be in common use when the statute was enacted. Therefore, the statute cannot be invoked as to one type and disregarded as to the other, but must be treated as having failed of its purpose unless it permits of a practical standard for measuring both types.

If it be conceded that the statute is broad enough to make provision for the practical measurement of both classes of tires, no difficulty is encountered in concluding that so far as concerns solid tires, your position is entirely correct and in accord with what would be the general understanding of the terms of the statute—namely, that "total width of tire surface on all wheels" means the aggregate width of that part of all tires on the vehicle which actually comes in contact with the road—in other words, the bearing surface or tread, not allowing for any expansion at point of contact. Putting this proposition in another way, if the vehicle were run over a layer of tar or some other adhesive substance, the impression left on the tire through the adherence of the substance would represent the true width of tire surface to be considered in calculating the total width. Force is lent to this conclusion by the fact that the bearing surface is readily discernible after slight usage, and the further fact that there is no inherent practical objection to accepting as within the plain intent of the statute the width as shown by simple instruments of lineal measure, just as the width of a steel tire is measured. And certainly, the conclusion is not in the least weakened by the fact that trade usage, because of the shape of the tire or the requirements of proper manufacture, may designate the standard width as somewhat in excess of that which comes in contact with the road.

Is this rule as to solid tire measurement necessarily to be applied to pneumatic tire measurement, with the result in practice that the use of pneumatic tires for truck hauling will have to be discontinued? Since the statute in question is regulatory in character, a pertinent rule for its construction is that quoted with approval by our

supreme court in the case of Gas & Fuel Co. vs. City of Chillicothe, 65 O. S. 186, at page 206 of the opinion:

> "When the real design of the legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect, even though in so doing the exact letter of the law be sacrificed, or although the construction be, indeed, contrary to the latter."

It should be kept in mind that while the statute fixes a maximum load for each inch of tire surface, it does not give a definition of tire surface. Therefore, we must conclude that the term "total width of tire surface" is to be given its reasonable and practicable meaning.

The word "surface" is defined as follows:

> "The exterior part of anything that has length and breadth; one of the limits that bound a solid; superficies; outside; as, the surface of the earth; the surface of a diamond; the surface of the body; a spherical surface."
>
> Webster's Dictionary.

> "The exterior part of anything that has length, breadth and thickness; the outside of a body; superficies; exterior."
>
> Standard Dictionary.

Clearly, then, the legislature did not use the word surface in a strictly literal sense, for taken in that sense "total width of tire surface" would as to a pneumatic tire represent its exposed width measured in circumference from one side to the other of the rim to which it is attached. Neither could the legislature have intended the other extreme in measurement, namely, the width of that part of a pneumatic tire actually coming in contact with the road, for in that case, for the practical reason given above, the effect would be to cause the discontinuance of the use of pneumatic tires in truck hauling. To illustrate: The width at point of contact of a so-called ten-inch solid tire is approximately eight inches, whereas with a so-called ten-inch pneumatic tire the width at point of contact is approximately three and one-half inches, depending in part on degree of inflation, with the result in the case supposed that the weight allowed the solid tire would be 6,400 pounds and the pneumatic tire but 2,800 pounds.

We are thus left to the middle ground that the intent of the legislature was that the width of pneumatic tires should be taken as measured by the only practicable method remaining after the exclusion of the two methods above mentioned, namely, by taking the distance between parallel lines produced from the extreme edges of the tire,—the word "edges" as here used being referable to the sides as distinguished from the face and back of the tire; or, stating the rule in another form, by taking the perpendicular distance between planes touching the extreme edges of the tire and parallelling the plane of the wheel to which the tire is attached.

It may be urged that inasmuch as the method just stated gives approximately the width as to pneumatic tires as understood in trade usage, the seemingly arbitrary terms of the statute would by parity of reasoning make trade usage measurement applicable to solid tires also. The answer is that the plain terms of the statute permit, without untoward practical results, the measuring of tire surface of solid tires by the simple process hereinbefore mentioned, thus making unnecessary any resort to extraneous considerations; whereas, with pneumatic tires, the only practical method of measurement is by a process of calculation which happens to accord approximately with trade usage measurement.

You have also requested an opinion as to whether justices of the peace have final jurisdiction of offenses under section 13421-17 G. C. That section, as has been seen, makes the violation of section 7248 G. C. a misdemeanor punishable by fine. As part of the act in which section 13421-17 appears, there is also found section 13421-21, reading as follows:

> "All courts of competent jurisdiction, including police judges, mayors of villages and cities, shall have jurisdiction as provided by law in all cases of violation of any of the sections contained in this act."

Clearly, there is not in this section any affirmative grant to justices of the peace of final jurisdiction, whatever may have been the intent of the legislature in that respect. The expression "including police judges, mayors of villages and cities" is an excrescence, since the final jurisdiction of these officers in misdemeanor cases had already been defined by sections 4577, 4536 and 4528, respectfully. As compared with the broad provisions of the three sections just named, limited provision is made in section 13423 G. C. for final jurisdiction in justices of the peace in certain classes of cases. However, there is not to be found in the last named section any reference to final jurisdiction in road traffic violations, nor has any provision been found elsewhere in the General Code conferring final jurisdiction in such matters upon justices of the peace. Hence, we are reverted to sections 13510 and 13511 G. C. in the matter of jurisdiction of justices of the peace as to violations of sections 7246 to 7249 G. C., and as there is no authority vested in a justice of the peace to accept a plea of guilty as to such violations because there is no way by which the complaint may be filed by the "party injured" as those words are used in section 13510, it follows that the only jurisdiction vested in a justice of the peace as to violations of said sections 7246 to 7249 is solely an examining, and not a final, jurisdiction.

Respectfully,
JOHN G. PRICE,
Attorney-General.

816.

COUNTY DEPOSITARY—PROPOSALS FOR COUNTY FUNDS MUST CONTAIN NAMES OF SURETIES—WHEN FIDELITY INSURANCE COMPANY MAY BE ACCEPTED AS SURETY FOR SUCH FUNDS —PROPOSAL SHOULD BE RESPONSIVE TO ADVERTISEMENT INVITING BIDS—COMBINATION TO SUPPRESS COMPETITION IN BIDDING—NO AUTHORITY FOR DEPOSIT EXCESS FUNDS OUTSIDE OF COUNTY UNLESS COUNTY COMMISSIONERS ADVERTISE FOR PROPOSALS.

1. *The commissioners are without authority to accept a proposal for county funds under the county depository act (sections 2715 et seq. G. C.) which does not contain the names of the sureties or securities that will be offered to the county in case the proposal is accepted.*

2. *A fidelity insurance company which is authorized to do business in this state and has an authorized paid up capital stock of not less than $250,000, may be accepted as surety under the county depositary act, subject to the limitation prescribed by section 2726 G. C. (See section 2723 G. C.).*

3. *A proposal for the deposit of funds under the county depositary act should be responsive to the advertisement inviting bids.*

4. *When all the banks and trust companies submitting proposals for county funds to be awarded under the county depositary act were in a combination to suppress competition among themselves in bidding, the commissioners should reject all the proposals.*

5. *When the aggregate amount placed with all banks and trust companies does not equal the amount that may be placed in inactive depositaries, and the banks and trust companies are unwilling to increase the amount of their bids so as to absorb the excess funds, the commissioners are without authority under section 2715-1 G. C. to enter into private negotiations with banks or trust companies located without the county for the deposit of such excess funds, but must advertise for proposals and proceed in the same manner for designating depositaries within the county.*

6. *The commissioners are without authority under the county depositary act to advertise for proposals from banks and trust companies located outside the county for the deposit of county funds other than the excess funds referred to in section 2715-1 G. C., although all the banks and trust companies within the county are in a combination to suppress competition among themselves in such bidding. In such case the funds must remain in the county treasury until a depositary can be designated.*

7. *An advertisement under the county depositary act for proposals for the deposit of county funds should invite proposals from the class of banks referred to in section 710-84 G. C. as well as from banks and trust companies coming under the provisions of the depositary act.*

COLUMBUS, OHIO, November 26, 1919.

HON. CHESTER A. MECK, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—Your letter of recent date relating to certain proposals or bids made for county funds under the county depositary act, was duly received.

The act is somewhat lengthy and will not be quoted in this opinion.

1. The first question for decision is whether a proposal for county funds must contain the names of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted. The question must be answered in the affirmative. Section 2716 G. C. specifically provides that "each proposal shall contain the names of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted," and under the provisions of section 2717 G. C. the commissioners are only authorized to award the money to the bank or trust company that tenders proper sureties or securities "in the proposal." See also 1912 Opinions of Attorney-General, Vol. II, p. 1332, in which it was held that a bank bidding as a depositary for county funds must name its security, and that a general statement to the effect that a reliable surety company bond will be furnished is not of sufficient definiteness. The statement of facts contained in your letter discloses that the proposal of one of the banks tendered a choice of three sureties or securities, viz: first "a satisfactory surety bond," second, "a personal bond signed by the following directors of this bank (naming them)," or, third, "collateral consisting of good municipal (securities)." The first and third choice could not be accepted for reasons already mentioned, but there would be no objection to accepting the second choice if the persons therein named are satisfactory to the commissioners.

2. The commissioners would be warranted by section 2723 G. C., as construed in 1916 Opinions of Attorney-General, Vol. II, p. 1428, in accepting a fidelity insurance company having an authorized paid up capital stock of not less than $250,000.00, and authorized to do business in this state, as surety under the act, subject, however, to the limitation as to amount prescribed by section 2726 G. C.

3. The advertisement for bids enclosed with your letter discloses that bids were invited for the deposit of county funds for a "period of three years from the 28th day of November, 1919." All bids under the advertisement should be responsive to the invitation; and the commissioners would not be warranted in accepting a bid covering

a different three years period of time, such as "three years from and after the 14th day of November, 1919."

4. In case it can be established by competent evidence that all the banks and trust companies submitting bids under the act, were in combination or collusion to suppress competition among themselves in bidding for county funds, the commissioners would not only be justified, but it would be their duty to reject all the bids.

5. You next inquire whether the commissioners in case some of the proposals for inactive funds are legal and some illegal, and the amount bid for in the legal proposals is not enough to take up the entire amount of such funds, and the banks making legal proposals will not increase the amount of their bids, would be authorized under section 2715-1 G. C. in awarding the excess of such funds to a bank located outside the county on private negotiations.

You will observe that section 2715-1 G. C. authorizes the commissioners to designate a bank or trust company located outside the county as a depositary for excess inactive funds "in the manner herein provided." The phrase just quoted refers to the manner in which depositaries generally are designated, namely, after advertising under section 2716 G. C. for sealed proposals, and not to private negotiation. See 1915 Opinions of Attorney-General, Vol. III, p. 2065.

6. Your final question is whether or not the county commissioners are authorized under the act to invite bids from banks and trust companies located outside the county in the event there is collusion among all the banks located in the county to stifle competitive bidding among themselves.

There appears to be no authority in the act to invite proposals from banks and trust companies located outside the county, except for the excess inactive funds referred to in section 2715-1 G. C. See Opinions of Attorney-General for 1915, Vol. III, p. 2065. In such situation the funds must remain in the county treasury. See section 2745 G. C.

7. Another question, however, is presented by the form of advertisement used by the commissioners of your county in inviting proposals for the deposit of county funds, the answer to which, in my opinion, requires the rejection of all the proposals submitted thereunder. The advertisement, copy of which you enclosed with your letter, invites proposals only from banks or trust companies "coming under the provisions of the said law," viz: the county depositary act, sections 2715 et seq. G. C.

In 1915 Opinions of Attorney-General, Vol. II, p. 1279, it was held that

> "A board of county commissioners in its advertisement for bids for the deposit of public funds, should invite proposals under both sections 2715 and 744-12 G. C. If such advertisement is not so worded as to invite bids from the classes of banking concerns mentioned in both sections, either by appropriate language or by express reference to said sections, said advertisement is not sufficient in law."

Section 744 12 G. C. referred to in the foregoing opinion was section 13 of the act passed April 17, 1913 (103 O. L. 379), providing for the examination and supervision of certain banking concerns therein referred to. The section, however, was repealed by the recent act revising and codifying the laws of Ohio relating to the organization and inspection of banks (sections 710-1 et seq. G. C.; 108 O. L. 80), but by the same act, however, another section somewhat kindred in terms was enacted (section 710-84 G. C.), providing that

> "Whenever any of the funds of the state, or any of the political subdivisions of the state, shall be deposited under any of the depositary laws of the state, every unincorporated bank shall be permitted to bid upon and be designated as depositary of such funds, upon furnishing such surety or securities therefor as is prescribed by the law."

Under authority of the opinion last referred to, the advertisement for proposals for the deposit of county funds should have invited proposals from the class of banks mentioned in section 710-84 G. C. as well as those coming under the provisions of the depositary act.

Respectfully,
JOHN G. PRICE,
Attorney-General.

817.

APPROVAL OF DEED, 120 ACRES LOCATED IN MADISON COUNTY, OHIO, BY IVA F. DALBEY AND HUSBAND TO STATE OF OHIO.

COLUMBUS, OHIO, November 26, 1919.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—You have submitted for my approval the proposed deed for conveyance to the state of Ohio of a 120 acre tract of land located in Madison county, by Iva F. Dalbey and husband, it being understood that the tract in question is the same as that involved in the abstract of title approved by this office under date of November 19, 1919.

I have examined the deed and find it to be in such form and substance that when properly executed and delivered it will convey the legal title of said grantors to the state.

Accordingly said deed is approved as above indicated.

Respectfully,
JOHN G. PRICE,
Attorney-General.

818.

APPROVAL, BOND FOR $1,000 GIVEN TO STATE OF OHIO BY WILLIAM J. LEONARD, STATE FIRE MARSHAL—CHICAGO BONDING AND INSURANCE COMPANY, SURETY.

COLUMBUS, OHIO, November 26, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am transmitting herewith, endorsed with the approval of the Governor as to amount, and with my approval as to form, bond in the sum of $1,000.00 given to the state of Ohio by William J. Leonard as principal and the Chicago Bonding and Insurance Company as surety, covering the faithful performance by Mr. Leonard, as state fire marshal of the additional duties imposed on that office by the hotel inspection act,—the bond in question being provided for by section 843 G. C. as found in 108 O. L. 288.

The act in question does not specify the place of the filing of the bond, and under hese circumstances, I take it that your office is the proper place for its safekeeping.

Respectfully,
JOHN G. PRICE,
Attorney-General.

819.

APPROVAL, BONDS OF MONTGOMERY COUNTY, OHIO, IN THE SUM OF $7,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 28, 1919.

820.

APPROVAL, BONDS OF MONTGOMERY COUNTY, OHIO, FOR REPAIR AND IMPROVEMENT OF BRIDGES IN THE SUM OF $18,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, November 28, 1919.

821.

APPROVAL, BOND ISSUE CITY OF WARREN, OHIO, IN THE SUM OF $3,500.

Industrial Commission of Ohio, Columbus Ohio.

COLUMBUS, OHIO, November 28, 1919.

822.

APPROVAL, CONTRACT AND BOND, BETWEEN BOARD OF TRUSTEES OF BOWLING GREEN STATE NORMAL COLLEGE AND THE BRYCE HEATING & VENTILATING COMPANY OF TOLEDO, OHIO, FOR COMPLETION OF HEATING AND VENTILATING SYSTEM—ORIGINAL CONTRACTOR, THE STEINLE CONSTRUCTION COMPANY DEFAULTED.

COLUMBUS, OHIO, November 29, 1919.

Board of Trustees of Bowling Green State Normal College, Bowling Green, Ohio.

GENTLEMEN:—On November 19 there was submitted to me for approval a contract, in triplicate, between your board and the Bryce Heating & Ventilating Company of Toledo, Ohio, for the construction and completion of a heating and ventilating system in the teachers' training school building at your institution; also the bond covering said contract.

It appears that the letting of this contract has become necessary by reason of the default of the original contractor, the Steinle Construction Company. It further

appears that the contract price, to wit, $11,470, is to be met by an emergency appropriation heretofore made by the state emergency board. I have before me the certificate of the auditor of state that said emergency appropriation is available and sufficient for the purpose set forth in said contract.

I have this day approved said contract and bond, and have filed same with the auditor of state, together with all miscellaneous papers submitted to me in this connection.

Respectfully,
JOHN G. PRICE,
Attorney-General.

823.

APPROVAL OF CONTRACT BETWEEN BOARD OF TRUSTEES OF BOWLING GREEN STATE NORMAL COLLEGE AND THE HUFFMAN-WOLFE COMPANY OF COLUMBUS, OHIO, FOR PLUMBING, GAS FITTING AND SEWERAGE—DEFAULT OF ORIGINAL CONTRACTOR, THE STEINLE CONSTRUCTION COMPANY.

COLUMBUS, OHIO, November 29, 1919.

Board of Trustees of Bowling Green State Normal College, Bowling Green, Ohio.

GENTLEMEN:—On November 19 there was submitted to me for approval a contract in triplicate between your board and the Huffman-Wolfe Company of Columbus, Ohio, for plumbing, gas fitting and sewerage.

It appears that the letting of this contract has become necessary by reason of the default of the original contractor, the Steinle Construction Company.

It further appears that the contract price, to wit, $15,740, is to be met by an emergency appropriation heretofore made by the state emergency board. I have before me the certificate of the auditor of state that said emergency appropriation is available and sufficient for the purpose set forth in said contract.

I have this day approved said contract and bond and have filed same with the auditor of state, together with all miscellaneous papers submitted to me in this connection.

Respectfully,
JOHN G. PRICE,
Attorney-General.

824.

APPROVAL, BOND ISSUE, HARDIN COUNTY, OHIO, IN THE SUM OF $53,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 1, 1919.

825.

STATE FIRE MARSHAL—FEES PAID UNDER SECTION 3, HOUSE BILL No. 259, 108 O. L. 306, SHOULD BE REMITTED TO TREASURER OF STATE—FEES PAID BY APPLICANT MAY NOT BE LEGALLY REMITTED OR RETURNED TO SAID APPLICANT.

1. *Fees paid to the state fire marshal as required by section 3 of house bill No. 259, 108 O. L. 306, should be remitted to the treasurer of state as provided in section 24 G. C*

2. *The state fire marshal may not legally remit or return to the applicant any part of the fee said applicant may have paid under the provision of said section 3.*

COLUMBUS, OHIO, December 2, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—I have your communication of recent date which is as follows:

"This department in accordance with the law has made an examination of the office of the state fire marshal. During the course of the examination two questions arose on which we desire your written opinion.

1st. It has been the policy of the state fire marshal to deposit the fees collected under section 3, H. B. 259, in the New First National Bank, Columbus, Ohio, and pay the same fees into the state treasury only as the permits are issued. Do these fees belong to the state when the application is filed and should they be paid into the state treasury in compliance with section 24 G.C.?"

2nd. A fee of $10.00 collected under section 3, H. B. 259, has been returned to W. O. D. of Washington C. H. Ohio. This man made application for an inspection and permit and the records of the state fire marshal show that the inspector called upon him. The inspector reported that the man had decided not to open his establishment and recommended the return of the fee, said fee was returned by the state fire marshal. Can the state fire marshal legally return said fee; if he cannot whom shall we hold responsible?"

House bill No. 259, passed by the legislature on April 14, 1919 (108 O. L. 306) which is now in force, provides for the construction, maintenance and inspection by the state fire marshal of dry cleaning and dry dyeing buildings and establishments. Sections 2, 3 and 4 of said act provide as follows:

"Section 2. No building or establishment shall be used for the business of dry cleaning or dry dyeing as above defined, or for the storage of inflammable or volatile substances for use in such business until an application for permission to do so shall have been filed with and approved by the state fire marshal of the state of Ohio, and on blanks provided by him for that purpose.

Section 3. Upon the filing of every such application, the applicant shall pay to the state fire marshal a filing and inspection fee of ten ($10.00) dollars.

Section 4. When any application is filed with the state fire marshal and the fee paid as above mentioned the state fire marshal by himself, his deputies or assistants shall make an inspection of such building, buildings or establishments, and if the same conforms to the requirements of law and rules which may be prescribed by the state fire marshal for such places, then the state fire marshal shall issue a permit to the applicant for the conduct of such business, which permit shall extend until the first day of January next after the date of the issuing of same."

Evidently the intention of the legislature in requiring the payment of the fees as provided in section 3 was to provide for the maintenance of the office of the state fire marshal, as section 35 of the same act specifically provides as follows:

> "Section 35. All fees, penalties or forfeitures collected by the state fire marshal, his deputies or assistants under the provisions of this act, shall when paid into the state treasury be credited to the special fund for the maintenance of the office of the state fire marshal and shall be disbursed in the same manner as other moneys which come into said fund are disbursed."

Said section should be construed with section 841 G. C., which provides as follows:

> "Section 841. For the purpose of maintaining the department of state fire marshal and the payment of the expenses incident thereto, each fire insurance company doing business in this state shall pay to the state in the month of November each year, in addition to the taxes required to be paid by it, one-half of one per cent. on the gross premium receipts after deducting return premiums and considerations received for reinsurances as shown by the next preceding annual statement of such company made pursuant to section fifty-four hundred and thirty-two and section ninety-five hundred and ninety of the General Code. The money so received shall be placed to the credit of a special fund for the maintenance of the office of state fire marshal. If any portion of such special fund remain unexpended at the end of the year for which it was required to be paid, and the state fire marshal so certifies, it shall be transferred to the general fund of the state."

Section 34 of said H. B. No. 359 charges the state fire marshal with the enforcement of this act in the following language:

> "Section 34. It shall be the duty of the state fire marshal, his deputies and assistants, to enforce the provisions of this act, and he shall have the same power and authority in the enforcement of the provisions hereof as are given to the state fire marshal under the provisions of the state fire marshal law, namely section 820, et seq. of the General Code of Ohio."

Section 821 G. C. provides:

> "The state fire marshal shall appoint a first deputy fire marshal, a second deputy fire marshal, and a chief assistant, each of whom he may remove for cause. He may employ such clerks and assistants, and incur such other expenses as are necessary in the performance of the duties of his office."

In view of the foregoing, it can not be successfully disputed that the express intention of the legislature, in providing for a fee to be charged applicants under this law, was to provide funds to cover whatever additional expenditures the state fire marshal might incur in the administration of the said law.

Section 3, as above set forth, is mandatory and we think there can be no doubt as to its meaning. The application is not complete, in the sense that the state fire marshal is authorized or required to make an inspection as provided in section 4 of said law, until the fee is paid. If the applicant, after having paid his fee, can recover the same by giving notice of his abandonment of his business, then under the same rule, after the inspection is completed, perhaps at a great expense to the state, when nothing remains to be done except the formality of granting a permit or making a refusal, he may at this time decide to withdraw his application and have his fees remitted.

We do not think this view can be regarded as sound. If the legislature had contemplated the fee being remitted, unless the permit was actually granted or inspection actually made under said law, it would have so stipulated.

Specifically in answer to your first request, I am of the opinion that section 3 is mandatory and that the fee therein required to be paid shall be paid at the time of the application, the payment of which is essential before the state fire marshal can take further action under the law in making an inspection or taking other action in reference thereto, and at the time of payment the right to said fee is vested in the state and the state fire marshal can not legally remit or return to the applicant any part thereof.

It is my further opinion that it is the duty of said state fire marshal to remit fees received by him by virtue of said section to the treasurer of the state in accordance with the provisions of section 24 G. C. which provides as follows:

> "Section 24. On or before Monday of each week every state officer, state institution, department, board, commission, college, normal school or university receiving state aid shall pay to the treasurer of state all moneys, checks and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, college, normal school or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals or otherwise, and file with the auditor of state a detailed, verified statement of such receipts. Where tuitions and fees are paid to the officer or officers of any college, normal school or university receiving state aid, said officer or officers shall retain a sufficient amount of said tuition fund and fees to enable said officer to make refunds of tuition and fees incident to conducting of said tuition fund and fees. At the end of each term of any college, normal school or university receiving state aid the officer or officers having in charge said tuition fund and fees shall make and file with the auditor of state an itemized statement of all tuitions and fees received and disposition of the same."

Said fees should be remitted, when paid, to the state treasurer in accordance with the provision of the law, irrespective of what future action is taken relative to the application for which said fee is paid.

Your second inquiry is covered in the main by the foregoing reply to your first inquiry. There seems to be no doubt, from the facts recited, but that the said applicant, to whom you refer in your second inquiry, had made application and paid the fee under the provision of the law. In fact, the state fire marshal was without authority to inspect his premises or take any action in reference to said application under said law, until he had made application and paid the fee. Unquestionably the state fire marshal is charged with the collection of this fee before he could act and it was his duty under the law to remit the same to the treasurer of state in accordance with the provisions of section 24 G. C.

It being clear that the fee was received in accordance with the official duties of the state fire marshal, as provided by law, and the statutes requiring said funds to be remitted to the treasurer of state being mandatory and the plain provisions of said statutes being ignored by the state fire marshal, it follows that said state fire marshal is responsible for the fee which came into his hands in his official capacity, which he has remitted or returned without legal authority.

Respectfully,
JOHN G. PRICE,
Attorney-General.

826.

APPROVAL OF ELMER McDANIEL COAL LEASE FOR LAND, PART OF "DONATION LOT No. 8" IN WINDSOR TOWNSHIP, MORGAN COUNTY, OHIO.

COLUMBUS, OHIO, December 2, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent letter transmitting the Elmer McDaniel coal lease for the approval of this department. It is noted that the land so leased is a part of "Donation Lot No. 8" in Windsor township, Morgan county, Ohio.

This lease is made and executed expressly under the authority of section 3209-1 (105 O. L., p. 6), which authorizes the auditor of state to lease for coal or other minerals any unsold portions "of sections 16 and 29, or other lands granted in lieu thereof, of the original surveyed township, for the support of schools and religion, * * * upon such terms and for such time as will be for the best interest of the beneficiaries thereof."

Consideration has been given the question as to whether this section is applicable to such land as the "Donation Tract."

The congressional grant to the Ohio Land Company contained certain reservations, which it is believed include the real estate described in this lease, as shown by Swan's land laws (1825), pages 16 and 17, as follows:

> "There shall be reserved to the United States out of every township, the four lots, being numbered 8, 11, 26, 29 * * * for future sales. There shall be reserved the lot No. 16 of every township for the maintenance of public schools within the said township."

I am also informed through personal conference with Mr. Hyneman, of your department, that the lessee has received a deed for this real estate in which the coal and mineral rights were reserved, and it is the intention and purpose of this lease to convey the coal rights upon the terms and in the manner stated in the lease. Investigation of the land laws pertinent to the "Donation Tract" convinces me that the real estate is embraced in the provisions of section 3209-1 (supra), in that it is lands "granted in lieu" of sections 16 and 29, and this lease, having been executed in conformity to that section, is therefore approved.

Very respectfully,
JOHN G. PRICE,
Attorney-General.

827.

RURAL BOARDS OF EDUCATION—PROVISIONS OF SECTION 20 ARTICLE 11 OF THE CONSTITUTION DO NOT APPLY—MEMBERS CAN DRAW INCREASED COMPENSATION PROVIDED UNDER SECTION 4715 G. C. EVEN THOUGH HOLDING OFFICE WHEN AMENDMENT BECAME EFFECTIVE—WHEN MEETINGS HELD ON AND AFTER AUGUST 28, 1919—COMPENSATION—ATTENDANCE AT MEETINGS—WHEN ONE AND TWO DOLLARS PAID—REGULAR MEETINGS.

1. *The provisions of section* 20 *of article* 2 *of the constitution do not apply to members of rural boards of education and they can draw the increased compensation as provided for in section* 4715 *G. C.,* 108 *O. L.,* 506, *even though they were holding office at the time said*

amendment became effective, for the reason that they do not draw a salary as contemplated in the constitution, but merely compensation.

2. *Members of rural boards of education attending regular meetings of such board of education, if such meetings are held on and after August* 28, 1919, *H. B.* 43, 108 *O. L., are entitled to two dollars compensation for such attendance where the school district contains sixteen square miles or more, and members of boards of education in rural school districts containing less than sixteen square miles are entitled to receive one dollar compensation for each meeting attended; but no member of any rural board of education shall be paid for more than ten meetings during the year* 1919, *and only regular meetings of the board of education can be paid for.*

COLUMBUS, OHIO, December 2, 1919.

HON. C. M. CALDWELL, *Prosecuting Attorney, Waverly, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent request for an opinion upon the following statement of facts:

> "In the recent amendment to section 4715, General Code, compensation is provided for ten meetings instead of five, as per original section.
>
> The question arises as to when the members of rural boards of education begin to draw the increased compensation.
>
> I have given it as my opinion that the salary of an officer cannot be increased during his term of office; therefore members who were elected two years ago for four years could not draw the increased compensation for two years to come. Members of these boards naturally do not agree but wish to begin the increased compensation at once.
>
> Please give me your opinion. Will the increased compensation begin in each instance with the new term of a member of such board, or will it begin at the time the recent act became effective?"

Your question grows out of the amendment made to section 4715 G. C., as appearing in house bill 43, which was filed in the office of the secretary of state on May 29, 1919, and became effective 90 days thereafter, viz., August 28, 1919.

Section 4715 G. C., as amended in 108 O. L., 506, reads as follows:

> "Each member of the board of education of rural school districts, except such districts as contain less than sixteen square miles, shall receive as compensation two dollars for each regular meeting actually attended by such member, and members of such boards in rural school districts containing less than sixteen square miles shall receive one dollar for each meeting, but for not more than ten meetings in any year. The compensation allowed members of the board shall be paid from the contingent fund."

You indicate that since members of boards of education are officers elected for a definite term, there can be no change in their compensation because of the provisions of section 20, article 2 of the constitution, which reads as follows:

> "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

It is noted in your statement of facts that you use the word "salary" as being synonymous with "compensation," and it is therefore necessary to distinguish between

these two terms. Salary is always compensation but compensation does not necessarily mean salary, as the courts have shown in a number of instances. Thus compensation might be salary, wages, hire, allowance, stipend, damages, or a number of other kinds of remuneration. Salary is but one kind of compensation and the constitution says that it is the *salary* of any officer during his existing term that shall not be changed unless the office be abolished.

> "Worcester defines salary to mean an annual or periodical payment for services; a stipulated periodical recompense." School Commissioners of the city of Indianapolis vs. Wasson, 74 Ind., 133.

Webster defines salary to be "the recompense or consideration stipulated to be paid to a person for services; annual or periodical wages or pay; hire."

The Century Dictionary defines salary to be "the recompense or consideration stipulated to be paid to a person periodically for services."

> "The reward paid to a public officer for the performance of his official duties." Bouvier's Law Dictionary, 492; State vs. Raine, 49 O. S., 580.

The Standard Dictionary defines compensation as pecuniary amends for loss, privation or injury. The same dictionary defines salary to be a periodical allowance made as compensation for regular work.

> "Salary is a fixed, annual or periodical payment for services, depending upon the time, and not the amount of services rendered."
>
> Thompson vs. Phillips, 12 O. S., 117;
> Landis vs. Lincoln County, 31 Ore., 424;
> State vs. Barnes, 24 Fla., 29;
> Castle vs. Lawler, 47 Conn., 340;
> Commonwealth vs. Butler, 99 Pa., 535.
>
> "Salary is a fixed compensation which is paid at stated times." Dane vs. Smith, 54 Ala., 47.
>
> "Salary * * * does not include money paid out to others as expenses in performing the duties of the office." Windmiller vs. The People, 78 Ill. App., 273.
>
> "Compensation * * * should not be construed as synonymous with salary, but that a sum fixed as compensation should include not only the sum intended for the treasurer's personal services, but also the allowance intended for clerk hire, fuel, etc." Kilgore vs. The People, 76 Ill., 548.
>
> "The term compensation in its ordinary acceptation applies not only to salary but to compensation by fees for specific services * * *." Commonwealth vs. Curtis, (Ky.) 55 Southwestern.
>
> "As used in the constitution, article 4, paragraph 26, forbidding the compensation of any officer to be increased or diminished during his term of office, the word compensation signifies a return for the services of such officers as receive a fixed salary payable out of the treasury of the state, and does not and was not intended to apply to the remuneration of that large class of officers such as sheriffs, constables, clerks of courts and other officers who receive specific fees for services as they are from time to time required to render them." State vs. Kalb, 50 Wis., 178.
>
> See also Milwaukee County Commissioners vs. Hackett, 21 Wis., 613.

Possibly the best Ohio case in point as to whether these members of rural boards

of education are entitled during their term to receive additional compensation for their attendance at regular meetings, is that of Gobrecht vs. Cincinnati, 51 O. S. p. 68, the syllabus of which case reads as follows:

"1. Compensation of a public officer fixed by a provision that 'each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive five dollars for his attendance,' is not 'salary' within the meaning of section 20, of article 2, of the constitution, which provides that 'the general assembly, in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.'

2. An increase in the compensation of such officer during his term is not prohibited by the constitution."

In rendering the opinion upon this case Judge Spear said:

"(a) Can the compensation of members of the board of legislation be increased during the existing term? * * *

At the commencement of the term of plaintiff as a member of the board of legislation the compensation provided by statute was five dollars for attendance during the entire session of any regular meeting. By the act of February 19, 1892, it was provided that 'each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive ten dollars for his attendance, and shall receive no other compensation whatever.'

1. It is contended that section 20, of article 2, of the constitution, prohibits an increase of compensation during the existing term. That section is as follows: 'The general assembly, in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.'

The question, therefore, is whether or not the pay of a member of the board is 'salary' within the meaning of the above section?

We think it is not. A general definition of salary includes compensation. General definitions do not, however, cover all cases. Salary is compensation, but, under the section quoted, compensation is not, in every instance, salary. The point is emphasized by this court in the case of Thompson vs. Phillips, 12 Ohio St., 617, where it is said that 'it is manifest from the change of expression in the two clauses of the section that the word 'salary' was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on the time and not on the amount of the services rendered. And it was there held that a percentage compensation allowed by law to a public treasurer for official duties, could be altered during his term. It is the 'salary' which shall not be changed during the term, not necessarily, the compensation.

We think the compensation in the case at bar comes within the principle of the case cited, although a *per diem* compensation. It is not within the meaning of the section quoted, 'salary.'"

The board of legislation, mentioned in the above case, was one of the branches of the law making body of the city of Cincinnati under the form of government at that time in that city, and the members chosen for a definite time just as members of

boards of education are so chosen today; the compensation of the members of the board of legislation was that they should receive a certain sum for actual attendance at each meeting of the board which they attended, which provision is practically the same as that governing compensation of members of rural boards of education provided for in section 4715 G. C. The compensation given to these members of rural boards of education for attendance at the regular meetings is dependent entirely upon their being present at such meetings and they are not paid for any meeting at which they are not present. On the other hand, if this remuneration which they received during the year was a salary, they would receive such salary whether they were present at such meetings or not because salary is not wholly dependent upon duties performed but is governed rather by the element of time.

In opinion 1370 issued by the Attorney-General, in July 27, 1918 (Opinions of the Attorney-General 1918, Vol. 2 page 1034) the syllabus reads:

> "Salary is incidental to the office and not to the performance of the duties of the same. Hence, so long as an officer does not resign, die or is removed, he is entitled to the salary pertaining to that office."

Attention is also invited to Opinion 1630, issued by the Attorney-General on December 20, 1918, and appearing at page 1565, Vol. 2, Opinions of the Attorney-General for that year, the syllabus reading as follows:

> "The provisions of section 20 of article 2 of the constitution do not apply to members of the board of deputy state supervisors of elections, and they can draw the increased compensation as provided for in section 4943 G. C. (107 O. L., 684), even though they were holding office at the time said amndment became effective, for the reason that they do not draw a salary as therein contemplated,but merely compensation."

In arriving at such conclusion the Attorney-General cited the more recent case of State ex rel. Taylor vs. Carlisle, et al., 3 O. N. P., (n. s.) 544, wherein the court was passing upon the question as to an increase in salary for the county commissioners of Franklin county from $2,000.00 to $3,500.00 per annum. Here the compensation of the county commissioners for any one year was to be determined by the amount of the tax duplicate in each county for real and personal property, and Judge Evans held that this did not come within the inhibition of section 20 of article 2 of the constitution. After holding that the law under which the county commissioners had formerly drawn compensation was unconstitutional and void, and hence in reality there was no law fixing the compensation of county commissioners until the amended act was passed, the court went further and used this language:

> "The act does not provide for any *definite fixed salary*. The compensation depends on the aggregate of the tax duplicate from year to year. It may be less one year and greater another, depending on the variation of the tax duplicate, and the amount from one year to another can not be determined until December of each year when the aggregate is ascertained."

This statement of Judge Evans is also true of section 4715, providing for the compensation of members of rural boards of education, which says that they shall receive in the larger districts $2.00 for each meeting attended and $1.00 in the smaller districts for each meeting attended, but that not more than ten meetings shall be paid for to each individual in any year; so that while the duties of the members of the board of education in the rural district are practically the same, one would not be drawing the same remuneration as another member if he failed to attend the same number of regular

meetings. It would seem, therefore, in view of the decision of the courts, above cited, that there is little question but what members of rural boards of education can receive additional compensation during the term for which they were elected, for the reason that they receive a compensation for duties performed and not a salary for the time they are in office. On the other hand, there is no question that where a public officer receives a definite stated salary per annum, such officer cannot be increased or diminished in his salary during the term for which he was either elected or appointed, neither does this rule hold on the classified civil service employes of the state because they are chosen for an indefinite period and not for a stated term.

You now ask as to when the members of rural boards of education begin to draw increased compensation. The act amending section 4715, increasing such compensation, became effective August 28, 1919. An examination of the history of this statute shows that prior to its amendment in 104 O. L., it read:

> "Each member of the township board of education shall receive as compensation two dollars for each meeting actually attended by such member, but for *not more than ten meetings in any year.* * * *"

This was amended in 104 O. L., page 135, to read:

> "Each member of the board of education of rural school districts, except such districts as contain less than sixteen square miles, shall receive as compensation two dollars for each regular meeting actually attended by such member, but not *more than five meetings in any year* * * *."

It will thus be seen that prior to the amendment in 104 O. L., every member of the township board of education, whether the district contained less than sixteen square miles or more, was to receive two dollars for each meeting, but not more than ten meetings in any year. Then came the amendment in 104 O. L., cutting down the number of meetings for which the members could be paid from ten to five during any year, but excepting those districts which contained less than sixteen square miles, the members in such districts to receive nothing for their attendance at board meetings. The present legislature has now amended section 4715 by increasing the number of meetings from five to ten, for which payment can be made, and the law is similar to that in force prior to the amendment in 104 O. L., except that the present legislature has seen fit to provide that:

> "Members of such boards in rural school districts containing less than sixteen square miles, shall receive one dollar for each meeting;"

The two changes, therefore, are providing for ten meetings instead of five in any year and permitting the payment of members of boards in those districts which contain less than sixteen square miles by the provision that they shall receive one dollar for each meeting. This compensation is not salary to either of these two classes of members of rural boards of education, but is rather a compensation for time on a particular date, or payment for expenses in going to and from such meetings, the wear and tear on vehicles, the using of gasoline if motor cars are used, etc., and this is likely what the legislature had in mind when it changed this section and provided, as the law read some few years ago, that every member of a rural board of education should receive something in the way of remuneration for his attendance at the regular meetings of such board.

The more difficult question is as to the meaning of the words "in any year." This might mean the school year which begins on September 1st, and ends on August 31st, or it might mean one year's service on the part of a certain member, that is, twelve

months from the time he might have been appointed to a vacancy in the middle of the calendar year, or, on the other hand, it might mean the calendar year which begins in January and ends in December, the latter being the year which governs the term of office of members of boards of education in that they enter upon their duties in January and retire in January, at the end of their term.

When the former compensation of these members of rural boards of education was reduced in 1914, by changing the number of meetings for which they could be paid from ten meetings to five meetings, the Attorney-General rendered an opinion (No. 1283, p. 1510, Vol. 2, Annual Report of the Attorney-General for 1914) in which held as follows:

> "Your question presents an entanglement of legal difficulties. Whatever theory of solution is adopted in answer to the difficulty presented meets with an obstruction of serious legal consequence, and I am unable to arrive at any conclusion which presents a clearly smooth and satisfactory legal answer. I, therefore, feel urged to present that solution which has the best appearance of fairness and logical practicability. To my mind the best construction that the conflicting provisions can be given would be the holding that the officers in question be permitted to draw the salaries prescribed by statute prior to the amendment above referred to, for the entire year of 1914. I, therefore, advise that the officers be permitted to draw their salaries for the year 1914 under section 4715, General Code, under assumption that said statute remains in force and effect until the first Monday of January, 1915. The officers, therefore, will receive $2.00 per meeting for each meeting actually attended during the year 1914, but for not more than ten meetings in the year. After that time, the compensation prescribed by the amended statute above quoted may, in equity and fairness, be permitted to control."

Here the law changing the remuneration of members of boards of education became effective June 10, 1914, but the Attorney-General, "under assumption that said statute remains in force and effect until the first Monday in January, 1915," held that these school officers therefore would receive the old scale of salaries for the entire year of 1914, that is, ten meetings in the year, though the law after June 10, 1914, provided that but five meetings should be paid for. In this former opinion the Attorney-General held the calendar year was the year to be computed in construing the language of section 4715 G. C., and that is really the practicable year to consider in this matter, since members enter upon their duties in January and retire the following December. It having been established that compensation can be increased at any time during the term of an officer, clearly then those members of boards of education who are serving during the year 1919 are entitled to this increase in compensation, which the legislature desired they should have but which many of them would not receive if construed to be effective in January, 1920, for the reason that a large number of members of boards of education in Ohio retire January, 1920, since the regular elections for members of rural boards of education were held in November, 1919.

It is therefore the opinion of the Attorney-General that:

1. The provisions of section 20 of article 2 of the constitution do not apply to members of rural boards of education and they can draw the increased compensation as provided for in section 4715 G. C., 108 O. L., 506, even though they were holding office at the time said amendment became effective, for the reason that they do not draw a salary as contemplated in the constitution, but merely compensation.

2. Members of rural boards of education attending regular meetings of such board of education, if such meetings are held on and after August 28, 1919, (H. B. 43, 108 O. L.) are entitled to two dollars compensation for such attendance where the

school district contains sixteen square miles or more, and members of boards of education in rural school districts containing less than sixteen square miles are entitled to receive one dollar compensation for each meeting attended; but no member of any rural board of education shall be paid for more than ten meetings during the year 1919 and only regular meetings of the board of education can be paid for.

Respectfully,
JOHN G. PRICE,
Attorney-General.

828.

APPROVAL, ABSTRACT, PREMISES KNOWN AS LOT No. 54, WOOD BROWN PLACE ADDITION, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, December 2, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I have made an examination of an abstract certified by J. C. Erwin, attorney-at-law, February 19, 1914, to be a copy of an abstract certified by E. E. Corwin, attorney-at-law, April 26, 1899, and further continued by John K. Kennedy, November 26, 1919, with reference to the following described premises:

> "Situated in the state of Ohio, county of Franklin, city of Columbus, and being known as lot No. 54 in Wood Brown Place addition, of record in plat book 5, pages 196 and 197, recorder's office, Franklin county, Ohio."

Said abstract in my opinion shows a good and clear title to said premises to be in the name of Leonidas S. Wells at the date of the last continuation thereof, November 26, 1919, with the exception of the following liens:

Unpaid taxes for the year 1918, twenty-two cents.

Taxes for the year 1919.

A special assessment for the improvement of Ridgeview Road amounting to thirty cents with two cents interest.

Said abstract does not show that any examination was made in the United States court.

Respectfully,
JOHN G. PRICE,
Attorney-General.

829.

APPROVAL, BOND ISSUE, PAULDING COUNTY IN THE SUM OF $84,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 2, 1919.

830.

APPROVAL, BOND ISSUE, PAULDING COUNTY, OHIO, IN THE SUM OF $41,600.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 2, 1919.

831.

APPROVAL, BOND ISSUE, PAULDING COUNTY, OHIO, IN THE SUM OF $41,300.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 2, 1919.

832.

APPROVAL, BOND ISSUE, VILLAGE OF OAKWOOD, MONTGOMERY COUNTY, OHIO, IN THE SUM OF $2,400.00.

Industrial Commission of Ohio.

COLUMBUS, OHIO, December 2, 1919.

833.

APPROVAL, BOND ISSUE, VILLAGE OF OAKWOOD, MONTGOMERY COUNTY, OHIO, IN THE SUM OF $2,900.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 2, 1919.

834.

APPROVAL, BOND ISSUE, VILLAGE OF OAKWOOD, MONTGOMERY COUNTY, OHIO, IN THE SUM OF $5,200.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 2, 1919.

835.

APPROVAL, BOND ISSUE, SPRINGFIELD TOWNSHIP RURAL SCHOOL DISTRICT IN THE SUM OF $11,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December, 2, 1919.

836.

APPROVAL, RESOLUTION FOR SALE OF LAND TO UNITED STATES OF AMERICA, AT CAMP SHERMAN, CHILLICOTHE, OHIO, AT A PRICE OF $7,500.00.

COLUMBUS, OHIO, December 5, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Your letter of this date is received transmitting in duplicate transcript of the record of the proceedings of your department relating to sale to the United States of America of 32.016 acres of land in Ross county, constituting part of the national army encampment known as Camp Sherman; and requesting my approval of the sale of said lands to the United States government at the price of $7,500.00

I note from the papers transmitted that the land in question is abandoned state canal lands; that you have made a finding that said lands are not necessary or required for the use, maintenance or operation of any of the canals of the state, and that the same cannot be leased so as to yield six per cent on the value thereof; also that you have appraised the lands at the sum of $10,000.00.

I have carefully examined the transcript submitted and find that the sale has been legally made, and I therefore return the transcript in duplicate with my approval of the sale.

Respectfully,
JOHN G. PRICE,
Attorney-General.

837.

APPROVAL, BOND OF WILLIAM E. MARTIN, DEPUTY STATE HIGHWAY COMMISSIONER IN THE SUM OF $5,000.00—CHICAGO BONDING AND INSURANCE COMPANY, SURETY.

COLUMBUS, OHIO, December 3, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am transmitting herewith bond of William E. Martin in the sum of $5,000.00, with the Chicago Bonding and Insurance Company as surety, covering faithful performance by Mr. Martin of his duties as deputy state highway commissioner, to which office he has recently been appointed. The bond is given in accordance with section 1181 G. C.

I have approved the bond as to form, and it has also been approved by the state highway commissioner as to surety.

The law is not specific in naming a custodian of the bond, but I am filing it with you in line with the statute providing that the bond of the state highway commissioner shall be filed in your office.

Respectfully,
JOHN G. PRICE,
Attorney-General.

838.

EXAMINATION OF ABSTRACT OF TITLE TO LOT NUMBER EIGHTY-EIGHT, WOOD-BROWN PLACE, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, December 4, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I have made an examination of an abstract of title certified by L. J. Hegelheimer on January 12, 1914, to be a copy of an abstract prepared by William A. Poste & Company May 16, 1893, continued January 11, 1914, by L. J. Hegelheimer further continued on March 3, 1915, and on June 26, 1918, by L. P. McCullough, and continued November 19, 1919, by Guy V. Fridley, attorney-at-law, with reference to the following described property:

> "Situated in the county of Franklin, in the state of Ohio, and in the township of Clinton, and being lot number eighty-eight (88) of Wood-Brown Place, as the same is numbered and delineated on the recorded plat thereof, of record in plat book 5, pages 196-197, recorder's office, Franklin county, Ohio."

I am of the opinion that said abstract and the continuations thereto show the title to said premises to be in the name of Annie R. Bowen on November 19, 1919, the date of the last continuation of said abstract, subject to the following liens and encumbrances:

A mortgage for $300.00 given by Elmer E. Clark and wife to the Buckeye State Building and Loan Company on March 4, 1915, as shown in section 1 of the continuation of said abstract dated June 26, 1918.

Also a mortgage for $1,050.00 given by Annie R. Bowen to Elmer E. Clark, exe-

cuted October 30, 1918, and given to secure a note for said amount with interest at six per cent. per annum.

The abstract does not show that said mortgages have been released in any manner on the record.

The taxes for the last half of the year 1918, amounting to $3.52, are unpaid and a lien; also the taxes for 1919 are a lien upon said premises.

A special assessment for Ridgeview road improvement, amounting to 30 cents, is a lien upon said premises, the third annual payment of 10 cents, with 2 cents interest being due in December, 1919.

Said abstract does not show that any examination was made in any of the United States courts.

Respectfully,
JOHN G. PRICE,
Attorney-General.

839.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN FRANKLIN, HIGHLAND AND MAHONING COUNTIES.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, December 4, 1919.

840.

EXAMINATION, ABSTRACT OF TITLE TO PREMISES KNOWN AS LOTS Nos. EIGHTY-NINE, NINETY, AND NINETY-ONE OF WOOD BROWN PLACE SUBDIVISION, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, December 4, 1919.

HON. CARL E. STEEB, *Secretary, Board of Trustees Ohio State University, Columbus, Ohio.*

DEAR SIR:—You recently submitted to this department abstract of title covering the following described premises:

> "Situated in the state of Ohio, in the county of Franklin, and in the township of Clinton, and bounded and described as follows:
> Being lots Nos. eighty-nine (89), ninety (90) and ninety-one (91) of Wood Brown Place subdivision, as the same is numbered and delineated upon the recorded plat thereof of record in plat book 5, page 196, recorder's office, Franklin county, Ohio."

I have made an examination of said abstract certified by J. C. Erwin, attorney at law, February 19, 1914, to be a copy of an abstract certified by E. E. Corwin, attorney at law, April 26, 1899, continued by J. C. Erwin, February 19, 1914, and March 1, 1915, further continued by L. P. McCullough, June 26, 1918, and continued November 19, 1919, by Guy V. Fridley, attorney at law, and am of the opinion that said

abstract shows the title to the above described premises to be in the name of Annie R. Bowen on November 19, 1919, the date of the last continuation thereof, subject to the following liens and encumbrances:

A mor gage for $300.00 executed by Elmer E. Clark and Mary J. Clark to the Buckeye State Building and Loan Company March 4, 1915; also a mortgage for $1,050.00 executed by Annie R. Bowen to Elmer E. Clark, given to secure the payment of a note for $1,050.00 with interest at six per cent payable semi-annually. Said abstract does not show that the said mortgages have been in any manner released on the records.

The taxes for the last half of the year 1918, amounting to 22 cents on each lot or 66 cents on all, and the taxes for the year 1919 are unpaid and a lien.

A special assessment for the Ridgeview road improvement, amounting to 30 cents on each lot, is unpaid, the third annual payment of 10 cents, with 2 cents interest, is due in December, 1919.

Said abstract does not show that any examination was made in any of the United States courts.

Respectfully,
JOHN G. PRICE,
Attorney-General.

841.

APPROVAL, BOND OF IRA R. PONTIUS, SUPERINTENDENT OF BANKS IN THE SUM OF $50,000—CHICAGO BONDING AND INSURANCE COMPANY, SURETY.

COLUMBUS, OHIO, December 4, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am transmitting herewith, endorsed with my approval as to form, bond of Ira R. Pontius, in the sum of $50,000, with the Chicago Bonding and Insurance Company, as surety, covering the faithful performance of Mr. Pontius of his duties as superintendent of banks. The bond is given in accordance with section 710-10 G. C. (108 O. L., 83). You will note that it has been approved by the Governor as to surety.

The statutes are not specific in naming a custodian of the bond; and in the absence of direct authority, I am transmitting it to you.

Respectfully,
JOHN G. PRICE,
Attorney-General.

842.

APPROVAL OF SEVEN LEASES OF CANAL AND OTHER LANDS ALONG WATER FRONTS OWNED BY THE STATE.

COLUMBUS, OHIO, December 4, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 2, 1919, in which you enclose, among others, the following leases, in triplicate, for my approval:

	Valuation.
To R. R. Shellenbarger, Millersport, Ohio. Cottage site and dock purposes. Lease of water front lot No. 3, on south shore of Buckeye Lake, Ohio	$400 00
To Clara Y. Ellis, Buckeye Lake, Ohio. Cottage purposes. Lease of inner slope and water front 100 feet wide near wasteway gates, Buckeye Lake, Ohio	500 00
To Sall Mountain Company, 230 LaSalle St., Chicago, Ill. Building and storage purposes, a portion of the berme bank of the M. & E. canal, 537 feet long, in Butler county, Ohio	333 33
To The Gordon Hauss & Folk Company, St. Marys, Ohio. Storage purposes, state canal land in Auglaize county, St. Marys, Ohio	1,900 00
To Roland A. Zurbee, 3167 Detroit avenue, Toledo, Ohio. Cottage site and dock landing, the water front lot No. 120, Indian Lake, Ohio	300 00
To E. Kiesewetter, National Bank Building, Columbus, Ohio. Cottage purposes only, the inner slope and water front and the outer slope and barrow pit in the rear thereof lot No. 78 of the waste gates, Buckeye Lake, Ohio	400 00
To The County Commissioners of Stark county, Ohio. Highway purposes, use of 600 lineal feet of berme bank of the Ohio & Erie Canal in Jackson township, Stark county, Ohio	200 00

I have carefully examined said leases, find them correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

It is noted that of the above leases two of them are to corporations, namely, the Sall Mountain Company and the Gordon, Hauss & Folk Company. These leases are not accompanied by the usual certificates of authority on the part of corporation officers to execute. However, I do not regard this as at all vital so far as the interests of the state are concerned, and am only calling attention to it so that the leases may be completed in accordance with your usual practice.

Respectfully,
JOHN G. PRICE,
Attorney-General.

843.

APPROVAL, BOND ISSUE OF THE VILLAGE OF BROOKVILLE IN THE SUM OF $6,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 4, 1919.

844.

APPROVAL BOND ISSUE CHAMPAIGN COUNTY IN THE SUM OF $114,200.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 4, 1919.

845.

DISAPPROVAL, BONDS OF WYANDOT COUNTY IN THE SUM OF $6,161.30.

COLUMBUS, OHIO, December 5, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

RE: Bonds of Wyandot county in the amount of $6,161.30 to pay the cost and expense of Sycamore township road improvement No. 89, being 1 bond of $461.30 and 19 bonds of $300.00 each.

GENTLEMEN:—I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the reason that the transcript reveals that the county commissioners failed to cause the notice required by section 6912 G. C. to be published for the length of time provided in said section. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing upon the question of allowing the improvement was held June 11, 1919. The notice of such hearing was published June 3, 1919, and June 10, 1919, in the Daily Chief. Two full weeks or fourteen days should have intervened between the first publication and the date of hearing.

In the case of Fenner vs. City of Cincinnati, 8 N. P. 340, Judge Smith, of the superior court of Cincinnati, in special term, held (quoting from the syllabus):

> "Where a statute provides that municipal bonds can only be issued 'After advertising the same for sale once per week for four consecutive weeks of the same day of the week in some newspaper of general circulation in such city,' no sale of such bonds can be had until notice of four weeks or twenty-eight days shall have been given; and the statute is not complied with where an advertisement is inserted on the 8th, 15th, 22d and 29th of the month calling for sealed bids to be submitted on or before 12 o'clock on the 31st."

This decision was reversed by the same court in general term (see same report, p..342). The supreme court of Ohio on October 15, 1901, in case No. 7473, without reported opinion, reversed the judgment of the superior court and affirmed the judgment of Judge Smith rendered in special term. Therefore, the rule laid down by Judge Smith must be taken as the holding of the supreme court of Ohio.

I believe that the interpretation laid down by Judge Smith in the case referred to is applicable to the language used in section 6912 G. C. and that the notice there required must be published once a week for two full weeks or fourteen days prior to the hearing.

For the reason just stated I am of the opinion that the bonds above described are not valid obligations of Wyandot county and advise that you decline to accept them.

Respectfully,
JOHN G. PRICE,
Attorney-General.

846.

DISAPPROVAL, BOND ISSUE, WYANDOT COUNTY IN THE SUM OF $11,482.44.

COLUMBUS, OHIO, December 5, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

RE: Bonds of Wyandot county in the amount of $11,482.44, to pay the cost and expense of improving Sycamore-Tymochtee road No. 91, being 1 bond of $82.44 and 19 bonds of $600.00 each.

GENTLEMEN:—I have examined the transcript of the proceedings of the county commissioners and other officers relative to the above bond issue and decline to approve the validity of said bonds for the reason that the transcript reveals that the county commissioners failed to cause the notice required by section 6912 G. C. to be published for the length of time provided in said section. The language of this section is that such notice shall be published "once a week for two consecutive weeks." The hearing upon the question of allowing the improvement was held June 11, 1919. The notice of such hearing was published June 3, 1919, and June 10, 1919, in the Daily Chief. Two full weeks or fourteen days should have intervened between the first publication and the date of hearing.

In support of this holding I refer you to the authorities cited in opinion No. 845 of even date herewith, a copy of which is enclosed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

847.

DISAPPROVAL, DEFICIENCY BONDS, CITY OF NEWARK, OHIO, IN THE SUM OF $15,377.80.

COLUMBUS, OHIO, December 5, 1919.

Industrial Commission of Ohio, Columbus, Ohio.

RE: Deficiency bonds of the city of Newark in the amount of $15,377.80.

GENTLEMEN:—I have examined the transcript of the proceedings of council and other officers of the city of Newark relative to the above bond issue and herewith decline to approve the validity of said bonds for the following reasons:

(1) Section 3 of house bill 567, under authority of which said bonds are issued, provides that council by resolution by a two-thirds vote of all members elected thereto, "shall determine whether or not such deficiency exists and the amount thereof, which shall not be greater than that certified to it by the accounting officer, * * *" The transcript fails to show that council of the city of Newark, either in ordinance No. 3054 under authority of which the bonds in question are issued, or in any other proceedings, have made the finding or determination required by said section 3.

(2) Section 4 of said house bill 567 provides that such bonds "shall run for a period not exceeding eight years. * * *" Under ordinance 3054, under authority of which the bonds in question are issued, the last bond runs for a period of nine years from the date of its issuance.

For the reasons above cited I advise you to decline to accept the bonds.

Respectfully,
JOHN G. PRICE,
Attorney-General.

848.

APPROVAL, BOND ISSUE, JEFFERSON COUNTY, OHIO, IN THE SUM OF $29,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 5, 1919.

849.

APPROVAL, BOND ISSUE, JEFFERSON COUNTY, OHIO, IN THE SUM OF $55,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 5, 1919.

850.

APPROVAL, BOND ISSUE, VILLAGE OF BEXLEY, OHIO, IN THE SUM OF $45,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 5, 1919.

851.

APPROVAL, LEASE FOR OIL, GAS, COAL AND OTHER MINERALS TO MAYBELLE D. DYAR, MARIETTA, OHIO.

COLUMBUS, OHIO, December 6, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter transmitting the Maybelle D. Dyar oil and gas lease for the approval of this department. It is noted that your letter states that "this is another of the lots lying in the ministerial section in the city of Marietta."

This lease has been examined in connection with section 3209-1, as amended in 105 O. L., page 6, wherein the auditor of state is authorized to lease for oil, gas, coal and other minerals, any unsold portions of section 16 and section 29, or other lands granted in lieu thereof, upon such terms and for such time as will be for the "best interest of the beneficiaries thereof." The purpose of this lease is stated in your letter to be:

> "To make it impossible for the state or any officer of the state, at any time in the next one hundred years or more to erect or threaten to erect a derrick upon the lands."

It is also noted that it is for the protection of purchasers of titles to such lands from the state and that it is in accordance with the policy of the state in such cases in the past.

While some doubt might exist whether such a purpose, in a strict technical sense, would be considered as being in the "interest of the beneficiaries" of such ministerial land, yet in view of the fact that the lessees in such cases are the grantees of the state, and the land in question is located inside a municipal corporation, I am not inclined to give it such a strict technical construction as would unnecessarily interfere with or obstruct the established policy of the state of Ohio in such matters, and in view of these considerations, I am returning this lease with the approval of this department as to form endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

852.

BANKS AND BANKING—WHERE BANK FURNISHES SURETY FOR DEPOSIT OF PUBLIC FUNDS—NOT LEGAL TO ACCEPT COLLATERAL SECURITY BONDS OTHER THAN THOSE DEFINED IN SECTION 4295 G. C.

Where a bank furnishes a surety (other than a surety company), as security for the deposit of public funds, it is not legal to accept as collateral security bonds other than those defined in section 4295, to make such surety "good and sufficient" as required by that section.

COLUMBUS, OHIO, December 6, 1919.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent request for the opinion of this department on the following:

> "The G. S. and Trust Company, of C., Ohio, is protesting against a ruling made by one of the state examiners relating to the kind of security deposited with the treasurer of the city of C., securing city money on deposit. The state examiner rules that the personal bond offered by the trust company, which in turn was secured by collateral other than interest bearing obligations of the United States,etc., was not sufficient under the statutes of the state regulating such security. This section is number 4295. The contention of the G. S. and Trust Company is that under the second provision of said statute, reading as follows: 'or furnish good and sufficient surety,' that the law has been complied with and that the examiner is in error when he rules that the collaterals of the personal bond must be interest bearing obligations of the United States or such other bonds as are described in section 4295 in the third provision.
>
> "May the city treasurer legally accept as security for deposit of public funds collateral securities other than those listed in section 4295 G. C., to further secure personal bond furnished by the bank?
>
> (By other securities in our question we mean industrial bonds or mortgages not authorized by sections 4295 or 2288-1 G. C.)"

The brief of the G. S. & Trust Company has also been noted and considered.

Section 4295 G. C. is the section under which your question arises and in part is as follows:

> "The council may provide by ordinance for the deposit of all public monies * * * in such bank * * * as officers * * * the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state *or* furnish good and sufficient surety *or* secure said monies by a deposit of bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia;"

Other requirements and restrictions as to such bonds are set out in the statute, but it is not necessary to quote that part of the section in full.

It will be observed that this section authorizes council to deposit such money where the security is affected by any one of the three methods therein provided and that these methods appear to be alternatives.

The matter reaches this department in your effort to determine which, if either, of the positions taken by your examiner and the trust company, above referred to is correct.

On the one hand your examiner's position appears to be, as stated in your letter, that "he rules that the collaterals of the personal bond must be interest bearing obligations of the United States or such other bonds as are described in section 4295 in the third provision." On the the other hand the trust company's position may be shown by a quotation from page 2 of their brief, as follows:

> "We contend that if we comply with the second alternative by furnishing 'good and sufficient surety' we have complied with the requirements of section 4295 of the General Code, particularly when the form of assurance not only complies with the law as to form, but has been approved by the proper municipal officers, authorized by law to pass upon the sufficiency thereof and approve the same.
>
> * * * * * * * * *
>
> We understand that your office has taken the position that the form of assurance referred to in the second alternative above referred to should be ignored and that the depositary banks should comply either with the first alternative by giving a surety company bond, or with the third alternative by pledging United States, state, county or other bonds or obligations of political subdivision as expressly defined in section 4295.
>
> The undersigned respectfully submits that the second alternative form of security is not only warranted by law but when supplemented by property or securities to an excessive margin of safety meets the entire power of the act and furthermore that the property or securities which make the surety 'good and sufficient' as required by section 4295 need not be bonds of the United States nor of the state or the political subdivision thereof as defined in the third alternative."

It is noted that reference is made in the brief of the trust company to sections 115 and 128 of the revised ordinances of the city of Cleveland. These sections designate certain municipal officers as the depositary commission and require their approval of the bond or securities offered by the depositary. No reference to any other Cleveland ordinance is made which would indicate that there is any conflict between the ordinances or charter provision of Cleveland and section 4295, and for this reason it is assumed that section 4295 governs and this opinion is limited to that section and the ordinances to which attention is called, as above indicated.

The question involved may be raised and re-stated in another way, viz., does the word "surety" refer to persons contracting in and sustaining the relation of suretyship or does it refer to things such as securities, and is it used in the sense of "security?" Are the three alternative methods provided in section 4295 separately exclusive, or may they be used conjunctively in furnishing the security for public funds?

The purpose of depositary laws, as pointed out in opinion No. 761 addressed to your department under date of November 7, 1919, is "to safeguard and insure the proper custody of public money, but they go further than that and require that such part of the increment of the public funds as is agreed upon shall inure to the benefit of the public." To this it may also be added that the evident purpose was to secure for the public the highest possible rate of interest, with the minimum risk. As to the meaning of the phrase "good and sufficient surety," as used in what may be termed the second alternative, it is suggested that in the construction of statutes words are to be given their ordinary meaning rather than a special restricted or enlarged meaning and must be interpreted in connection with other parts of the act in which it is used.

What is the meaning of the word "surety" as used in that phrase?

It is defined in Standard Dictionary to be:

"1. *A person* who engages to be responsible for the debt, default or miscarriage of another; guarantor; bail.

2 A pledge of money deposited or of credit given to secure against loss or damage; * * *

3. That which gives security or confidence; * * * the state of being secure * * *."

Bouviers Law Dictionary, page 3191, defines "surety" to be:

"*A person* who binds himself for the payment of a sum of money or for the performance of something else for another."

In words and phrases, Vol. 8, page 6809, numerous definitions from different jurisdictions are given, which are, as to the pertinent part quoted here:

"A surety is *a person* who binds himself." Young vs. McFadden, 125 Ind., 254.

"* * * In law one who enters into a bond, etc." Pitkins vs. Boyd (Iowa), 4 Green, 255.

A surety is defined as "*a person* who," etc., citing authorities from numerous states.

These definitions are recognized by the supreme court of this state in Wise vs. Miller, 45 O. S., 399, where the court quoted Smith vs. Sheldon, 35 Mich., 42:

"A surety, it is said, *is a person* who being liable to pay a debt," etc.

These authorities are cited as showing that the word "surety" had an accepted meaning both in popular usage and in law, which meant a person sustained certain legal relations.

It appearing reasonably certain that this word had an accepted meaning, that meaning must be attributed to the legislature unless a different meaning is evidenced by other provisions of the section.

It is noted that the grant and direction of this state is to the city council, which may do certain things when certain requirements are met, and these are stated disjunctively and in substance are: (1) giving a surety bond, (2) furnishing good and sufficient surety, and (3) depositing bonds or other obligations. The first two contemplate the same method, viz., some corporation or person in the capacity of surety, incurring a secondary liability in behalf of the principal and for his benefit.

The third alternate substitutes things, viz., certain kinds of bonds and obligations, for persons, and it is noticeable also that in the substitution great particularity is used in defining the character of bonds and obligations referred to.

It would seem that these different alternative plans authorize the council to deposit the public money in a bank which (1) gives the surety bond or (2) furnishes a good and safe surety or (3) furnishes the prescribed security by the hypothecation of the bonds described and that each plan is exclusive and may not be used in whole or in part with the other alternative. However, in view of your exact question, the final consideration and decision on this question is withheld.

It may be claimed with logical justification that the phrase "good and sufficient surety" implies a self sufficiency in the surety which is inconsistent with the idea of reenforcing such suretyship agreement with collateral security. The requirement of such collateral carries with it an implied admission of insufficiency of the surety, whose surety obligation of itself, under the statute, must be "good and sufficient."

The result to which these observations lead may be regarded as rather technical, but it must be remembered that the legislature was dealing with the subject of public

money and great care is attributable to it in safeguarding its deposit in every possible practical manner. It is common knowledge which is also attributable to the legislature that the value of industrial stocks and other securities fluctuates greatly and does not have the permanence and stability in value and security approaching the value and security of the bonds and obligations referred to in section 4295, and if the pledging of such non-statutory bonds and obligations were permissible under the second alternative, the great care and particularity with which the legislature defined the bonds in the third alternative would seem to have been useless.

Therefore, the character and purpose of this legislation furnishes a practical reason for agreement with the conclusion technically arrived at, which is that where a bank furnishes a surety (other than a surety company), as security for the deposit of public funds, it is not legal to accept as collateral security bonds other than those defined in section 4295, to make such surety "good and sufficient," as required by that section.

Respectfully,
JOHN G. PRICE,
Attorney-General.

853.

SCHOOLS—PUPILS OF SCHOOL DISTRICT ASSIGNED TO ANOTHER DISTRICT UNDER PROVISIONS OF SECTION 7684 G. C.—SUSPENSION OF SCHOOL OPERATES THOUGH NO FORMAL ACTION TAKEN UNDER SECTION 7730 G. C.—HOW SUCH SCHOOL RE-ESTABLISHED—SALARY OF TEACHER MATTER OF CONTRACT BETWEEN TEACHER AND BOARD OF EDUCATION WHEN SCHOOL DOES NOT RECEIVE STATE AID.

1. *Where a board of education, acting under the provisions of section 7684 G. C., assigns all of the pupils of a school district to another district school or schools, such assignment operates as a suspension of the school in question, even though formal action regarding suspension was not taken under section 7730 G. C.; and where the district school has been closed in this manner, the patrons of the district have recourse to the provisions of section 7730 G. C., providing for the presentation to the board of education of a petition signed by a majority of the electors in the territory of the suspended district and showing also that the average daily attendance of the pupils who reside in such district, though attending other schools to which assigned, is twelve or more, such school must be-establishd.*

2. *Where a school district does not receive state aid, the salary to be agreed upon in the contract between the teacher and a board of education is a matter of voluntary arrangement between such board and such teacher, not governed by any maximum in amount.*

COLUMBUS, OHIO, December 6, 1919.

HON. V. W. FILIATRAULT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion upon the following statement of facts:

> "District No. 2, Randolph township rural school district had an enrollment of about twenty-five pupils last year. The board at the beginning of the school year this fall was unable to secure a teacher for the school in question and as a result the school was not in session for four weeks after which the board acting under authority of section 7684 of the General Code assigned the pupils, made a contract with the driver to haul them to a school at Randolph center. This assignment, of course, operated as a suspension

of the school. A petition signed by a majority of the voters of the school district in question, has been filed with the board asking for a re-establishment of such school. The board believing that it is compelled to do so by section 7730 of the General Code as defined in the case of Myers vs. the Board of Education, 95 C. S., 367, has granted the petition and agreed to reopen the school if it is able to secure a teacher. The highest salary paid for school teaching in this district is eighty-five dollars.

It will be observed that the school was not suspended because of the small attendance at any time but that the children were assigned for the proper accommodation of the schools.

1st. Would the school board be required to open this school under the facts as stated?

2nd. Would the board be required to pay more than the maximum, eighty-five dollars, now being paid to secure a teacher for this district? "

Section 7684 G. C. reads as follows:

"Boards of education may make such assignment of the youth of their respective districts to the schools established by them as in their opinion best will promote the interests of education in their districts."

In your statement of facts you indicate that the district in question had an enrollment of about twenty-five pupils during the preceding school year and thus there was no occasion for the county board of education to direct the suspension of such school under the provisions of section 7730 G. C., nor was there any reason, as far as enrollment or average daily attendance was concerned, for the local board of education to suspend such district school. You indicate that the board at the time of opening school this fall was unable to secure a teacher for the school in question and that as a result the school was not in session for four weeks during which it should have been in session. The board of education then acted under the provisions of section 7684 and assigned the pupils residing in the district to another district school at Randolph Center and provided for their transportation to such school by contract with a driver. When the local board of education of Randolph township did this, it settled the question as to having any school at least for a temporary period in district No. 2, that is, the district in question, and therefore while the board did not act under the provisions of section 7730, in formally suspending such school, their action under section 7684 G. C., in transferring all the pupils, under their authority to do so, to another district school, brought about the suspension of the public school in district No. 2, at least for the current term.

You indicate further that the school having been closed by the board of education, through the assigning of the pupils to another district, there was a petition signed by a majority of the voters of district No. 2, asking for the re-establishment of such school. Inasmuch as the school in question had twenty-five pupils last year, and you do not indicate that any question of low attendance enters herein, it will be presumed that district No. 2 had the necessary number of pupils under the provisions of section 7730 to entitle them to a re-established school in the place of one that had been suspended. Section 7730 G. C. provides that the local board of education can suspend the schools temporarily or permanently at any time and for any cause, but the section further provides that the patrons of any particular territory must be protected in their rights in that they have been granted the petitioning power to bring about the re-establishment of a school in their district and all that is necessary is to show that the average daily attendance of the pupils who reside in their school district, although going to other schools to which assigned, is twelve or more, and the local board of education must re-establish the school as decided in the case of State ex rel. Myers vs. Board

of Education, 95 O. S., 367, wherein the court, passing on a case similar to the one at hand, decided that the word "may", occurring in the last sentence of section 7730 G. C., shall be construed as meaning "shall," and therefore where a majority of the voters in such old school district sign a petition to the board of education, asking for the re-establishment of such school that has been suspended, and proving that the average daily attendance of the pupils in schools to which assigned is twelve or more, the board of education has no leeway, but must re-establish such school.

It may be said that were it not for the closing sentence of section 7730, the patrons of such district would have no recourse to bring about the re-establishment of their school, where a board of education had arbitrarily decided, without ample cause, that the school in their particular district should be discontinued, closed or suspended, such terms meaning practically the same thing. Here the school was discontinued; the school was closed and it was not in operation, and it would therefore be idle to say that the school was not suspended in effect simply because the procedure mentioned in section 7730 had not been complied with by the local board of education in showing on their minutes that such school was suspended *in but one way*, but had transferred the pupils, by virtue of section 7684, to another school or schools. The effect was a suspension of the school in question, and the patrons must come to the provisions of section 7730 if they desire to have such school re-established where the board does not voluntarily establsh the school.

Section 7730 G. C. in part reads:

> "* * * Upon the finding by the board of education ordering such suspension that such school ought to be re-established, such school shall be re-established. If at any time it appears that the average daily attendance of enrolled pupils residing in the territory of the suspended school, as it was prior to such suspension, was twelve or more, then upon a petition asking for re-establishment, signed by a majority of the voters of the said territory, the board of education may (shall) re-establish such school."

Referring to this language of section 7730 G. C., in the case of State ex rel. Myers, vs. Board of Education, 95 O. S., 367, Judge Johnson said:

> "As already pointed out, the first clause confers upon the board absolute authority to re-establish the suspended school * * *. Unless the word 'may' was used in a mandatory sense, the remaining part of the proviso is wholly meaningless and vain. By this last clause, it is provided that the district may be re-established upon a petition signed by a majority of the voters of the district; but under the first clause the same board might re-establish the school on the petition of a small minority, or upon no petition at all. We cannot conceive, and we find nothing in the language to indicate, that the legislature enacted the additional clause without any purpose whatever in view.
>
> We think it clear that the legislature intended that the word 'may' when applied to the last clause in the proviso should be held to be mandatory. It intended to secure to the residents of the rural and village school district, which has twelve or more pupils of lawful school age (average daily attendance now required) the privileges of the residents of other similar districts, that have not been centralized by the affirmative vote of the people pursuant to the statute (4726 G. C.)"

You also say that the highest salary paid for school teaching in this district is eighty-five dollars per month, and desire to know if the board would be required to pay more than the maximum of eighty-five dollars, now being paid, to secure a teacher for this district after the school is re-established.

In reply to this question it may be said that the amount of salary paid a teacher by a board of education is a voluntary agreement between the board of education and the teacher, and there might be cases in which the board would be required to pay ninety dollars or one hundred dollars per month, if they could get no teacher for less money, and yet this requirement is one, if it can be called such, that requires the voluntary acquiescence of the board itself.

It is, therefore, the opinion of the Attorney-General that (1) where a board of education, acting under the provisions of section 7684 G. C., assigns all of the pupils of a school district to another district school or schools, such assignment operates as a suspension of the school in question, even though formal action regarding suspension was not taken under section 7730 G. C.; and where the district school has been closed in this manner, the patrons of the district have recourse to the provisions of section 7730 providing for the presentation to the board of education of a petition signed by a majority of the electors in the territory of the suspended district and showing also that the average daily attendance of the pupils who reside in such district, though attending other schools to which assigned, is twelve or more, such school must be re-established.

(2) Where a school district does not receive state aid, the salary to be agreed upon in the contract between the teacher and a board of education is a matter of voluntary arrangement between such board and such teacher, not governed by any maximum in amount.

Respectfully,
JOHN G. PRICE,
Attorney-General.

854.

MUNICIPAL CORPORATIONS—MAY ENACT ORDINANCES TO REGULATE CARRYING OF CONCEALED WEAPONS—JURISDICTION OF MAGISTRATES UNDER SECTION 12819 G. C.—NO FINAL JURISDICTION IN FELONY CASES.

1. *Municipalities may legally enact ordinances regulating the carrying of concealed weapons.*

2. *Justices of the peace, mayors, police judges and municipal judges have jurisdiction in cases arising under section 12819 G. C., as examining magistrates only, and do not have final jurisdiction in felony cases.*

COLUMBUS, OHIO, December 6, 1919.

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

GENTLEMEN:—I am in receipt of your letter of recent date in which you submit the following question:

> "We are taking it in view of opinion of the Attorney-General, page 1839 of the 1916 annual reports, that a municipality may not legally enact an ordinance covering the carrying of concealed weapons, and in connection therewith we respectfully request your written opinion upon the following matter:
>
> In view of section 12819 G. C. (107 O. L. 28), may a justice of the peace, mayor, judge of police court or judge of municipal court legally have jurisdiction in case of carrying concealed weapons?"

In reference to the first proposition presented as to the legality of an ordinance enacted by a municipality, regulating the carrying of concealed weapons, will say, that municipal corporations in their public capacity possess such powers and only such powers as are expressly granted by statute, and such as are by implication essential to carry into effect those that are expressly granted, together with such powers as are granted to them by the amended constitution of 1912.

While in the general and special powers granted by the legislature there is no express provision authorizing the enactment of ordinances by municipalities covering the carrying of concealed weapons, section 3658 of the General Code, which relates to the general powers granted to a municipality, provides as follows:

> "To prevent riot, gambling, noise and disturbance, indecent and disorderly conduct or assemblages, and to preserve the peace and good order, and to protect the property of the corporation and its inhabitants."

It would seem that by implication to enable a municipality to carry into effect the express provisions of this section "to preserve the peace and good order" the power to enact ordinances regulating the carrying of concealed weapons is reasonably implied.

Section 3628 G. C., which relates to the powers of municipalities, provides as follows:

> "To make the violation of ordinances a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months."

Article XVIII, section 3 of the amended constitution of Ohio provides as follows:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The supreme court of Ohio, in the case of city of Fremont vs. Keating, 96 O. S. 468, clearly holds that under said constitutional provision municipalities may "adopt, and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws." Said opinion makes no distinction as to the application of such rule as between chartered and non-chartered municipalities.

Therefore, in view of the foregoing, I am of the opinion that non-chartered as well as chartered municipalities may enact proper ordinances regulating the carrying of concealed weapons.

In answer to your second inquiry relative to the jurisdiction of certain named courts, in cases arising under section 12819 G. C. (107 O. L. 208), you are advised that said offense as prescribed by said statute constitutes a felony under the laws of this state.

Section 13422 G. C., which relates to the jurisdiction of justices of the peace provides as follows:

> "A justice of the peace shall be a conservator of the peace and have jurisdiction in criminal cases throughout the county in which he is elected and where he resides, on view or on sworn complaint, to cause a person, charged with the commission of a felony or misdemeanor, to be arrested and brought before himself or another justice of the peace, and, if such person is brought before him, to inquire into the complaint and either discharge or recognize him to be and appear before the proper court at the time named in such recognizance, or otherwise dispose of the complaint as provided by law. He also may hear complaints of the peace and issue search warrants."

Section 4534 G. C., which relates to the jurisdiction of mayors in felony cases, provides in part as follows:

> "In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power, throughout the county, concurrent with justices of the peace."

Section 4577 G. C., which relates to the jurisdiction of police courts, contains the following:

> "The jurisdiction of such court to make inquiry in criminal cases shall be the same as that of a justice of the peace."

With reference to the jurisdiction of municipal courts it is necessary to look to the statute creating and establishing the power of said courts in their respective localities, to determine the extent of their jurisdiction. However, I am of the opinion that in most cases, if not in all cases, where municipal courts have been established their jurisdiction in felony cases is the same as that given to justices of the peace, mayors and police judges.

From the above it follows that said courts have jurisdiction as examining magistrates in cases arising under section 12819 G. C. However, said courts do not have final jurisdiction as under section 10 of the bill of rights of the Ohio constitution, the accused may not be convicted of the felony unless indicted by a grand jury, and the law does not provide for such action by a grand jury except in a court of common pleas, nor in fact do the statutes purport to confer upon said lower courts final jurisdiction in felony cases. However, the fact that section 12819 G. C. makes said offense a felony does not prevent a municipality from making the same act a misdemeanor by ordinance and granting final jurisdiction to proper tribunals in misdemeanor cases.

I am further of the opinion that a prosecution under such an ordinance does not prevent a prosecution under section 12819 G. C., as in the case of Koch vs. State, 53 O. S. 433, the syllabus reads:

> "A former conviction before a mayor for the violation of an ordinance is not a bar to the prosecution of an information charging the same act as a violation of the statute."

The rule in Ohio seems to be that municipalities, within the limits of the power granted to them, may pass ordinances regulating the same acts as state statutes have regulated so long as the said ordinance prescribes a punishment which limits the offense to a misdemeanor. If a city ordinance should prescribe such a punishment as would result in placing the accused in jeopardy when being prosecuted under said ordinance, this would defeat the operation of the state statute providing an offense for the same act and render said ordinance invalid.

Respectfully,
JOHN G. PRICE,
Attorney-General.

855.

MUNICIPAL CORPORATION—MAYOR OR MAGISTRATE MAY LEGALLY SUSPEND OR MODIFY A SENTENCE—WHEN TIME MAY BE GRANTED TO DEFENDANT FOR PAYMENT OF FINE—BEFORE SENTENCE IS CARRIED INTO EXECUTION.

A mayor or magistrate may legally suspend or modify a sentence, including the power to grant time to the defendant for the payment of a fine, if the same is done before said sentence is carried into execution and in the manner as provided by law.

COLUMBUS, OHIO, December 6, 1919.

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

GENTLEMEN:—I am in receipt of your communication of recent date, which is as follows:

> "We respectfully request your written opinion upon the following matter:
> The judge of a municipal court of a certain city in Ohio sentenced a defendant to pay $50.00 and costs, and allows the defendant thirty days in which to pay $25.00 of the fine and costs and sixty days in which to pay the balance, immediately releasing the accused from custody, the terms of payment being entered on the docket and made a part of the court record.
> Question: May a mayor or magistrate legally grant time for payment of fines and costs and release the prisoner as above stated?"

The suspension or modification of a sentence is controlled by what are known as the probation statutes of Ohio, and those sections of said law which I think advisable to consider in connection with your question are as follows:

> Section 13706 G. C. (108 O. L., 144). "In prosecutions for crime, except as hereinafter provided, where the defendant has pleaded or been found guilty, and the court or magistrate has power to sentence such defendant to be confined in or committed to the penitentiary, the reformatory, a jail, workhouse, or correctional institution, and the defendant has never before been imprisoned for crime, either in this state or elsewhere, and it appears to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and that the public good does not demand or require that he shall suffer the penalty imposed by law, such court or magistrate may suspend the execution of the sentence, at any time before such sentence is carried into execution, and place the defendant on probation in the manner provided by law."
> Section 13707 G. C. "This subdivision of this chapter shall not affect the laws providing the method of dealing with juvenile delinquents, nor shall detention in an institution for such juvenile delinquents be considered as imprisonment."
> Section 13708 G. C. "No person convicted of murder, arson, burglary of an inhabited dwelling house, incest, sodomy, rape without consent, assault with intent to rape, or administering poison shall have the benefit of probation."
>
> Section 13711 G. C. "When the sentence of the court or magistrate is that the defendant be imprisoned in a workhouse, jail, or other institution,

except the penitentiary or the reformatory, or that the defendant be fined and committed until such fine be paid, the court or magistrate may suspend the execution of said sentence and place the defendant on probation, and in charge of a probation officer named in such order, in the following manner:

1. In case of sentence to a workhouse, jail or other correctional institution, the court or magistrate may suspend the execution of the sentence and direct that such suspension continue for such time, not exceeding two years, and upon such terms and conditions as it shall determine;

2. In case of a judgment of imprisonment until a fine is paid, the court may direct that the execution of the sentence be suspended on such terms as it may determine and shall place the defendant on probation to the end that said defendant may be given the opportunity to pay such fine within a reasonable time; provided, that upon payment of such fine, judgment shall be satisfied and the probation cease."

While the statutes are reasonably clear as to the authority of courts or magistrates to suspend or modify a sentence, when the accused has not been previously imprisoned for crime, in the construing of such law the courts have encountered some difficulty in determining the time at which the authority to suspend a sentence terminates after the same is pronounced. However, section 13706 supra was amended (108 O. L. 144), evidently for the manifest purpose of clearing up this point. Said section is the same as the original with the exception of the following clause, which was added in the amendment: "at any time before such sentence is carried into execution."

Paragraph 2 of section 13711 supra, specifically authorizes a court or magistrate o suspend the execution of a sentence in case of a judgment of imprisonment until the fine is paid, permitting the defendant to pay such fine within a reasonable time.

In specific answer to your inquiry I am of the opinion that a mayor or magistrate may legally suspend or modify a sentence, including the power to grant time to the defendant for the payment of a fine, provided the suspension is not for a longer period than two years and that the defendant has not previously been imprisoned for crime, if the same is done before said sentence is carried into execution and in the manner as provided by law.

Respectfully,
JOHN G. PRICE,
Attorney-General.

856.

FISH AND GAME LAWS—OFFENSE COMMITTED IN PRESENCE OF GAME PROTECTOR—SECTION 1452 G. C. AUTHORIZES SUCH OFFICERS TO PROSECUTE WITHOUT APPROVAL OF PROSECUTING ATTORNEY OR ATTORNEY-GENERAL—COSTS, HOW PAID, IN CASE DEFENDANT ACQUITTED OR DISCHARGED FROM CUSTODY.

1. *Where an offense under the fish and game laws of Ohio has been committed in the presence of a game protector, that officer is, in contemplation of section* 1452 *G. C. "a person authorized by law to prosecute a case under the provisions of this act," it being unnecessary, under such circumstances, that such a prosecution have the approval of either the prosecuting attorney of the county wherein the offense was committed or of the attorney-general.*

2. *If, in such a case, the defendant be acquitted or discharged from custody, the*

costs of prosecution, when properly certified under oath by the justice of peace or other magistrate to the county auditor, are payable upon the county auditor's warrant out of the county treasury. Section 1452 G. C.

COLUMBUS, OHIO, December 6, 1919.

HON. ROBERT M. NOLL, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—Your letter of recent date, after citing sections 62 and 54 of the new fish and game code, being sections 1452 and 1444 G. C. respectively, reads in part thus:

> "In the particular case of which I inquire, J. L., deputy game protector, made affidavit that one W. D. had interfered with the said J. L. as such game protector, while making an arrest.
>
> The arrest of W. D. was not made at the time of such claimed interference, but later the affidavit was filed by J. L. against W. D. and he was duly arrested upon warrant issued upon such affidavit. The affidavit was not approved by the prosecuting attorney or by the attorney-general. A trial was had before the justice of the peace, and at the close of the evidence for the state, introduced by J. L., deputy game warden, the case was dismissed on the grounds that there were not facts sufficient to show a violation of the law. The affidavit filed by J. L., deputy game warden, was filed before a justice of the peace directly across the street from the office of the prosecuting attorney, but no request was made by the deputy game protector to have the prosecuting attorney approve the affidavit. The defendant having been acquitted, the justice of the peace files under section 59 a cost bill before the county auditor, and the county auditor desires my recommendation before he will pay the same. I do not desire to recommend its payment unless the law is absolutely mandatory that the same shall be paid.
>
> Personally, I am of the opinion that the provisions in section 5 4 providing that the protector or other public officer may make arrests without the approval of the prosecuting attorney when the offense is committed in his presence, are for the purpose of authorizing the protector or public officer to make the arrest at such time without a warrant, but that when the procedure of filing the affidavit and securing a warrant for the arrest, then such affidavit requires the endorsement or approval of the prosecuting attorney or the attorney general."

From a subsequent letter received from you, it appears it was claimed that while J. L., the game protector, was endeavoring to arrest some third party for an offense under the fish and game laws, he, W. D., interfered with him (J. L.) in respect of such arrest.

It is assumed that the affidavit against said W. D. was based on section 1442 G. C. (108 O. L. 577), which, so far as pertinent, reads:

> "No person shall interfere with, threaten, abuse, assault, obstruct or in any manner attempt to deter a protector or other police officer from carrying into effect any of the provisions of this act, or refuse to accompany a protector or other police officer when placed under arrest. Any game protector shall have the authority to make arrests under the provisions of this section for any such violations."

Said section 1452 G. C. (108 O. L. 577), and section 1444 G. C. (108 O. L. 577), are as follows:

> "Section 1452. A person authorized by law to prosecute a case under

the provisions of this act shall not be required to advance or secure costs therein. If the defendant be acquitted or discharged from custody, or if he be convicted and committed in default of payment of fine and costs, such costs shall be certified, under oath by the justice of the peace or other magistrate to the county auditor who shall correct all errors therein and issue his warrant on the county treasurer payable to the person or persons entitled.

Section 1444. Sheriffs, deputy sheriffs, constables and other police officers shall enforce the laws for the protection, preservation and propagation of birds, fish, game and fur-bearing animals, and for this purpose they shall have the power conferred upon the fish and game protectors and receive like fees for similar services. Prosecutions by a protector or other public officer for offenses not committed in his presence shall be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed or upon the approval of the attorney general."

What is now section 1452 G. C. was, until the recent recodification of the fish and game laws, known as section 1404 G. C., and what is now section 1444 G. C. was known as section 1397 G. C. Construing these sections, the Attorney-General, on September 21, 1916, in an opinion to the bureau of inspection and supervision of public offices (1916 Opin. of Atty.-Gen., Vol. II, p. 1601), said:

> "Where a prosecution is instituted under the fish and game laws of the state by a warden or other police officer authorized by law to prosecute, and the provisions of section 1397 are not observed, costs incurred therein should not be paid from the county treasury."

Other opinions of the Attorney-General to the same effect are found in 1912 Atty.-Gen. Ann. Rep., Vol. II, p. 1075, and in Opinions of Atty.-Gen., 1917, Vol. III, p. 2362.

If, however, the prosecution by a warden (or "protector," as he is now called) or other public officer, is for an offense under the fish and game laws which was committed in the *presence* of such protector or other public officer, then clearly the approval of either the prosecuting attorney or the Attorney-General is unnecessary.

From the statement contained in your letter, we take the fact to be that the alleged offense committed by the said W. D. was committed in the *presence* of the protector who instituted the prosecution. The approval of either the prosecuting attorney or the Attorney-General was, therefore, not necessary.

Careful attention has been given to your suggestion that the language in section 1444 G. C., viz.:

> "Prosecutions by a protector or other public officer for offenses not committed in his presence shall be instituted only upon the approval of the prosecuting attorney of the county in which the offense is committed or upon the approval of the Attorney-General,"

means this: That the fact of the commission of the offense in the presence of the protector or other public officer authorizes such protector or officer to arrest the defendant at such time and without a warrant; but that if the protector or officer does not arrest at that time, but goes through the procedure of first filing an affidavit and causing a warrant to be issued, then the prosecution must be upon the approval of either the prosecuting attorney or Attorney-General.

At least two objections are seen to this theory: First, the authority of the protector to arrest upon sight and without a warrant is not given by the provision in question at all. If it exists in any given case, it exists by reason of some other provision of the statutes, possibly that part of section 1442 G. C. which says:

"* * * and he may arrest on sight and without warrant a person found violating any such law."

Secondly, such a theory does violence to the clear intent expressed in section 1444 G. C., which was to require the prosecuting attorney's or the Attorney-General's approval only where the offense was not committed in the protector's presence.

That part of section 1444 G. C. which we have been considering was enacted for a purpose and was doubtless intended to further some policy of administering the fish and game laws. What was that policy? Was it a policy with respect to the *manner of arresting* a person found violating the fish and game laws, arrests upon warrant being made a mere formal matter (because requiring the precedent approval of the prosecuting attorney or the Attorney-General) than arrests upon sight without a warrant? Or was it a policy of safeguarding the public and the public's money from the consequences of ill-advised, unnecessary arrests?

Upon reflection it seems to me that the statute in question reflects the policy last above stated. In this connection attention is called to that part of the opinion of the Attorney-General hereinbefore referred to (1916 Opin. of Atty.-Gen., Vol. II, p. 1601) which speaks of what is now section 1444 G. C. in the f llowing language:

"It is quite evident from the foregoing provisions of law that one of the purposes, if not the moving purpose, of the legislature in providing for approval by the prosecuting attorney or Attorney-General of prosecutions for offenses not committed in the presence of the officer * * * was to prevent the institution and the consequent incurring of costs in cases in which the facts or the available evidence did not justify such action."

Answering your question directly, I advise you that where an offense under the fish and game laws of Ohio has been committed in the presence of a game protector, that officer is, in contemplation of section 1452 G. C. "a person authorized by law to prosecute a case under the provisions of this act," it being unnecessary, under such circumstances, that such a prosecution have the approval of either the prosecuting attorney of the county wherein the offense was committed, or of the Attorney-General. If, in such a case, the defendant be acquitted or discharged from custody, the costs of prosecution, when properly certified under oath by the justice of peace or other magistrate to the county auditor, are payable upon the county auditor's warrant out of the county treasury. Section 1452 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

857.

APPROVAL, BOND ISSUE, COLUMBIANA COUNTY, OHIO, IN THE SUM OF $9,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 6, 1919.

858.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN HENRY AND ADAMS COUNTIES.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, December 6, 1919.

859.

APPROVAL, ABSTRACT OF TITLE AND DEED OF ELSWORTH CLAAR TO STATE OF OHIO FOR PART OF LOT No. 14 OF GEORGE STEVENSON'S HEIRS' SUBDIVISION, RANGE 18, UNITED STATES MILITARY LANDS.

COLUMBUS, OHIO, December 6, 1919.

HON. N. E. SHAW, *Secretary of Agriculture, Columbus, Ohio.*

DEAR SIR:—I am transmitting herewith deed of Elsworth Claar to the state of Ohio for a lot approximately 42 feet by 125 feet, part of lot No. 14 of George Stevenson's heirs' subdivision, quarter township 4, township 1, range 18, United States military lands.

The lot conveyed adjoins the state fair grounds, and was purchased by the state in conformity with authority granted by section 1095-1 (107 O. L. 463). The consideration named in the deed is $800.00; but $100.00 of this is being contributed by the city of Columbus.

For your information I may say that the revenue stamp has been omitted from the deed because of rulings of the United States treasury department that a stamp is not required on conveyances made to the state.

The deed is to be recorded in the office of the recorder of Franklin county, Ohio, and the state is to pay the last half of the 1919 taxes payable in June, 1920. The present tenant of the premises is Will Hall, who pays $8.00 per month rent. His rent is paid up to and including November 30, 1919, and the state is entitled to the rent from December 1, 1919.

I transmit also abstract of title covering the premises conveyed. In my opinion this abstract shows in Elsworth Claar a good and indefeasible title free of all encumbrances except 1919 taxes, though not a perfect record title.

Respectfully,
JOHN G. PRICE,
Attorney-General.

860.

APPROVAL, DEFICIENCY BONDS OF WELLSVILLE CITY SCHOOL DISTRICT IN THE SUM OF $60,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 9, 1919.

861.

TOWN HALL—TWO-THIRDS MAJORITY OF ALL BALLOTS CAST AT AN ELECTION NOT NECESSARY ON QUESTION OF BUILDING OR ENLARGING TOWN HALL AT A GREATER COST THAN $2,000.

A two-thirds majority of all the ballots cast at an election, on the question of building or enlarging a town hall, at a greater cost than $2,000, is not necessary to carry such election.

COLUMBUS, OHIO, December 9, 1919.

HON. GEORGE W. SHEPPARD, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department, as follows:

> "When a township hall is to be constructed at a greater cost than $2,000, and the proposition of constructing such hall at a greater cost than $2,000 is submitted to a vote of the people of the township, is a majority vote sufficient to authorize the trustees to issue bonds of the township for the purpose of constructing said hall or does it require a two-thirds vote? "

Sections 3260, 3395 and 3396 G. C. are pertinent to your inquiry.

Section 3260 authorizes the township trustees to purchase a site and erect thereon a town hall "if a majority of the electors of the township * * * voting at a general election vote in favor thereof." Under this section the cost of such hall may not exceed two thousand dollars.

Section 3395 authorizes the erection of a town hall, at a greater cost than is otherwise allowed by law, "upon submission of the question of the erection of such hall to the electors of the township."

Section 3396 further provides the manner of submission of such question and provides:

> "If a majority *of all the votes cast* at the election are in the affirmative, the trustees shall levy the necessary tax."

The language used in this section leaves no doubt as to what quantity of ballots the affirmative ballots are to be compared with, viz., "all the ballots cast." This does not require a two-thirds majority.

It is possible that this section has been confused with section 3402 in the same chapter which reads:

> "If at such election two-thirds of the electors of the township and of the village voting, vote in favor of such improvement, the trustees of such township and the council of the village shall jointly take such action as is necessary to carry out such improvement."

This section, however, relates to the joint improvement provided for in section 3399 and not to the election referred to in section 3396 (supra). It rather emphasizes the lack of a necessity for a two-thirds majority in section 3396, both from its position in the chapter and the later enactment of 3402, as well as the different language employed in the two sections.

You are therefore advised that it is the opinion of the Attorney-General that a two-thirds majority of all the ballots cast at an election, on the question of building or enlarging a town hall, at a greater cost than $2,000, is not necessary to carry such election.

Respectfully,
JOHN G. PRICE,
Attorney-General.

862.

ROADS AND HIGHWAYS—DAY WHEN LIEN OF ASSESSMENT ATTACHES UNDER HIGHWAY ACT, 106 O. L., 574, AND ALSO UNDER HIGHWAY ACT, 107 O. L., 69—DUTY OF DESIGNATING LOCATIONS WHERE MAINTENANCE AND REPAIR WORK TO BE DONE ON HIGHWAYS—SECTIONS 6956-1 AND 6956-1a G. C., 108 O. L., 503, CONSIDERED.

1. *The lien of assessments growing out of proceedings under the so-called Cass highway act,* 106 O. L. 574, *attaches on the day that such assessments are approved by the township trustees, and the lien of assessments growing out of proceedings under the so-called White-Mulcahy act,* 107 O. L. 69, *attaches on the day that such assessments are approved and confirmed by the county commissioners or township trustees.*

2. *The duty of designating locations where maintenance and repair work is to be done on highways which the county is directed or authorized to maintain and repair by the use of funds mentioned in sections* 6956-1 *and* 6956-1a *G. C.,* 108 *O. L.* 503, *rests with the county commissioners and not with the county surveyor.*

COLUMBUS, OHIO, December 9, 1919.

HON. W. R. WHITE, *Prosecuting Attorney, Gallipolis, Ohio.*

DEAR SIR:—Your letter of recent date is received reading as follows:

> "I desire the opinion of your department on two separate questions.
>
> I have been requested by the county auditor and treasurer to ask your department for an opinion as to when the lien attaches on road assessments, that is:
>
> When does the assessment made against the abutting property for the purpose of paying a part of the construction cost of an inter-county highway constructed under the supervision of the state highway department become a lien on said property?
>
> My contention is that the last two or three paragraphs of section 1214 as found on page 129 of Ohio Laws, Vol. 107, fixes the time when the lien attaches.
>
> The second question I desire to ask your department is:
>
> Are the commissioners compelled to turn over to the county surveyor all of the road repair money to be used and expended by him as he may see fit or shall the commissioners retain control of the money and direct the surveyor on which roads they desire the repairs to be made. In other words, if the surveyor is authorized to repair the roads do the commissioners lose control of the money and lose their right to dictate where the money shall be expended?"

Your first question as to the date at which an assessment in connection with the state aid highway improvement became a lien, cannot be answered generally, but must have reference to the statutes which were in force at the time the improvement became a pending proceeding. This latter subject is dealt with in an opinion of this department of date April 29, 1918, found in Opinions of Attorney-General for 1918 at page 624.

As to the improvements which became pending proceedings on and after June 28, 1917, the answer to your first question is comparatively simple, since the statutes in point are sections 1214 and 1216 as amended in 107 O. L. pages 129, 130. Section 1214 because of its length need not be here quoted in full. It makes provision as to

the shares to be borne by the county, township and property owners concerned in a state aid highway improvement, and specifies the steps to be taken by the county commissioners or township trustees as the case may be, in connection with the asessment against the adjoining lands. Briefly, these steps embrace the making of a tentative apportionment by the county surveyor, the filing of such apportionment with the county commissioners or township trustees; publication of notice that such apportionment has been made; opportunity to property owners to object to the apportionment, and hearing by the commissioners upon such apportionment with the right of said commissioners to make such change in the apportionment as they find just and equitable. The last sentence of said section is:

> *"Such assessments when so approved and confirmed shall be a lien on the land chargeable therewith."*

Section 1216, among other things, provides that the assessments shall be certified to and placed by the county auditor upon a special duplicate to be collected as other taxes, etc. Very plainly, by the provisions of the last sentence of section 1214 as above quoted, the assessments become a lien upon the date on which they are approved and confirmed by the county commissioners.

The answer to your first question, so far as it concerns assessments made in connection with improvements which became pending proceedings under the so-called Cass highway act is not so readily arrived at. The sections of the Cass law which relate to assessments are applicable to proceedings which became pending proceedings between the first Monday in September, 1915, and the 28th day of June, 1917.

Section 1214 as it appeared in said Cass law (106 O. L. 637), after providing for the percentages to be borne by the county, township and property owners, recited:

> "* * * The township trustees shall apportion the amount to be paid by the owners of the abutting property according to the benefits accruing to the owners of the land so located. At least ten days' notice of the time and place of making such apportionment shall be given to the persons affected thereby, and an opportunity given them to be heard. The township trustees shall cause a notice to be served upon the abutting property owners, stating the time and place for hearing on the apportionment and the amount to be paid by each abutting property owner. In case any of the abutting property owners are non-residents, such notice shall be given by one publication in some newspaper of general circulation in the county. If the improvement lies in two or more townships, the amount to be paid by each, shall be apportioned according to the number of lineal feet of the improvement lying in each township."

Section 1216 as it appeared in the Cass law (106 O. L. 638) reads as follows:

> "The township trustees shall certify the assessments so made to the county auditor, who shall place them upon the tax duplicate against the several properties benefited as shown by said assessment list. The county treasurer shall collect such assessments in the same manner as other taxes are collected. The township trustees shall pay to the county the portion of the cost and expense apportioned to the township, in the same manner as other claims against the township are paid."

We are thus left without any exact statement in the statutes themselves as to when the assessment should actually become a lien. However, we are not without judicial authority which by analogy furnishes an answer to your inquiry.

In the case of Cattell vs. Putnam, 73 O. S. 147, the supreme court had occasion to consider the question of the time at which the lien of an assessment under the then existing ditch statutes attached to affected lands. The supreme court, in the course of the opinion, makes a brief abstract of the county ditch statutes; and it will be seen that those statutes do not in terms fix the date at which the lien attached. It will be noted also that the statutes provided for a preliminary apportionment before the time set for letting the work. The fact that such preliminary apportionment was provided for gave rise to the claim which was being made in the case that the lien attached when the preliminary apportionment was approved. However, the supreme court called attention to and quoted the provisions of section 4479 of the Revised Statutes as follows:

> "When the working sections of the improvement are let, as hereinbefore provided, and the costs and expenses of location and construction, and all compensation and damages are ascertained, the commissioners shall meet and determine in what time and in what number of assessments they will require the same to be paid, and order that the assessments, as made by them, be placed on the duplicate accordingly, against all the lots or lands, or corporate roads or railroads assessed, and they shall also determine whether they will issue bonds to pay such costs and expenses."

The conclusion of the supreme court as set out in the syllabus is as follows:

> "An assessment for a county ditch is not made by the county commissioners until it is ordered by them to be placed on the duplicate against the lots or lands or corporations or railroads assessed as provided by section 4479 of the Revised Statutes."

Another case which may be mentioned, arising under the same ditch statutes as those just referred to, was that of Lackey vs. Sheriff, 33 W. L. B. 38. The report of that case shows that in connection with ditch proceedings pending before them, certain county commissioners on February 2, 1886, made a finding to the effect that assessments be placed on the special duplicate, etc., and that on February 16, 1886, plaintiff delivered to defendant his warranty deed dated February 13, 1886, for the affected premises, and at the time of delivery of said deed no part of the ditch had been constructed and neither of the parties had any actual knowledge of the location. The common pleas court found as its conclusion of law that the ditch assessment became a valid lien on February 2, 1886, "and that on both February 13th, and February 16th, 1886, it was an encumbrance against the real estate in the petition described."

The report of the case further shows that the circuit court affirmed the judgment of the court of common pleas, and that the supreme court on January 15, 1895, affirmed the judgment without report.

The principles embodied in the two cases cited would seem to be fully applicable to sections 1214 and 1216 as they existed in the Cass law, with the result that it is to be concluded that the lien of an assessment under those sections attaches on the date that the township trustees approve the assessments. This conclusion is not affected by the fact that the further duty rests with the township trustees of certifying the assessments to the county auditor; because it is quite evident that such action is to be considered as a mere ministerial duty on the part of the trustees, and hence is not to be treated as a jurisdictional step in the perfection of the lien. See Otte vs. State, 9 C. C. (N. S.) 293; 19 O. C. D. 203.

The assessment statutes as they existed before the passage of the Cass act were quite similar to their form as appearing in the Cass act; so that it is believed that the foregoing discussion will serve to answer fully your inquiry, although, as above noted,

the exact form of the statutes as applicable to a given proceeding must be considered in determining the date at which the lien attaches.

In your second question you refer to "road repair money;" and from the nature of your inquiry, it is assumed that you refer to the proceeds of the levy which has been heretofore authorized by section 6956-1. That section was amended and supplemented at the recent session of the general assembly, and its new form set forth in sections 6956-1 and 6956-1a (108 O. L. 503) is as follows:

> "Sec. 6956-1. After the annual estimate for the county has been filed with the county commissioners by the county surveyor, and the county commissioners have made such changes and modifications in said estimate as they deem proper, they shall then make their levy for the purpose set forth in said estimate, upon all the taxable property of the county not exceeding in the aggregate two mills upon each dollar of the taxable property of said county. Such levy shall be in addition to all other levies authorized by law for said purposes, but subject, however, to the limitations upon the combined maximum rate for all taxes now in force. The provisions of this section shall not, however, prevent the commissioners from using any surplus in the general funds of the county for the purposes set forth in said estimate.
>
> Sec. 6956-1a. The board of county commissioners of each county shall provide annually by taxation an adequate fund for the maintenance and repair of improved county highways. Such fund shall be provided by levies made under sections 6926, 6927 and 6956-1 of the General Code and the several sections amendatory thereof or supplementary thereto. The maintenance and repair fund so provided shall not be less than one hundred dollars for each mile of improved county highway within the county. Such levy or levies for maintenance and repair purposes shall be separately set forth in the annual budget of the county commissioners presented to the budget commission, and the maintenance and repair levies so made by the county commissioners pursuant to the provisions of this section shall be preferred levies as against any other levies made by the commissioners for county road purposes. Should the budget commission of any county be unable, by reason of the limitations of law, to allow all of the road levies made by county commissioners, such reductions as are necessary therein shall be first made in levies other than those for maintenance and repair purposes made under the provisions of this section. The fund produced by such levy or levies for maintenance and repair purposes shall not be subject to transfer by order of court or otherwise and shall be used solely for the maintenance and repair of the improved county roads within the county. The provisions of this section shall not prevent the county commissioners from using any other available road funds for the maintenence and repair of improved county roads."

Your inquiry as to whether the expenditure of the accruals of such levy is to be made under the direction of the county surveyor or of the county commissioners doubtless arises through consideration of certain broad provisions of the duties of the county surveyor. As to that officer, it is noted that section 7184 opens with the statement:

> "The county surveyor shall have general charge of the construction, reconstruction, improvement, maintenance and repair of all bridges and highways within his county under the jurisdiction of the county commissioners."

Section 7192 provides in part:

> "The county surveyor shall supervise the construction, reconstruction,

improvement, maintenance and repair of the highways, bridges and culverts under the jurisdiction of the county commissioners."

Section 2792, in referring to the county surveyor, contains the statement:

"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 * * * constructed under the authority of any board within and for the county."

However, in contrast to the provisions just quoted, there are other statutory provisions which leave no doubt that the primary duty of directing the expenditure of the proceeds of the levy above authorized rests with the county commissioners; among which provisions may be noted the following:

The last sentence of section 6956-1 and the last sentence of section 6956-1a above quoted are to the effect that the provisions of said respective sections shall not prevent the *county commissioners* "from using other available road funds for the maintenance and repair of improved county roads."

Section 2788-1 as recently enacted (108 O. L. 497) after making reference to road maintenance and repair work under the *supervision* of the county surveyor, states that:

"The county surveyor *when authorized by the county commissioners*, shall appoint a maintenance supervisor or supervisors to have charge of the maintenance of improved highways within a district or districts established by the commissioners and surveyor and containing not less than ten miles of improved county roads. Such maintenance supervisor shall act under the direction of the county surveyor; and the county surveyor, when authorized by the county commissioners, shall establish a patrol or gang system of maintenance under the direct charge of such supervisor. The compensation of such supervisor shall be fixed upon a per diem basis by the county commissioners and shall be paid out of the road repair or county road fund upon the approval of the county surveyor."

Section 7198 provides that:

"The county surveyor may when authorized by the county commissioners employ such laborers and teams, lease such implements and tools and purchase such material as may be necessary in the construction, reconstruction, improvement, maintenance or repair of roads, bridges and culverts by force account."

Section 7200 authorizes the *county commissioners* to purchase machinery, tools and equipment for use in road maintenance and repair—the cost to be paid out of the road funds of the county.

Section 7203 permits the county commissioners or the county surveyor *when authorized by the county commissioners to* make purchase of road material, etc., from public institutions.

Section 7214 reads in part:

"The county commissioners or township trustees may contract for and purchase material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county * * *."

The foregoing references make plain that there is no conflict beteeen the statutes relating to county commissioners and those prescribing the duties of the county surveyor. On the one hand, direct authority is conferred on the county commissioners to purchase machinery, equipment and material, and on the other hand, the county surveyor is without authority to make purchases or employ teams and labor without the previous authorization of the county commissioners. In this situation, it necessarily follows that power is lodged in the commissioners to say where the material will be used and where the laborers will be employed; for otherwise the commissioners might refuse to purchase material or to authorize the county surveyor to employ teams and laborers, etc. The various statutes quoted with reference to the county surveyor plainly indicate that the range of his activity is confined to taking charge and supervision of repair and maintenance work after such work has been provided for and ordered by the county commissioners.

Two other statutes lending strong support to the conclusion just stated are sections 7464 and 7467. Subdivision (b) of section 7464 reads:

> "* * * (b) County roads shall include all roads which have been or may be improved by the county by placing brick, stone, gravel or other road building material thereon, or heretofore built by the state and not a part of the inter-county or main market system of roads, together with such roads as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners, and all such roads shall be maintained by the county commissioners."

The first sentence of section 7467 reads:

> 'The state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth; provided, however, that either the county or township may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the road under the control of the other."

Specific answer to your two questions may there ore be found in the following summary:

(1) The lien of assessments growing out of proceedings under the so-called Cass highway act (106 O. L. 574) attaches on the day that such assessments are approved by the township trustees, and the lien of assessments growing out of proceedings under the so-called White-Mulcahy act (107 O. L. 69) attaches on the day that such assessments are approved and confirmed by the county commissioners or township trustees.

(2) The duty of des gnating locations where maintenance and repair work is to be done on highways which the county is directed or authorized to maintain and repair by the use of funds mentioned in sections 6956-1 and 6956-1a G. C. (108 O. L. 503), rests with the county commissioners and not with the county surveyor.

Respectfully,

JOHN G. PRICE

Attorney-General.

863.

INHERITANCE TAX LAW—EXEMPTIONS APPLICABLE TO SHARES OF THE INDIVIDUAL SUCCESSORS AND NOT TO ESTATE AS A WHOLE—FEES AND COSTS PAYABLE OUT OF TAXES COLLECTED.

1. *The exemptions of the inheritance tax law apply to the shares of the individual successors, and not to the estate as a whole.*

2. *Fees and costs charged and incurred in inheritance tax proceedings are payable out of the taxes collected.*

COLUMBUS, OHIO, December 9, 1919.

HON. ROBERT B. MCMULLEN, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—You submit for the opinion of this department the following questions:

"1. Under section 5334 General Code, do the exemptions referred to apply to the estate as a whole or do they apply to the succession passing to each person? For example, under sub-paragraph 2 of section 5334 G. C., if an estate valued at $15,000.00 passes to five heirs, one of whom received $5,000, and the other four receive $2,500 each, will the exemption of $3,500 apply to the entire estate of $15,000 or does it apply to the share received by each individual heir?

2. Are the fees and costs payable from the estate?"

In reply to your first question, you are referred to the following provisions of the inheritance tax law:

"Sec. 5331. As used in this subdivision of this chapter:

1. The words 'estate' and 'property' include everything capable of ownership, * * * which passes to any one person * * * from any one person, whether by a single succession or not.

Sec. 5334. * * * Successions passing to other persons shall be subject to the provisions of said section to the extent only of the value of the property transferred above the following exemptions: * * *."

These provisions suggest that the particular exemptions are to be subtracted from the amount passing from the decedent to a given person. Assuming, as you apparently assume, that all the successors to the estate referred to by you belong in the second class with respect to the exemptions, there would be but one taxable succession in the estate, namely, that of $5,000.00, the tax on which would be one per cent. of $1,500.00, or $15.00. The other successions being less than the exemption of $3,500.00 would not be taxable.

Your second question is answered by section 5348-10 of the law.

"Sec. 5348-10. Such fees as are allowed by law to the probate judge for services performed under the provisions of this subdivision of this chapter, shall be fixed in each case and certified by him on the order fixing the taxes, together with the fees of the sheriff or other officers and the expenses of the county auditor. The county auditor shall allow such fees and expenses out of said taxes when paid and credit the same to such fee funds, and draw his warrants on the treasurer in favor of the officers personally entitled thereto, payable from such taxes, as the case may require."

This is a full provision for the taxation and payment of fees incurred in the ju-

dicial proceeding to assess the tax. The official fees of the county auditor and the county treasurer, which of course are not in the nature of "costs," are provided for by sections 2624-1 and 2685-1 G. C. as enacted.

Under all these circumstances, the fees charged and costs incurred are to be payable out of the taxes collected, and not out of the estate.

Respectfully,
JOHN G. PRICE,
Attorney-General.

864.

CORONER—WITHOUT AUTHORITY TO HOLD INQUEST UNDER SECTION 921 G. C. UNLESS DEATH OCCURRED AT A MINE OR UNDER SECTION 2856 G. C. THERE IS REASON TO BELIEVE DEATH WAS CAUSED BY UNLAWFUL MEANS.

The coroner is without authority to hold an inquest under section 921 G. C. unless death occurred at a mine, or under section 2856 G. C. unless he has substantial reaason for believing or surmising that death was caused by unlawful means.

COLUMBUS, OHIO, December 9, 1919.

HON. LLOYD S. LEECH, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Your letter of recent date inquiring whether or not the coroner of your county should hold an inquest over the body of one B. M., late of your county was duly received.

The statutes of this state imposing duties upon the coroner with respect to inquests over the body of deceased persons are sections 921 and 2856 G. C.

The former section provides for the holding of an inquest upon the body of a person whose death occurred at a mine, but since your letter discloses that decedent's death did not occur at a mine, but was the result of an injury which had been received at a mine sometime prior thereto, that section has no application to the present inquiry. The latter section provides that the coroner shall hold an inquest when informed that the body of a person whose death is supposed to have been "caused by violence" has been found within the county, and that he shall proceed to inquire how the deceased came to his death, etc.

In State vs. Bellows, 62 O. S. 307, the court held that death is supposed to have been caused by violence within the meaning of the section just referred to, whenever the coroner has substantial reason for believing or surmising that death was caused by unlawful means. In the opinion, at page 310, the court, after stating that the inquest is intended to aid in the detection of crime and in the punishment of those who perpetrated it, said:

> "A death 'caused by violence' is a death caused by unlwaful means, such as usually calls for the punishment of those who employ them. * * * 'Death is supposed to have been caused by violence whenever from such observation as he may be able to make, and from such information as may come to him, the coroner is for reasons of substance led to surmise or think that the death has been so caused."

In 1914 Annual Report of the Attorney-General, Vol. II, page 1529, it was held that death by accidental drowning is not a death caused by violence, so as to justify the coroner in holding an inquest under authority of section 2856 G. C.

In 1913 Annual Report of the Attorney-General, Vol. II, page 1281, it was said:

> "The coroner * * * can only hold an inquest when he knows or has good reason to suspect that death has been caused by violence, by the use of unlawful means.
>
> He would not be authorized to hold an inquest over a body of a person whose death was caused by railroad accident, or by accident in a factory, if the accident was not caused by unlawful means, or if there was no reason to suspect that it was caused by unlawful means.
>
> An inquest would not be authorized where death was caused by or resulted from disease, such as asthma, pneumonia, bronchitis, still born, starved to death, tuberculosis, and other similar diseases.
>
> In order to hold an inquest it must be a death by violence, and not a natural or mere accidental death. An accidental death without reasonable ground to believe that it was caused by unlawful means, would not authorize an inquest."

In 1918 Opinions of the Attorney-General, Vol. II, page 1226, it was held that if there was ground for a suspicion that death was caused by "criminal negligence or violence" an inquest should be held. Citing 1905 Annual Report of the Attorney-General, page 125.

You are therefore advised that section 921 G. C. has no application to the facts stated in your letter, and, also that the coroner is without authority to hold an inquest under section 2856 G. C. unless the death of Mr. M. was "caused by violence," as that phrase has been defined in the authorities above referred to, which, I gather from your letter, is not the case. However, if the coroner is, for reasons of substance, led to believe that death was "caused by violence," an inquest should be held, and for such service he would be entitled to the regular fees in such cases.

Respectfully,

JOHN G. PRICE,

Attorney-General.

865.

APPROVAL, ABSTRACT OF TITLE TO CERTAIN LANDS IN TOWNSHIP OF ATHENS, ATHENS COUNTY, TO BE TRANSFERRED TO STATE OF OHIO.

COLUMBUS, OHIO, December 9, 1919.

Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—I have made an examination of an abstract submitted to me, certified by R. W. Finsterwald, Athens, Ohio, November 1, 1919, and supplemented by him by letter with enclosures, dated December 8, 1919, with reference to the title to the following described premises:

> Situate in the township of Athens, in the county of Athens, and state of Ohio, and in the city of Athens, to-wit: Outlots numbered ninety-one (91), ninety-two (92), ninety-three (93), ninety-five (95), ninety-six (96) and ninety-seven (97); also all that part of outlots numbered eighty-nine (89), ninety (90), ninety-eight (98) and ninety-nine (99), lying on the south side of the fence, now in use along the south side of the old canal bed, as shown and indicated upon the survey of said premises made by S. H. Hibbard, surveyor, and dated December 3 to 7, 1915, and containing thirty-eight (38) acres more or less, as shown by said survey.

I find it somewhat difficult to trace the chain of title to said premises in the early transfers as shown by the abstract. However, by the transfer of Moses Arnold and wife to Henry B. Lindley, September 27, 1854, as shown on page 67 of said abstract, and various transfers previous to this date, as shown in the abstract, the said Henry B. Lindley acquired the title to all the property included in the above description, and from this time the title can be definitely traced.

The abstract is somewhat complicated because of the various leases which were granted by the Ohio University. However, in my opinion, whatever imperfections there may be in this respect are cured by the governor's deed to William A. Moore, Trustee, dated March 23, 1917, made in pursuance of an act of the General Assembly of the state of Ohio entitled: "An act authorizing the conveyance of lands held under leases from the Ohio University" passed April 19, 1883.

According to the abstract, a mortgage given by C. T. Arms and wife to Henry B. Lindley, June 9, 1856 for $240.00, as shown on p. 73, has not been released. Also a mortgage of C. T. Arms and wife given to Henry B. Lindley, dated January 27, 1858, for $216.25, has not been released (p. 74). However, the court proceedings as shown on p. 76 indicate that these mortgages should be released.

On p. 79 the mortgage given by John B. Paul to Henry B. Lindley on May 1, 1862, for $700.00 is not released upon the record.

However, I am of the opinion that because of the lapse of time since the right of action of the mortgagees would have accrued, they would be barred by the statute of limitations from claiming any interest in the premises described. I base my opinion in this respect upon the following cases:

51 O. S. 240.
67 O. S. 316.
16 O. C. C. (n. s.) 427.

I am further of the opinion that said abstract shows a good and sufficient title to said premises to be in the name of John Finsterwald at the date of said abstract, subject to taxes for the year 1919, which are a lien upon said premises.

Said abstract does not show that any examination was made of the records of any of the United States courts.

I have also examined a deed submitted for approval, wherein John Finsterwald and Mary Finsterwald, his wife, are named as grantors, and the state of Ohio is the grantee; consideration $10,000.00; executed November 1, 1919. I am of the opinion that said deed is sufficient to convey the title of said John Finsterwald to the premises above described, to the state of Ohio when properly delivered. The proper amount of documentary stamps should be placed upon said deed and cancelled.

Respectfully,
JOHN G. PRICE,
Attorney-General.

866.

APPROVAL, BOND ISSUE, HARLEM TOWNSHIP RURAL SCHOOL DISTRICT, DELAWARE COUNTY, OHIO, IN THE SUM OF $2,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 10, 1919.

867.

APPROVAL, BOND ISSUE, CITY OF NEWARK, OHIO, IN THE SUM OF $15,377.80.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 10, 1919.

868.

APPROVAL, CERTIFICATE OF AMENDMENT, ARTICLES OF INCORPORATION, THE CLEVELAND NATIONAL FIRE INSURANCE COMPANY—SUPPLEMENTAL TO OPINION NO. 539, AUGUST 4, 1919.

COLUMBUS, OHIO, December 11, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The certificate of amendment to the articles of incorporation of The Cleveland National Fire Insurance Company, with my approval endorsed thereon, is returned herewith.

The amendment is in conformity with Opinion No. 539 rendered to your department on August 4, 1919.

Respectfully,
JOHN G. PRICE,
Attorney-General.

869.

APPROVAL, BOND ISSUE, DELAWARE COUNTY, OHIO, IN THE SUM OF $18,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 21, 1919.

870.

APPROVAL, BOND ISSUE, VILLAGE OF CELINA, IN THE SUM OF

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 21, 1919.

871.

APPROVAL, ARTICLES OF INCORPORATION OF THE UNITED STATES POSTAL FIRE INSURANCE COMPANY OF CINCINNATI, OHIO.

COLUMBUS, OHIO, December 15, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—The articles of incorporation of The United States Postal Fire Insurance Company of Cincinnati, Ohio, are herewith returned with my certificate of approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

872.

APPROVAL, BONDS OF FRANKLIN TOWNSHIP RURAL SCHOOL DISTRICT IN THE SUM OF $1,500.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 15, 1919.

873.

APPROVAL, BONDS OF HOCKING COUNTY IN THE SUM OF $31,389.62.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 15, 1919.

874.

APPROVAL, DEFICIENCY BONDS OF GALION CITY SCHOOL DISTRICT IN THE SUM OF $32,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 15, 1919.

875.

APPROVAL, BONDS OF THE VILLAGE OF ST. CLAIRSVILLE IN THE SUM OF $65,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 15, 1919.

876.

APPROVAL, BONDS OF THE VILLAGE OF NORTHFIELD, SUMMIT COUNTY, OHIO, IN THE SUM OF $2,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 15, 1919.

877.

APPROVAL, BOND ISSUE, LISBON VILLAGE SCHOOL DISTRICT IN THE SUM OF $4,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 15, 1919.

878.

APPROVAL, NINE LEASES, LAND AND WATER HOLDINGS OF THE STATE.

COLUMBUS, OHIO, December 17, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 2, 1919, in which you enclose, among others, the folowing leases, in triplicate, for my approval:

Land Leases.	*Valuation.*
To C. E. Wheeler, Orchard Island, Ohio, for dock landing and yard purposes, the water front and state land that lies along the westerly side of lot No. 137, Indian Lake, Ohio--	$200 00
To I. M. Foster, A. A. Wolfe and Chas. R. Kirch of Athens, Ohio, for cottage residence and dock landing purposes two pieces of state land and the water front containing in all 17,555 square feet in the S. E. quarter of section 28, Town. 17, Range 18, at Buckeye Lake, Fairfield county, Ohio------	1,100 00
To S. H. Beadle, Newark, Ohio, for building and other business purposes, a portion of the abandoned North Fork Feeder to the Ohio canal in the city of Newark, Licking County, Ohio-	600 00
To the City of Troy, Ohio, for driveway and railroad switch, a portion of the berme embankment of the Miami and Erie canal that lies between Market and Walnut streets, Troy, Ohio ----------	667 00
To W. Schulenberg, New Bremen, Ohio, for business purposes, a portion of the Miami and Erie canal land in the village of New Bremen, Auglaize County, Ohio----------	400 00

Water Leases.	*Annual Rental.*
To St. Mary's Steam Laundry, for use steam boiler and washing machinery. Inserting a one inch pipe in Miami and Erie canal near lock No. 13, Loramie Summit, Ohio----------	24 00
To The Massillon Electric and Gas Co., Massillon, Ohio, for use of water for condensation and industrial purposes inserting a 15 inch pipe in Ohio and Erie canal at Massillon, Ohio----	1,200 00
To The American Straw Board Co., Tippecanoe City, Ohio, for use of water for steam inserting a 6 inch pipe in Miami and Erie canal at Tippecanoe City, Ohio----------	864 00
To The American Agricultural Chemical Company, of Cincinnati, Ohio, for use of water for wash tower inserting a 3 inch pipe in the Miami and Erie canal at St. Bernard, Ohio----------	216 00

I have carefully examined said leases, find them correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,

JOHN G. PRICE,

Attorney-General.

879.

APPROVAL, BOND ISSUE, VILLAGE OF LISBON IN THE SUM OF $14,450.00.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 18, 1919.

880.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN CHAMPAIGN AND WYANDOT COUNTIES.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, December 18, 1919.

881.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENT IN LORAIN COUNTY, OHIO.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, December 20, 1919.

882.

APPROVAL, DEFICIENCY BONDS, CITY OF WELLSTON, IN THE SUM OF $5,344.08.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 22, 1919.

883.

APPROVAL, LEASE TO CANAL LANDS, AKRON, OHIO, TO THE STAR PLANING MILL COMPANY.

COLUMBUS, OHIO, December 22, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 22, in which you enclose lease, in triplicate, for my approval, as follows:

	Valuation.
To The Star Planing Mill Company, canal lands in the city of Akron, Ohio	$14,400 00

I have carefully examined said lease, find it correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

It is noted that the above lease is to a corporation, namely, The Star Planing Mill Company. This lease is not accompanied by the usual certificate of authority on the part of corporation officers to execute. However, I do not regard this as at all vital so far as the interests of the state are concerned, and am only calling your attention to it so that the lease may be completed in accordance with your usual practice.

Respectfully,
JOHN G. PRICE,
Attorney-General.

884.

CORPORATIONS—PAR VALUE OF SHARES OF CAPITAL STOCK MAY BE INCREASED OR REDUCED UNDER SECTION 8719 G. C. BY INCREASING OR DECREASING NUMBER OF SHARES INTO WHICH CAPITAL STOCK DIVIDED, PROVIDED AUTHORIZED CAPITAL STOCK IS NOT INCREASED OR DIMINISHED—PAR VALUE OF SHARES MAY BE REDUCED UNDER SECTION 8700 G. C.

The par value of the shares of capital stock of corporations organized under the general corporation laws of this state, may be increased or reduced in the exercise of the power conferred upon such corporations by section 8719 G. C. to amend their articles of incorporation so as to increase or decrease the number of shares into which their capital stock is divided, provided the authorized capital stock of the companies is not increased or diminished thereby; and the par value of shares may also be reduced under section 8700 G. C. governing the reduction of capital stock.

COLUMBUS, OHIO, December 23, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date inquiring whether a domestic corporation has authority under section 8719 G. C. to change the par value of its shares by amending its articles of incorporation, was duly received.

The statute referred to, so far as pertinent to your inquiry, provides that a

corporation organized under the general corporation laws of this state may amend its articles of incorporation:

> "So as to increase or decrease the number of shares into which its capital stock is divided; to provide for preferred stock, or dispense with unissued preferred stock; to change unissued common stock to preferred stock, within the limits permitted by law; to change unissued preferred stock to common stock; to add any or all of the provisions permitted by sections 8668 and 8669 of the General Code, or to make new provisions of such nature with respect to newly authorized preferred stock; or to amend or eliminate such provisions as to unissued preferred stock; or to add to the articles anything omitted from, or which lawfully might have been provided for originally, or to take out of the articles any unnecessary provisions or provisions which might lawfully have been omitted from them originally. But the authorized capital stock of a corporation shall not be increased or diminished by such amendment."

The general rule is that a corporation cannot increase or reduce the amount of its capital stock, or the number or par value of its shares, without warrant of statutory authority (2 Clark & Marshall, Corps. pp. 1272 et seq., and 1302; 1 Cook, Corps. sections 281, 290; Cook, Stock & Stockholders, section 290; Beach, Corps. section 468; 5 Fletcher, Corps. section 3473), and then only in the mode and subject to the limitations or restrictions prescribed by the statute which confers the authority (5 Fletcher, Corps., sections 3460, 3471).

The authority conferred upon corporations by section 8719 G. C. to increase or decrease the number of shares into which its capital stock is divided, subject to the limitation or restriction that the company's authorized capital stock shall not be increased or diminished thereby, warrants the company in either increasing the number of shares of capital stock and making a corresponding reduction in their par value (as where the number of shares is doubled and the par value of each share is reduced one-half), or in reducing the number of its shares and making a corresponding increase in their par value (as where the number of shares is decreased one-half and the par value of each share doubled). In neither case would there be an increase or reduction in the amount of the company's authorized capital stock. Indeed, the only way in which the power to increase or decrease the number of shares could be exercised, without effecting an increase or reduction in authorized capital stock, would be to either increase or reduce the number of shares and change the par value of the shares to such an amount which, when multiplied by the total number of new shares, would produce a result equal to the amount of the company's authorized capital stock. Any other method of exercising the power would result in either increasing or decreasing the company's authorized capital stock—a result which the statute expressly forbids.

In the event it is desired to increase or reduce the amount of authorized capital stock, companies subject to the general corporation laws must proceed under sections 8698 and 8700 G. C.—the former governing the increase, and the latter the reduction. Of course, if the original articles of incorporation do not provide for preferred stock, and it is desired to increase the authorized capital stock by issuing preferred stock, the company must, in addition thereto, also amend its articles so as to provide for the new class of stock. See section 8698, fifth paragraph.

In 1911-12 Annual Report of Attorney-General, Vol. I, p. 126, it was held that a domestic corporation was not authorized by section 8719 G. C. to change the par value of its shares, but since that opinion was rendered the statute has been amended so as to empower the company to increase or decrease the number of

shares into which its capital stock is divided, provided the authorized capital stock is not increased or diminished thereby. As already pointed out, the only way in which the number of shares into which the company's capital stock is divided can be increased or diminished without increasing or diminishing its authorized capital stock, would be to either increase the number of shares and make a reduction in their par value, or reduce the number of shares and make an increase in their par value.

The only other general statute authorizing a change in the par value of shares is section 8700 G. C., which provides that a corporation may reduce the amount of its capital stock and the nominal value of its shares. The change is effected, not by amending the articles under section 8719 G. C., but by the board of directors acting with the written consent of the persons in whose names a majority of the shares stand on the books of the company. The object to be effected by section 8700 G .C. is a reduction in capital stock, whereas section 8719 G. C. expressly prohibits such a change being made by amendment.

You are therefore advised that the par value of the shares of corporations organized under the general corporation laws of this state may be increased or reduced in the exercise of the power conferred upon such corporations by section 8719 G. C. to amend their articles of incorporation so as to increase or decrease the number of shares into which their capital stock is divided, provided the authorized capital stock of the companies is not increased or diminished thereby, and also that the par value of shares may be reduced under section 8700 G. C. governing the reduction of capital stock.

Respectfully,
JOHN G. PRICE,
Attorney-General.

APPROVAL, SIX LAND AND WATER LEASES, PROPERTY OF STATE OF OHIO.

COLUMBUS, OHIO, December 24, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 12, 1919, in which you enclose the following leases, in triplicate, for my approval:

Land Leases.	*Valuation.*
To The Toledo, Bowling Green & Southern Traction Company, railway crossing over the Maumee side cut, in Maumee City	$666 66
Henry Fischer, land at Loramie reservoir for agricultural purposes	466 66
Frank DeLong, canal land at Circleville, Ohio	200 00
Mrs. Ben Smith, berme bank of canal at Middletown, Ohio	300 00
Water Leases.	
The Delphos Water Works, 1½ inch pipe at lock 23, M. & E. canal	$54 00
The Richardson Paper Company, Lockland, Ohio, 10 inch pipe for fire protection only	100 00

I have carefully examined said leases, find them correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

886.

ROADS AND HIGHWAYS—ASSESSMENTS UNDER SECTIONS 6922 AND 1214 G. C. MAY BE PAID IN INSTALLMENTS ONLY AND NOT AS LUMP SUM UNLESS INTEREST INCLUDED—ASSESSMENTS UNDER SECTION 1214 G. C. NOT TO BE MADE BEFORE BONDS ISSUED UNDER SECTION 1223 G. C.—WORK MUST BE COMPLETED.

1. *The road improvement assessments mentioned in sections* 6922 *and* 1214 *G. C. may be paid in installments only and not as a lump sum, unless the tender of payment in lump includes interest on the assessments in full from date of issue to date of maturity of bonds issued in anticipation of such assessments, rate of interest to be the same as that named in the bonds.*

2. *The assessment referred to in section* 1214 *G. C. is not to be made before bonds are issued under section* 1223 *G. C., but is to be made upon completion of the work and apportionment of the cost by the state highway commissioner as directed by section* 1211 *G. C.* (*Opinion of Attorney-General of date July* 3, 1916, *Opinions of Attorney-General* 1916, *p.* 1141, *not followed.*)

COLUMBUS, OHIO, December 24, 1919.

HON. BENTON G. HAY, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication submitting for opinion two inquiries, the first of which is as follows:

> "What, if any, provision, is there for the payment of cash by the property owner whose lands are assessed by the county commissioners for the improvement of a county road or an inter-county highway? Old section 6924 made such provision for the improvement of a county road, but this is repealed. My opinion is that there is no authority for the property owner to pay cash when bonds are issued."

It is assumed that your inquiry relates to assessments on account of improvements made by county commissioners as authorized by sections 6906 to 6955-2, as well as to assessments on account of state aid improvements made under the provisions of section 1178 to 1231-11.

So far as concern improvements of the class first named, it is to be noted that there appeared as part of the so-called Cass act (106 O. L. 574), section 6924, since repealed, reading as follows:

> "The county commissioners shall fix a time within which such assessments may be paid in cash, and they shall give notice by publication once a week for two consecutive weeks in a newspaper published and of general circulation in said county, if there be any such paper published in said county, but if there be no such paper published in said county then in a newspaper having general circulation in said county, of the time within which such assessment may be paid."

The repeal of said section 6924 as of June 28, 1917 (107 O. L. 69), leaves the county commissioners without any express statutory authority for accepting payment in cash of assessments made in connection with improvements authorized by said sections 6906 to 6955-2. However, it might well be urged as a practical proposition that if the assessments made in connection with improvements so authorized must be made and levied against affected lands before bonds may be issued

under section 6929 in anticipation of such assessments and in anticipation of the taxes provided for by sections 6926 and 6927, then there would be no objection to provision by the commissioners for a period of time before bonds are issued during which said assessments might be paid in cash, and a *pro tanto* reduction made in the amount of the bond issue. It therefore becomes necessary to inquire whether in fact the assessment must be made and levied before bonds in anticipation thereof may lawfully be issued under section 6929.

In this connection it is proper to refer to an opinion of this department of date of July 3, 1916, appearing in Opinions of Attorney-General for that year at page 1141. The following is taken from said opinion:

> "If any part of the cost and expense of the improvement is to be specially assessed upon benefited real estate, the further steps provided by sections 6922 to 6924, G. C., inclusive, should be taken before bonds are issued. That is to say, the surveyor should make his estimated assessment and file the same in the office of the county commissioners, notice that the estimated assessment has been made and is on file and that objections will be heard at a certain time should be given, the assessment should be approved and confirmed either as originally made or as modified by the commissioners and the persons specially assessed should be given an opportunity to pay their assessments in cash. When all the above requirements have been complied with, the county commissioners will be authorized to issue and sell the bonds of the county, if in their judgment it is deemed necessary, in the aggregate amount necessary to pay the estimated cost and expenses of the improvement. If any of the cost and expense of the improvement has been specially assessed and any part of the special assessments has been paid in cash, then, of course, it will not, under any circumstances, be necessary to sell bonds in anticipation of the collection of the special assessments already paid. Answering your question specifically, I advise you that the steps above outlined are jurisdictional to the authority of the county commissioners to issue bonds under section 6929 G. C."

It is to be observed in connection with the opinion just quoted from that at the time of its rendition said section 6924, as above quoted, was in full force and effect. This fact may have had much to do with the conclusion reached in said opinion that the making and levying of the assessment was jurisdictional to the authority of the county commissioners to issue bonds under section 6929 G. C.; although it is to be said, on the other hand, that county commissioners were not as a matter of law under the necessity of issuing bonds to produce funds with which to undertake the improvement, since the improvement might have been paid for directly out of tax funds, and for that reason, the legislature may have intended section 6924 for those cases only in which the improvement should be paid for out of tax funds rather than with the proceeds of bonds. It is also worthy of note that the attorneys who were acting on behalf of a prospective purchaser of the bonds whose proposed issue gave rise to the opinion in question, did not express the view that there was a necessity for the making of the assessment before bonds were issued—in fact, these attorneys seem to have been of the very opposite belief (see p. 1143 of opinion).

At all events, a careful study of the statutes as they now exist, in connection with the opinion referred to, fails to reveal any real ground for the conclusion that the making and levying of assessments is a condition precedent to the authority of the commissioners to issue bonds. In that connection, you are referred to an opinion of this department (No. 887) of even date herewith, directed to Hon.

P. A. Taylor, prosecuting attorney, Eaton, Ohio, a copy of which is enclosed. That opinion does not pass upon the question now being considered; but the discussion therein points clearly to the conclusion that the issue of bonds rather than the making of the assessment comes first in point of time.

In addition to the matters mentioned in said last named opinion, mention should be made of certain language appearing in section 6922 G. C. That section as amended 107 O. L. 100, reads as follows:

> "As soon as all questions of compensation and damages have been determined, the county surveyor shall make, upon actual view, an estimated assessment upon the real estate to be charged therewith of such part of the compensation, damages, costs and expenses of said improvement as is to be specially assessed. Such estimated assessment shall be according to the benefits which will result to such real estate. In making such estimated assessment the surveyor may take into consideration any previous special assessments made upon such real estate for road improvements. The schedule of such estimated assessment shall be filed in the office of the county commissioners for the inspection of the persons interested. Before adopting the estimated assessment so made and reported, the commissioners shall publish once each week for two consecutive weeks in some newspaper published and of general circulation in the county, if there be any such paper published in the county, but if there be no such paper published in said county then in a newspaper having general circulation in said county, notice that such estimated assessment has been made, and that the same is on file in the office of the county commissioners, and the date when objections, if any, will be heard to such assessment. If any owner of property affected thereby desires to make objections, he may file his objections to said assessments in writing with the county commissioners before the time for said hearing. If any objections are filed the county commissioners shall hear the same and act as an equalizing board, and they may change said assessments if, in their opinion, any change is necessary to make the same just and equitable, and such commissioners shall approve and confirm said assessments as reported by the surveyor or modified by them. Such assessments, when so approved and confirmed, shall be a lien on the land chargeable therewith."

Upon first impression, it might be thought that the opening sentence of said section implies that the next step to be taken after the passage of the resolution to proceed with the improvement as referred to in section 6917 is the making of the assessment; and that such an implication carries the further implication that all proceedings relative to the making of the assessment must be complete before the bonds are issued. Any such argument, however, is wholly without foundation, not only for the reasons given in said opinion of even date herewith, but also for the further reason that there is absolutely nothing in the terms of section 6929 which indicates that the resolution of the commissioners for the issue of bonds may not be passed immediately after the passage of the resolution provided for in section 6917. In other words, even on the assumption that by reason of the provisions of section 6922 the matter of assessment proceedings must be begun immediately upon the passage of the resolution provided for in section 6917 and carried on without interruption until the assessments are approved and confirmed as provided in the last sentence of section 6922, there is no provision in section 6929 which prevents the proceedings respecting the issue of bonds from being begun and carried on contemporaneously with the proceedings respecting the making of the assessment.

It is often found that the history of legislation is helpful in arriving at the meaning of a statute whose terms are of doubtful import. This aid to statutory construction may not be invoked with any particular force in construing sections 6922 and 6929 as they now exist, for the reason that prior to the passage of the Cass act a number of different systems of county road improvement had been in use. However, a passing reference to certain statutes in force on January 1, 1912, may not be amiss.

Sections 6903 to 6914 as in force at that date, provided for road improvement by county commissioners upon petition of abutting owners. Section 6904 of said series provided for an assessment either upon the foot frontage or benefit plan, and sections 6907 to 6912 provide for notice, equalization and confirmation of the assessment. Then follows section 6912-1 which reads as follows:

> "After so certifying said assessment to the auditor of the county, the commissioners may, in anticipation of the collection of all moneys from all sources required to be raised for said improvement, whether by assessment, taxation, or by agreement with the township trustees or village council, borrow a sum of money sufficient to pay the entire estimated cost and expense of the improvement, and may issue and sell negotiable notes or bonds of the county, bearing a rate of interest not to exceed five per cent per annum. For the purpose of paying their respective shares of the principal and interest on the notes or bonds authorized to be sold, the county commissioners and township trustees may levy a tax upon all the taxable property of the county or township in addition to all other taxes authorized by law of not to exceed two mills in any one year until said notes or bonds and interest are paid."

Another series of statutes in existence at the date named were sections 6926 to 6956 G. C. providing for the improvement of "stone and gravel roads" upon petition of property owners. That series of sections also contained provision for an assessment upon adjoining property, and this assessment, according to the terms of section 6937 might be made "either before the improvement is commenced, or after it is completed." Bonds were authorized by section 6949 in an amount necessary to pay the cost and expense of the improvement.

Still another series of sections in force at that date providing for improvement of roads by county commissioners, were sections 6956-1 to 6956-15. Included in that series of sections were provisions for the making of an assessment against adjoining real estate. By the provisions of section 6956-12 the assessment was not to be made until the improvement had been completed. Bonds were authorized by section 6956-15, the first sentence of which reads as follows:

> "The county commissioners, in anticipation of the collection of said taxes and assessments, and whenever, in their judgment, it is necessary or desirable, are hereby authorized to sell the bonds of any such county in which such improvement is to be or has been constructed to any amount not exceeding in the aggregate the amount necessary to pay the respective shares of the county, township or townships, and the land owners whose lands in such county are benefited by such improvement."

It is to be noted from these three sets of statutes that in the case of the first of them positive provision was made that bonds should not be issued until the assessment had been completed; in the case of the second of them, bonds might be issued before the assessment was made, since by the terms of section 6937 the assessment might be made either before the improvement was commenced or after

it was completed, and naturally, if the assessment were made after the work were completed, the money represented by the assessment could in many instances be made available only by the issuance of bonds, and bonds would therefore have to be issued before either the work was done or the assessment was made; and in the case of the third of them, the assessment could only be made when the work were completed (section 6956-12), and thence the authority in section 6956-15 for the issue of bonds necessarily meant that the bonds would in many cases be issued before the assessment was made, in order to provide funds for the work. It is thus seen from a comparison of the three sets of statutes that in the instance where the legislature intended the assessment to be made before bonds were issued, it said so in plain terms (section 6912-1); whereas, in the remaining two instances where bonds might be issued before the assessment was made, the fact that bonds might be issued at that stage of the proceedings appears from necessary implication rather than by express words. There is a strong similarity between the terms of said former section 6956-15 and present section 6929; and as has already been pointed out, the authority to issue bonds as provided for in section 6956-15 very plainly included the power to issue them before the assessments were made.

To say the least, the terminology of the former legislation just noted gives no grounds of objection to the conclusions herein stated relative to the construction of sections 6922 and 6929.

From what has been said, it follows that the opinion first above mentioned is not adhered to in so far as it may conflict with the view herein expressed that bonds may be issued under section 6929 prior to the making of the assessment named in section 6922.

The views above expressed do not furnish a complete answer to your first question, for the reason that nothing has so far been said indicating that the commissioners may not at their option make the assessment before the bonds are issued. It therefore remains to dispose of the question whether any such option lies with the commissioners.

Section 6922 has already been quoted. That section in effect, provides that such part of the "compensation, damages, costs and expenses" of the improvement as in accordance with one of the several plans named in section 6919 is to be borne by the property owners, shall be specially assessed by the method outlined in section 6922. Said section 6919 in setting forth the several plans covering division of cost, nowhere indicates that the shares are to be apportioned on the basis of an estimated cost. The whole import of the section is that the actual cost and not the estimated cost is to be used as the basis of division. Hence, if the first sentence of section 6922 is taken literally, it is inconsistent with the provisions of section 6919, for the reason that the actual cost and expenses of the improvement are not known "as soon as all questions of compensation and damages have been determined," and cannot be known until the improvemet work is completed. This inconsistency becomes the more evident when it is borne in mind that there is absolutely no provision of statute for an adjustment of such assessments once they have been made and confirmed—in other words, if the sum total of the part of the cost of an improvement to be specially assessed turns out to be more or less than as shown by the original estimates of the surveyor, and an assessment is made on the original estimates of the surveyor, then there is no authority of statute which provides for a lien for any greater amount than as determined by the assessment made on the estimated cost, and on the other hand, there is no provision whereby the county can return to the property owner any sum of money if his assessment turns out to be less whan based on actual cost than when based on estimated cost.

As the view has already been expressed herein that the assessments named in section 6922 need not be made before bonds are issued, it would seem that the inconsistency between sections 6919 and the first sentence in section 6922 when

read literally becomes immaterial to the practical working of the statutes. In other words, since the making of the assessment named in section 6922 at a particular time, is not jurisdictional to the issue of bonds, the mere matter of time at which the assessment is made must yield to and be governed by the broad intent of section 6919 that the actual cost be used as the basis of the assessment. It is certainly in line with just and reasonable practice that a property owner be required, in the absence of express statutory provision to the contrary, to pay his assessment only on the basis of actual cost, and not on the basis of an estimate which may be greatly in excess of actual cost; and furthermore, it is hardly consistent with good business that the county be placed by mere implication in the position either of rebating sums of money or collecting sums of money consequent upon a difference between an estimated cost and an actual cost. In short, it is to be presumed that the legislature intended that there be but one assessment, and that such assessment have reference to actual cost rather than mere estimates.

This view of the situation solves any seeming difficulties that may appear by reason of the inconsistency mentioned. When the work is done the surveyor is then in position to make an assessment of the part of the cost to be borne by the property owners. He makes up an assessment in estimated form in the sense that he calculates what share each affected tract of real estate is to bear as compared with the percentage of the actual cost borne by the assessed realty as a whole. Such estimate of the share of each property owner is then filed in the form of a schedule with the commissioners, who give notice of its filing, etc. In brief, the estimated assessment made by the surveyor is not made upon the basis of an estimated cost; but it is an estimated assessment made upon actual cost, and the purpose of the estimated assessment is merely to afford a means for the giving of notice and the equalizing of the assessment before its final confirmation and adjustment by the county commissioners.

The views above expressed necessarily lead to the conclusion that no method is open to the county commissioners whereby they may accept assessments in cash without interest. The assessments may be made only after the bonds are issued and the work done, and they must bear interest from the date of and at the same rate as the bonds (section 6923).

The conclusion just expressed in connection with assessments named in section 6922 is equally applicable to assessments named in section 1214. The latter section is part of the series 1178 to 1231-11 providing for state aid improvements, and owing to the similarity of the two sets of statutes the same general principles respecting assessments are applicable as much to the one set of statutes as to the other.

Your second question is:

> "Must the apportionment as provided in section 1214 be made before the bonds are issued?"

In a general way, the discussion herein as to the assessments mentioned in section 6922 is applicable to assessments under section 1214, and furnishes a negative answer to your second question. It may be added that section 1214 and related statutes contain no language similar to that of the opening sentence of section 6922; hence there is even less ground for supposing that bonds mentioned in section 1223 may not be issued until after the assessment is first made as directed in section 1214, than there is for supposing that an issue of bonds under section 6929 must await the making and levying of the assessment described in section 6922. Clearly, the assessment proceedings provided for by section 1214 are to be had only after completion of the improvement and apportionment of cost thereof the state highway commissioner as directed by section 1211.

It is perhaps proper to make mention here of an opinion of this department (No. 126) dated March 15, 1919, and directed to Hon. Lloyd S. Leech, prosecuting attorney, Coshocton, Ohio. The particular inquiry to which said opinion related was the construction to be placed upon the word "tentative" as used in section 1214, that is, whether the word referred to a percentage assessment or to a concrete assessment in dollars and cents. The conclusion expressed in the opinion was:

> "The words 'tentative apportionment' as used in section 1214 G. C. contemplate the setting forth in dollars and cents of the amount proposed to be assessed against each tract within the zone or district determined upon for assessment purposes."

Said opinion did not involve the question of the proper time of making the assessment, and there is nothing in the opinion indicating directly or indirectly an expression of view as to the time at which the assessment should be made.

Specific answer to your questions is therefore as follows:

1. The road improvement assessment mentioned in sections 6922 and 1214 G. C. may be paid in installments only and not as a lump sum, unless the tender of payment in lump includes interest on the assessments in full from date of issue to date of maturity of bonds issued in anticipation of such assessments, rate of interest to be the same as that named in the bonds.

2. The assessment referred to in section 1214 G. C. is not to be made before bonds are issued under section 1223 G. C., but is to be made upon completion of the work and apportionment of the cost by the state highway commissioner as directed by section 1211 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

887.

ROADS AND HIGHWAYS—COUNTY COMMISSIONERS MAY ISSUE BONDS UNDER SECTION 6929 G. C. FOR SPECIFIC IMPROVEMENT WITHOUT HAVING MADE LEVY UNDER SECTION 6926 G. C.

The county commissioners may issue bonds under section 6929 G. C. for a specific improvement, but not otherwise, without having made as yet any levy for the county road improvement fund under section 6926 G. C. or its supplementary sections. In issuing such bonds, however, the commissioners must, by resolution, bind themselves and their successors to make the anticipated levies to the extent necessary for interest and sinking fund purposes in connection with the bonds and to make the underlying levy spoken of in section 6929 for the purpose of guaranteeing the collection of the township taxes and special assessments anticipated. It then becomes incumbent upon the commissioners and their successors to raise by taxation or otherwise a sufficient amount during the years covered by the bonds to meet the interest and sinking fund charges thereon. This duty may be enforced by mandamus.

COLUMBUS, OHIO, December 24, 1919.

HON. P. A. SAYLOR, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—I have your letter of recent date advising that at the November

election in Preble county the electors approved a proposition to levy to the extent of one mill for a period of two years for a purpose which you do not state. Inasmuch, however, as you speak of the issuance of bonds and refer to the levy as an "extra levy," it is assumed that the reference is to action under sections 6926-1 et seq. of the General Code, and that the effect of the vote of the electors is to exempt the levy provided by section 6926 for a county road improvement fund from all the limitations of the law relating to tax levies.

Please find enclosed herewith copy of an opinion to the Tax Commission of Ohio in which the legal possibility of extending such levy on the tax duplicate for the year 1919-20 is considered. It is pointed out in that opinion that with the co-operation of the various officials concerned it is possible to do this.

However, in your case the tax collecting officials have chosen to proceed without reference to the fact that the proposition to exempt the levy was pending and have not withheld the duplicate to ascertain the will of the electors. On the contrary, the duplicate was delivered, as you state, on October 1st and some tax collections have already been made. Meanwhile all the tax receipts have been made out and it would be very inconvenient to attempt to alter the situation at this time.

In the absence of any affirmative action on the part of the commissioners or the Tax Commission of Ohio, it is the opinion of this department that the collection of taxes should proceed without attempting to disturb the levies as made. The previous opinion, copy of which is enclosed herewith, is not out of harmony with this conclusion inasmuch as the topic of discussion therein was the authority of the various officers to place the levy on the current duplicate, and the consequence of their failure to exercise such authority was not considered.

It is also presumed from your letter that the proposition submitted to the electors was not specific in the naming of the years in which the levy should be made. In other words, it is supposed that your statement "a period of two years" reflects the exact proposition that was submitted to the electors and that no particular years were mentioned. That being the case, the favorable vote of the electors affords authority to the commissioners to make the levy outside of the limitations during the next two years, viz.: 1920-21 and 1921-22.

All this you apparently assume, and inquire whether or not bonds can now be issued in anticipation of the levy and collection to be made in future under this authority. As you state your question, even with the assumptions above made it can be shortly answered by the statement that no authority to borrow money in anticipation of the yield of a special tax levy of the kind referred to, or any other kind, without reference to some specific purpose, such as road improvement, exists. That is to say, assuming that the levy in question is a road levy under section 6926 G. C. exempted from tax limitations by reason of the favorable vote of the electors under sections 6926-1 to 6926-3 inclusive of the General Code, the county commissioners may not issue bonds in anticipation of the levy and collection thereof without having some specific road improvement in mind and limiting the amount of the issue to the estimated cost of the improvement, in which event the anticipation of the taxes under the sections named would extend only to the county's share of the total cost and expense of the improvement. The only authority which exists in the premises is that conferred by section 6929 G. C., which provides as follows:

> "The county commissioners in anticipation of the collection of such taxes and assessments may, whenever in their judgment it is deemed necessary, sell the bonds of said county in the aggregate amount necessary to pay the estimated cost and expenses of such improvement. * * *"

From this section it is apparent that a specific improvement must be in mind and that the borrowing power is limited by reference to the estimated cost of the improvement itself.

No other statute authorizes the anticipation of such levies in any way. It would therefore follow that if your question be interpreted in the broad manner just suggested a negative answer would have to be returned thereto.

It may be supposed, however, that your commissioners have under advisement the making of certain specific improvements, and desire to know whether or not they may proceed with these improvements and issue bonds therefor in anticipation, in whole or in part, of the levy in question.

In answering this question I shall make one further assumption—not because it is necessary to do so but in order to put the case which may exist in the strongest light. This assumption is that the commissioners of Preble county did not levy any tax under section 6926 on the duplicate for the year 1919-20, so that the levy outside the limitations which they are now authorized to make is the only levy for such purpose which is in existence or in contemplation.

Referring again to section 6929 G. C. and to that part of it which has been previously quoted, it will be observed that it speaks of the anticipation of the "collection of such taxes and assessments". The word "levy" is not used. It might be argued from this omission that the taxes and assessments to be anticipated must be levied and in process of collection before the power to issue bonds exists. This argument is very plausible but it overlooks certain very important considerations.

In the first place, we must bear in mind that although by force of sections 6926-1 to 6926-3, inclusive, authority may be acquired by the commissioners to make certain exempt levies for a particular period of years, yet the result is no more than this, and the favorable vote of the electors does not in and of itself automatically make the levy for the number of years referred to. This is made clear if in no other way by the express provision of section 6926-3, which is to the following effect:

> "If a majority of the electors * * * vote in favor of such levy * * * *it shall be lawful to levy taxes* within such county at a rate not to exceed such increased rate for and during the period provided for in such resolution."

In other words, the vote of the electors does not make the levy, but merely makes it lawful for somebody else, i. e., the commissioners, to levy outside of certain limitations.

Nor is there anything in these sections to indicate that such authority is to be exercised once and for all by a single act effective through the period of years covered by the vote of the electors. More language than has been used in the provision last quoted will be necessary to convey this meaning. The presumption is to the contrary, for under the general scheme of taxing machinery which obtains in this state and is embodied in numerous sections which need not be quoted, particularly in the Smith one per cent law so-called, sections 5649-1 to 5649-6 inclusive of the General Code, the act of levying taxes is an annual affair. In this respect taxes differ from special assessments, which are levied once and for all and must then be placed upon the duplicates of the years during which they are to be collected. Taxes are levied each year at the proper time by the levying authorities.

But the argument just made is not the only one which may be brought to the support of the conclusion which has been expressed. Section 6926-1 G. C. refers to the proposition submitted to the electors in the following terms:

> "The question of exempting from all tax limitations the levy of two

mills provided by section 6926 of the General Code for the purpose of paying the county's proportion of the * * * cost and expense of constructing * * * county roads, or the question of so exempting a part of such levy * * *."

As pointed out in the previous opinion, copy of which is enclosed herewith, this language has the effect of making the act of levying referable not to sections 6926-1 et seq. of the General Code, but to section 6926, the result of the election under sections 6926-1 et seq. being merely to give to such action a legal effect which it would not otherwise have.

This being so, the real levying authority after all is found in section 6926, which provides merely

"* * * For the purpose of providing by taxation a fund for the payment of the county's proportion of the costs and expenses of constructing * * * roads under the provisions of this chapter, the county commissioners are hereby authorized to levy annually a tax not exceeding two mills upon each dollar of the taxable property of said county."

What is the purpose of this levy? It is to provide a "fund"—not to meet any specific proportion of the cost and expense of constructing, improving or repairing a particular road. It is very clear that this levy may be made whether particular road improvements are in contemplation or not, and is not limited in amount by the cost and expense of any such improvement. Conversely, there is nothing to indicate that the making of such levy in any given year is a prerequisite to lawful action to improve a given road, provided the necessary money can be lawfully secured by the issuance of bonds.

But in addition to these considerations it is very clear that this levy under section 6926, the purpose of which is merely to provide a fund, is, like tax levies generally are under the policy of this state to which reference has been made, an annual affair. The commissioners are to determine, each year for themselves, how much they will levy within the limits specified in the section for the purpose of keeping up, as it were, the county road improvement fund. Then they are at liberty to draw upon this fund for the purpose of making particular county road improvements under the provisions of the chapter, which include, of course, contribution of the county's share of the road improvement to be paid for in part by township levies or by assessments.

From all these considerations it is very clear that the whole amount to be raised by taxation under section 6926 or section 6926-1 and succeeding sections for the purpose of a particular road improvement is not to be "levied" in any sense in order to make such fund the lawful subject of "anticipation" under section 6929 G. C. Any other interpretation would be absurd. It would require that the entire cost and expense of a particular road be levied for in a single year, and would limit the office and function of the issuance of bonds to securing the money only a few months in advance of its accrual to the treasury through the processes of tax collection. This cannot be the correct result because the bonds under section 6929 may run for "not more than ten years". Clearly, therefore, levies to be made during a period not in excess of ten years may lawfully be anticipated by the issuance of bonds.

This last provision of itself evidences a very clear index to the correct interpretation of the sections involved when coupled up with the statement that levies under section 6926 are to be made annually.

But there is still another consideration which reflects upon the meaning of the clause of section 6929 now under consideration. The bonds may be issued not only

in anticipation of the county taxes, but also in anticipation of the township taxes, to which the arguments already made would apply. Moreover, they are issued not only in anticipation of taxes but also in anticipation of assessments. Here, as previously intimated, even stronger reasons exist for arguing that the omission of the word "levy" is significant because assessments are not levied annually but are estimated and apportioned once for all, and when certified must go on the duplicate during the years within which they are to run without further action by the levying authorities. Hence the arguments already adduced would not apply to the anticipation of assessments in and of itself except in so far as the conclusions previously reached with respect to the anticipation of taxes might reflect upon the true meaning of the sentence under examination in respect of the anticipation of assessments.

Attention may be called to section 6923 G. C., which provides as follows:

> "All assessments, with interest accrued thereon, made under the provisions of this chapter, shall be placed by the auditor upon a special duplicate to be collected as other taxes, and the principal shall be payable in not more than twenty semi-annual installments extending over a period of not more than ten years, as determined by the county commissioners. In the event that bonds are issued to pay the compensation, damages, costs and expenses incident to such improvement, the principal sum of such assessments shall be payable in such number of equal semi-annual installments as will provide a fund for the redemption of the bonds so issued, and such assessments shall bear interest from the date of and at the same rate as the bonds, and the interest shall be collected in like manner as the principal of such assessments."

The latter part of this section would be impossible of application if the levy of the assessments preceded the issuance of the bonds; for it is very clear therefrom that the maturities and interest rate of the bonds condition the installments and the interest rate of the assessment, rather than that the installments and interest rate of the assessments condition the maturities and interest rate of the bonds. It is very clear therefore that an assessment cannot at least be finally and unalterably made until after the bonds are issued. While no opinion is expressed herein as to whether or not the "estimated assessment" spoken of in section 6922 G. C. must be adopted by the commissioners before the bonds are issued, it is very clear that no final levy can be made until the bonds are issued.

The conclusion which follows is that, despite the omission in the first sentence of section 6929 of the word "levy", the section is to be read as if it were actually there. In other words, though what may be "anticipated" under section 6929 according to its literal terms is merely the "*collection* of such taxes and assessments", so that it is arguable that "such taxes and assessments" must be in process of collection before the bonds may be issued; yet this cannot be the result for the reasons indicated and the word "collection" must be interpreted practically as if it were "levy and collection".

Thus far consideration has not been given to Article XII, section 11 of the constitution, which provides as follows:

> "No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

As construed in *Link* vs. *Karb*, 89 O. S., 326, this section does not require that a levy be actually made for interest and sinking fund purposes before the bonds are issued. On the contrary, the doctrine of that case as expressed in the third branch of the syllabus thereof is as follows:

> "This provision of the Constitution does not require that at the time the issue of bonds is authorized there shall then be levied any specified amount or any specific rate, but it does require that provision shall then be made for an annual levy during the term of the bonds in an amount sufficient to pay the interest on the bonds proposed to be issued and to provide for their final redemption at maturity, which levy must be made annually in pursuance of the provisions of the original ordinance or resolution requiring the same. The amount necessary to be levied for the purposes specified is to be determined by the taxing officials at the time the levy is made."

Applying this doctrine to section 6929 and related sections, the following considerations appear:

(1 The "anticipation" of the county levy to pay the county's share is of itself an appropriation of a ratable proportion of that levy for the purpose of meeting such proportion of the interest and sinking fund requirements of the issue as should be borne by that levy. When so much of the tax has been thus "anticipated" the duty exists on the part of the county commissioners in making their levies under sections 6926 and 6926-3 G. C. to levy and apportion a sufficient amount for this purpose. This duty can be enforced by mandamus once the bonds are so issued. In the resolution under which the bonds are issued this duty should be specifically declared in order to comply with Article XII, section 11 of the Constitution as interpreted in the case cited.

(2) The remainder of the interest and sinking fund charges of the bonds is to be met by the township taxes and assessments. There may conceivably be a failure on the part of such township taxes and assessments to meet their respective shares of the interest and sinking fund requirements of the bonds. To provide for this contingency the commissioners must in their resolution "provide for the levying of a tax upon all the taxable property of the county to cover any deficiencies in the payment or collection of any special assessments or township taxes anticipated by such bonds." (Section 6929.) By this double method of providing for the interest and sinking fund levies and guaranteeing the raising of a sufficient amount by taxation in each year for such purposes, the commissioners will have declared in their resolution that the bonds are ultimate general tax obligations of the county and that the full faith and credit of the county as a whole is back of them; they will also by their resolution have made it mandatory upon themselves and their successors in office, during each of the years within which the bonds are to run, to provide fully by the means thus designated for the interest and sinking fund charges on the bonds. This mandate is just as effective whether the first levy of taxes has been made at the time the bonds are issued or not. Thus the Constitution will have been complied with to the extent at least that it is possible to comply with it by following the statute. No opinion is, of course, invited or expressed upon the constitutionality of the section, which does not seem to be questioned.

The word "annually" in the Constitution must have reference to the years in which, after the bonds are issued, it would be possible according to the laws regulating the levy of taxes, to make such levies. If bonds are issued at any time shortly after the levies for a given year are made up it is obvious that the first yield of taxes which may be levied for interest and sinking fund purposes on ac-

count of such bonds may not accrue until after the expiration of the first twelve months following the date of the issuance of the bonds. It does not therefore follow that bonds may not be issued at such times. If the tax is duly levied at the first opportunity provision for the first accruing interest may be made by applying general sinking fund balances where they exist or by temporary transfer of general fund balances to the sinking fund in anticipation of the yield of the sinking fund levy. At all events the Constitution will have been complied with when the interest and sinking fund levies are made at the first opportunity, and they are sufficient in amount to meet the charges that will have accrued or will accrue during the period to be provided for by such initial levy.

The full answer to your question therefore is as follows:

The county commissioners may issue bonds under section 6929 G. C. for a specific improvement, but not otherwise, without having made as yet any levy for the county road improvement fund under section 6926 G. C. or its supplementary sections. In issuing such bonds, however, the commissioners must, by resolution, bind themselves and their successors to make the anticipated levies to the extent necessary for interest and sinking fund purposes in connection with the bonds and to make the underlying levy spoken of in section 6929 for the purpose of guaranteeing the collection of the township taxes and special assessments anticipated. It then becomes incumbent upon the commissioners and their successors to raise by taxation or otherwise a sufficient amount during the years covered by the bonds to meet the interest and sinking fund charges thereon. This duty may be enforced by mandamus.

Respectfully,
JOHN G. PRICE,
Attorney-General.

888.

ELECTIONS—BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS HAS AUTHORITY TO INSTALL TELEPHONE IN OFFICE OF SUCH BOARD—TELEPHONE OPERATOR CANNOT BE EMPLOYED.

A board of deputy state supervisors of elections in a county has authority to install a telephone in the office of such board when in its judgment it should be done, but where the state supervisor of elections has requested that returns be telephoned to him for his tabulation on the night of election, the employment of an operator to operate such a telephone for the board of deputy state supervisors is unauthorized.

COLUMBUS, OHIO, December 24, 1919.

HON. HARRY S. CORE, *Prosecuting Attorney, Ottawa, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion upon the following statement of facts:

> "At the request of the county commissioners I am sending you bill of A. A. U., Dr., against the county, for services of and installing telephone by the board of deputy state supervisors of elections of Putnam county, and calling your attention to section 4821 of the General Code which provides that all necessary expenses of the deputy state super-

visors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor.

The facts are that some time prior to the November election, 1918, the board of deputy state supervisors of this county received a communication from the state supervisors of election, requesting them to keep their office open and give returns until the county had been reported to the state headquarters.

In order to do this it seems to be necessary to install in the room occupied by the deputy state supervisors a telephone, for which you will find a charge of $2.00, also it was necessary to employ a night operator at Kalida, Ohio, which charge you will find on the bill, making total of $6.00. This bill coming to the county commissioners, the question was raised whether it was a proper and necessary expense of the board of deputy state supervisors, or not, and at their request I am referring same to you."

Section 4821 of the General Code reads as follows:

"All proper and necessary expenses of the board of deputy state supervisors shall be paid from the county treasury as other county expenses, and the county commissioners shall make the necessary levy to provide therefor. * * *."

You state that prior to the general state election in November, 1918, the state supervisor of elections requested the board of deputy state supervisors of Putnam county to keep their office open on the night of the election and furnish returns to said supervisor of elections until all the precincts in the county had been reported in his office, presumably by telephone, and further say that it was necessary to install in the room occupied by the deputy state supervisors a telephone for which installation was made a charge of $2.00, and it was also necessary to employ a night operator at Kalida, in your county, for which there was made a charge of $4.00, making a total of $6.00 for these services directed by the state supervisor of elections to be furnished to him on the night in question.

The state supervisor of elections is the official head of the election machinery in the state and has charge of the details in securing prompt election returns. The request not only of the deputy state supervisor of Putnam county, but of all the counties in the state, is more than likely made with the view of good administration of his offices and following the criticism that was general in Ohio that election returns from the counties of the state were always very much delayed.

It would seem that the use of a telephone in the room occupied by the deputy board of supervisors in a county during the election period, is necessary, for there would be times when election officers throughout the hours of election day, when on duty in their respective precincts, might have occasion to call up the office of the county election board to decide some question of law, or a question of supplies, or a number of other contingencies that might arise during the course of the election, and the office of the county board of elections should be in a position on election day that it might be reached by telphone by its various election judges and clerks on duty throughout the county.

It is found that the question of the installation of a telephone in the office of the board of deputy state supervisors of elections in a county has never been passed upon by the Attorney-General, but it could well be considered as being one of the legitimate furnishings of an office that was active, and the board of deputy state supervisors of election has authority to say whether such telephone should

be installed, either temporarily or permanently, there being in Ohio a number of the offices of the board of deputy state supervisors of elections which have need for a telephone throughout the year. Hence there could be little objection to a temporary installation of a telephone. The employment of a night operator, at some point in your county, is not a legitimate expense that should be allowed, for nowhere in the law is authority found for the hiring of such employe at the expense of the county.

It is conclusive that the General Assembly contemplated that the secretary of state shall have authority to communicate with those persons with whom he is conducting the business of the state. Such communication can be either by letter, telephone or telegraph, for in each annual appropriation bill passed by the General Assembly there is the item

"Maintenance * * * F. 7 communication, $——— * * *."

A great deal of the work of the secretary of state is that pertaining to elections, for the secretary of state is by law the state supervisor of elections and each year the General Assembly has appropriated a sufficient amount to care for such communication, thus indicating that the necessary communication with election officers is contemplated. It must follow, then, that if the secretary of state is annually given an ample appropriation for "communication" purposes, there must necessarily be some one at the other end of the line to answer such communications and it is not to be presumed that the legislature contemplated that the board of deputy state supervisors and inspectors of elections in any county at election time should go out and hunt a telephone in order to communicate with their chief, that is, the secretary of state. Similarly, since such communication is countenanced by the General Assembly in its appropriation for the purposes of any communication in the office of the secretary of state, the latter official should be in a position to know where to call in order to get those officers with whom he desires to communicate in the issuance of orders and instructions.

Section 4787 G. C. reads as follows:

> "By virtue of his office the secretary of state shall be the state supervisor and inspector of elections and the state supervisor of elections, and, in addition to the duties now imposed upon him by law, he shall perform the duties of such offices as prescribed in this title."

In passing upon a question relative to the payment of "communication" by the secretary of state, the Attorney-General, in opinion 2132, issued December 29, 1916, and appearing in Volume II, Opinions of the Attorney-General for 1916, used the following language:

> "While I find no express statutory provision covering the exact situation revealed by your letter, yet it is apparent from an examination of the current appropriation measure that the legislature, in the passage of the same, had in mind the fact that the secretary of state would at times find it proper and even necessary to communicate with the several boards of deputy state supervisors and inspectors of elections and state supervisors of elections, and other persons performing duties under his supervision or having official relations with his office.
>
> Section 3 of House bill No. 701, 106 O. L., 666, being an act to make general appropriations, and said section being especially intended to cover expenditures during the year ending June 30, 1917, contains the following appropriations for the secretary of state:
>
> 'Maintenance * * * F7 communication, $400.00 * * *.'

In view of the general supervisory character of the duties of the secretary of state with reference to elections, as indicated by his title and by the several statutes relating to the subject of elections, to which statutes it is unnecessary to refer in this connection, it is my view that the secretary of state is authorized to expend all or any part of the appropriation referred to above for telegraph tolls in communicating with the several boards of deputy state supervisors and inspectors of elections and deputy state supervisors of elections upon any matter pertaining to the operation of the election machinery of the state which in his judgment it is proper to bring to their attention, and that he has such a measure of discretion as to the matters proper to be so communicated that his actions are not subject to review."

In the syllabus of the above opinion it was held:

"A charge for telegraph tolls incurred by the secretary of state in communicating with the several boards of deputy state supervisors and inspectors of elections and deputy state supervisors of elections is, under the facts as submitted, a legal charge against funds appropriated for the use of the secretary of state for communication purposes, the validity or invalidity of the order contained in said communication being immaterial."

There has been no legislation passed which would warrant a change in the view held by the Attorney-General in 1916. On the contrary the General Assembly, at each and every session, made an annual appropriation for "F7 communication" in various amounts recommended by the budget commissioner upon request of the secretary of state.

It is therefore the opinion of the Attorney-General that a board of deputy state supervisors of elections in a county has authority to install a telephone in the office of such board when in its judgment it should be done, but the employment of an operator to operate a telephone for the board of deputy state supervisors is unauthorized.

Respectfully,
JOHN G. PRICE,
Attorney-General.

889.

NURSE IN INDUSTRIAL PLANTS—MAY NOT LEGALLY RENDER MEDICAL SERVICES OR ADMINISTER DRUGS EXCEPT IN CASES OF EMERGENCY—SEE SECTION 1287 G. C.—CONSTRUCTION OF PHRASE "IN CASES OF EMERGENCY."

A nurse employed and paid by the owner of an industrial plant to render service and be in charge of a factory first aid station may not legally render medical services or administer drugs or medicines, except in cases of emergency, as provided in section 1287 G. C. Such term "in cases of emergency" does not, in the absence of other facts, include treatments consisting of medicines or drugs for

"colds, pleurisy pains, sunburns, dysentery and biliousness." To render such services legally, such nurse must also be duly licensed to practice medicine in Ohio.

COLUMBUS, OHIO, December 24, 1919.

DR. H. M. PLATTER, *Secretary, State Medical Board, Columbus, Ohio.*

DEAR DOCTOR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

> "I am directed by the state medical board to obtain from you an opinion upon the subject of services rendered by nurses employed in industrial plants. The questions at issue are fully set out in correspondence, copies of which you will find enclosed.
>
> The board desires to know whether such practice does not constitute a violation of the medical practice act. In short, is a nurse performing duties as outlined, permitted to do so or is she practicing medicine?"

The character of services rendered by the nurses referred to in your letter is best shown by the following quotation from the correspondence accompanying your request:

> "Such procedures as suturing cuts, removing foreign bodies from the eye under cocaine, routine treatment of burns and other more or less severe injuries, removing splinters even if some dissection is necessary—are being done by nurses in several factories.
>
> They also treat other conditions which are not caused by work in the factories, as treating injuries received out of the shop, eye and ear conditions, remove impacted cerumen, treat skin diseases and any other conditions reported to them by the employes. They even prescribe and supply medicines for employes to take at home."

By personal conference it is also learned that the services performed by the nurses, as above stated, are not performed in the presence or under the direction of a physician and that such nurses are compensated by the employer and not by the employes who are treated. What purports to be a record of treatments rendered by a nurse in charge of a factory first aid station is also enclosed with your request. This contains a report showing the number of previous treatments, the name of the patient, the illness or injury and the treatment rendered. Part of this record will be quoted, omitting the other parts of the report, but indicating the illness or injury and the treatment rendered, as follows:

> "Cold—Treatment: Magnesium sulphate, cold tablets, aspirin.
> Boil, right axilla—Treatment: Opened drainage.
> Pleurisy pains—Treatment: Aspirin.
> Sunburned leg while swimming—Treatment: Alcohol iodine.
> Headache—Treatment—Salts, aspirin.
> Dysentery—Treatment: Paregoric, lacto pepsin, bismuth.
> Biliousness—Treatment: Calomel."

Sections 1262 and 1295 G. C. (state medical board act), 1295-1, 1295-20 (trained nurses' act) and 12694 G. C. are pertinent to your inquiry.

Section 1286 defines the practice of medicine. This section, so far as it is pertinent, is as follows:

"A person shall be regarded as practicing medicine * * *, within the meaning of this chapter. * * * who examines or diagnosis for a fee or compensation of any kind, or prescribes, advises, recommends, administers or dispenses for a fee *or compensation of any kind, direct or indirect,* a drug or medicine, appliance, application, operation or treatment of whatever nature for the cure or relief of a wound * * *, injury, * * * or disease."

The first sentence of section 1287 is:

"Nothing in this chapter shall prohibit service in the case of emergency or domestic administration of family remedies."

The rest of the sentence contains other exceptions to section 1286, not pertinent to the question under consideration at present.

Section 12694 G. C. makes it an offense for any person to practice medicine without first obtaining a license so to do from the state medical board.

Sections 1295-1 to 1295-20, and sections 12715-1 and 12715-2 (106 O. L. 191), constitute the registered nurse's act. This act regulates and defines the practice of nursing as registered nurses only.

Section 1295-16 in part is:

"All persons shall be regarded as practicing nursing as registered nurses, within the meaning of this act, who use the words or letters 'R. N.,' 'Registered Nurse,' or any other title in connection with their names which in any way represent them as registered nurses, or who by any means accept employment by representing themselves as registered nurses."

This section does not define nursing generally, nor does it in any way qualify or affect section 1286 (supra), nor does it enlarge or further define in any manner the matter of emergency referred to in section 1287.

The comprehensive definition of the practice of medicine, as construed by the Supreme Court of this state in Marble vs. State, 72 O. S., 177, and other cases, certainly brings the treatments above quoted from the record of treatments submitted, within the term "practice of medicine," as defined in that section, and the person rendering such service must have a certificate from the state medical board before he or she may legally render such service for a "fee or compensation of any kind, direct or indirect," unless such services come within the purview of the first sentence of section 1287, in that the illness or injury for the cure or relief of which they were performed was an "emergency."

The fact that the compensation to the nurse for her services is not paid by the persons whose illness or injury is treated, but paid for by their employer, does not destroy the character of such compensation and it is deemed to be within the provisions of section 1286 (supra).

The legislature did not see fit to more closely define the term "emergency," and in the absence of other evidence or expression of the legislative intention, this term must receive its usual and ordinary meaning.

"Emergency" is defined in Standard dictionary to be:

"1. Sudden or unexpected occurrence or condition calling for immediate action; a perplexing or pressing combination of circumstances; sometimes, less properly, used in the sense of urgent need or exigency."

It must be observed that it would be impractical, if not impossible, to de-

fine a hard and fast rule as to emergencies which would be applicable in all cases, but so far as the present opinion is concerned, with the facts submitted, it may be stated that the term "emergency," as used in this section, would include such cases of sudden or unexpected illness or injury which call for immediate medical attention.

Without further facts, it would be impossible for this department to pass upon the emergency character of some of the treatments in the enclosed record of treatments, and no opinion is here expressed as to such, but those quoted above are sufficiently definite and complete as statements of fact that this department is of the opinion that in the absence of further facts evidencing emergency character of the illness or injury treated, service in such cases, consisting of examination or diagnosis, prescription, advice or administration of a drug or medicine or treatment for the cure of the illnesses or injuries therein described, for compensation, direct or indirect, are not services performed in cases of emergency, as described in section 1287, and that in connection with the other facts included in your statement, such services may be rendered only by or under the direct personal supervision of a person duly licensed to practice medicine in the state of Ohio.

Respectfully,

JOHN G. PRICE,

Attorney-General.

890.

TAXES AND TAXATION—FRANCHISE TAXES OF CORPORATIONS—SUBSCRIBED OR ISSUED AND OUTSTANDING STOCK FORM BASIS OF ASSESSMENT UNDER SECTION 5498 G. C. DURING MONTH OF MAY—WHERE CHANGES OCCUR DURING MONTH—LAST CONDITION OF STOCK TO BE REPORTED—WHEN REPORT MADE LATER, CONDITION AT END OF MONTH OF MAY REPORTED—HOW STOCK REDUCED—WHEN EFFECTIVE.

The subscribed or issued and outstanding stock of a corporation which forms the basis of the assessment of its franchise tax under section 5498 *G. C. is that which it has during the month of May preceding; where changes occur therein during that month the last condition of such subscribed or issued and outstanding capital stock may be reported. But even though a report is not made by the corporation within the time limited by section* 5495 *G. C., the report when made must exhibit the conditions as they existed at the end of said month of May.*

It seems that the issued and outstanding common stock of a corporation cannot be reduced in amount save by reducing the authorized capital stock in the manner prescribed by law; and that as against the state for the purpose of franchise taxation such reduction is not effective until a certificate of the action of the directors and stockholders is filed in the office of the Secretary of State.

COLUMBUS, OHIO, December 24, 1919.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge the receipt of your letter of recent date submitting the following questions:

> "The G. E. Conkey company filed its 1919 report as a domestic corporation for profit June 13, 1919. Upon the basis of the report the com-

mission, on the first Monday in July, determined the amount of the subscribed or issued and outstanding stock to be $138,960.

The attorneys for the company state that the capital stock was reduced July 1 to $1,000. The certificate of reduction was filed in the office of the secretary of state July 18. They now contend that the franchise fee should have been based upon the reduced amount. Should the fee have been based upon the subscribed or issued and outstanding stock as of May 31 or as of the first Monday in July? The fee upon the basis determined by the commission was paid to the treasurer of state under protest.

If the fee was erroneously assessed, by what process may the company obtain a refund of the excess payment?"

In the opinion of this department, the corporation tax in question was properly assessed by the tax commission, so that the second question submitted does not even arise.

It would seem to be unnecessary to decide the question as to whether or not the issued and outstanding capital stock as it was on the day when the tax commission acted constitutes the basis of the assessment. For from your statement of facts it appears that one of the steps required by statute to be taken in order to reduce the capital stock was not taken until after the assessment was made; that is to say, the certificate of reduction was filed in the office of the secretary of state on July 18, the commission's action having been taken on the first Monday in July, a prior date.

Section 8700 of the General Code deals with the reduction of authorized capital stock. It provides as follows:

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

As between the corporation and the state, it seems clear that action under this section is not complete until the required certificate has been filed. Corporations have no inherent or implied authority to increase or reduce their capital stock, especially where the laws of the state provide for such a thing as an authorized capital stock and undertake to prescribe the conditions upon which it may be altered. This is especially true where the reduction involves, or may involve, an alteration of the nominal or par value of the outstanding shares, as seems to be the case under section 8700 above quoted. See Cook on Corporations, sections 288-290, inclusive.

Without, therefore, expressing any opinion as to the effect of the action by the board of directors and stockholders with respect to the rights of the latter among themselves, it is at least very doubtful whether creditors dealing with the corporation after such action is taken but before the certificate of reduction is filed can be affected by such intra-corporate action; and, as above stated, it seems even clearer that the state in any relation it may sustain toward the corporation with respect to the condition of its capital stock is not affected by such action, but is only affected when the required certificate is filed.

If these observations are well taken, there is no theory upon which the corporation in question could escape franchise taxation on the basis of the issued and outstanding capital stock, as based upon the authorized capital stock appearing of record in the office of the secretary of state on the first Monday in July. For

it is not contended that the issued and outstanding capital stock was or could lawfully have been decreased in amount otherwise than by compliance with section 8700 in the reduction of the authorized capital stock. Corporations have no authority to retire shares of their common stock. Exceptional circumstances might exist leading to a reduction in the amount of the subscribed capital stock of the corporation through the defeat of conditional subscriptions and the like, but when once issued a share of common stock cannot be extinguished as against the state without complying with the section cited. This has been the uniform holding of this department.

No claim is made that what happened on July 1 was the retirement of preferred stock in conformity to law. This could hardly be the case inasmuch as the alleged reduction was from $138,960 par value to $1,000 par value. This difference could not have represented lawfully retired preferred stock.

But inasmuch as the question is discussed at some length in the correspondence submitted to me in connection with your request, and for the future guidance of the commission, it is deemed proper to discuss in this opinion also the question as to whether or not the basis of the assessment of the franchise tax is the subscribed or issued and outstanding capital stock as of the time when report is made or that in existence at the time the commission acts. It is conceded that it must be one or the other. The assessment is complete when the commission acts, and what follows is merely the collection of a lawfully assessed tax. Changes occurring between assessment and collection are therefore obviously not to be considered.

It is the opinion of this department that the condition of the capital stock as of the time when the annual report is made, or if such report is not made in time then as of the last date at which report should have been made if made in time, controls the assessment of the tax. The pertinent statutes are as follows:

> "*Section* 5495.—* * * annually * * * during the month of May, each corporation, * * * shall make a report * * * to the commission, * * *."
>
> "*Section* 5497.—Such report shall contain:
>
> * * * * * * * * * *
>
> 5. The amount of authorized capital stock and the par value of each share.
>
> 6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.
>
> * * * * * * * * * *
>
> 8. The change or changes, if any, in the above particulars, made since the last annual report."
>
> "*Section* 5498.—Upon the filing of the report, provided for in the last three preceding sections, the commission, *after finding such report to be correct,* shall, on the first Monday of July, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, the commission shall certify the amount so determined by it to the auditor of state, * * *."

Section 5504 may also have some slight bearing. It provides that between the two dates last mentioned in section 5498 the commission may review and correct its findings.

Section 5514 may also be considered. It directs the secretary of state to make monthly reports to the tax commission showing new corporations and increases or decreases of capital stock, among other information.

The sections as to foreign corporations are similar excepting that the com-

mission is expressly given the authority to have recourse to "any other facts coming to its knowledge bearing upon the question," in addition to the facts reported to it, in making its assessment.

The examination of sections might be extended to other sections relating to powers and duties of the tax commission in the assessment of excise taxes. A general examination of these sections would show that in all such instances the tax is to be based upon a state of affairs existing some time prior to the time when the commission is required to perform the function of assessment or apportionment of the tax.

It is true that the statute is not explicit upon the point under consideration, so that an ambiguity exists requiring interpretation. It cannot therefore be argued, however, that we must give to the statute an interpretation favorable to this particular taxpayer on the principle that statutes imposing a special burden are subject to strict construction; for if it is held that the latter of the two dates rather than the former is the proper one, such a holding will operate disadvantageously to corporations increasing their capital stock in the interim. If the principle last alluded to is permissible at all it should support a holding that the earlier date is to be preferred, because it is common knowledge that increases in capital stock occur with vastly greater frequency than decreases therein; so that the greater degree of benefit to corporations in general would accrue from the holding which has already been intimated.

Upon careful consideration it appears that the only argument which can be brought to the support of the contention that the date on which the tax commission is required to act is the date as of which it should ascertain facts respecting the capital stock of the corporation subject to the tax, is that this date is definite and specific, whereas the reporting time covers a whole month and is therefore indefinite. It is not an argument in support of this particular date that the tax may be regarded as a tax on the privilege of doing business for a year *in future*, as urged by counsel for the company. The reasoning of the cases cited, viz.: *Emmerman* vs. *Specialty Co.*, 14 Ohio Federal Dec., 289, and *First National Bank* vs. *Aultman, Miller & Co.*, 14 Ohio Federal Dec., 298, is not specially satisfactory on this point; but granting that point, we have as yet no light on the date of the commencement of the "ensuing year" referred to in those decisions. Indeed, the intimations that are found in these cases tend to support a conclusion that the earlier date is the proper one. Thus, in the opinion of Doyle, Referee, in the first case appears the following: (p. 290)

> "The fee * * * is a tax * * * required to be paid to the state for the privilege of exercising its corporate franchise for the year ensuing *after the filing of the annual report* within the month of September."

The same referee makes a similar statement as to domestic corporations in the second of the two cases cited.

The referee in these dicta was not speaking of the date as of which the assessment is made, but rather the year for which the tax is imposed, i. e., the "year" the enjoyment of the corporate franchises for which constitutes the theoretical basis for the incidence of the tax. In this connection it is pointed out that in State vs. Harris, 229 Fed., 892, this dictum of Referee Doyle was disapproved. The lower court in that case had held that the year in question was the current calendar year, instead of the "year ensuing after the filing of the annual report" as held by Referee Doyle. Warrington, C. J., of the circuit court of appeals, noting this diversity of federal judicial opinion, remarked in the case last cited (p. 895) that

"It is not necessary to determine which of these periods is the correct one * * * but we are disposed to believe Judge Clarke's conclusion is right."

This decision virtually overrules the two cases relied upon, without, however, furnishing us with any real light on the present question.

Coming back, then, to the thought that the date when the commission must act is at least specific, while that for the filing of the report is more or less indefinite, it nevertheless appears that there is express warrant in section 5498 for the conclusion which has been intimated. The thing which the commission is to do preliminary to its actual determination is to "find such report to be correct." This shows that the commission is acting on the basis of the report and not otherwise. In the case at hand it is not contended that the report was not correct, but rather that the facts had changed, from which it is to be inferred that inasmuch as the commission must act on a report if it has one before it, the right exists to file an amended report if the facts have changed between the filing of the original report and the first Monday in July. This right may be conceded by implication subject to the provisions of the statute relative to the time in which reports may be filed. Here we have it by section 5495 that the report shall be filed "during the month of May." Presumably if a corporation had on the first day of May filed a report and then later in the same month had made changes in its capital stock, it would be proper for it to file an amended report during the month of May, or even thereafter, setting forth any state of affairs that existed during the month of May. But there is no warrant in the statutes for exhibiting in a report any state of affairs other than that which existed during the month of May; nor is there any warrant in the statute for action on the part of the commission predicated upon any report other than the one filed in accordance with the statute.

These plain inferences shown by the language of sections 5495 and 5498 G. C. are supported by a consideration previously referred to, which is that throughout the scheme of administration embodied in the tax commission act generally, we find action by the commission based upon reports filed at an earlier date, and in some instances relating themselves to conditions existing as of the still earlier date than the date at which the report is filed. This is indeed a feature common to all taxation laws. Personal property is listed for taxation as of the day preceding the second Monday in April. The lists, however, need not be handed in to the county auditor or assessor until a later date. The old statute on this subject prescribed the third Monday of May as this date. The returns thus made are subject to revision for the purposes of assessment, and do not find place on the tax duplicate in the form of a final assessment until October. The tax so laid on property is for the purposes of an ensuing year. But save where modified by express provision of law, as in the case of the destruction of buildings between April and October, the assessment is not changed because personal property had in ownership or possession on the day preceding the second Monday of April has been lost or alienated before the final assessment is made or even before the taxpayer makes his return.

Indeed administrative convenience dictates a certain lapse of time between the date as of which the conditions upon which the apportionment of the tax depends and the taxation machinery is initiated, on the one hand, and the date on which the administrative action which constitutes the preliminary or final assessment is taken.

For all these reasons, then, it is the opinion of this department that the tax commission was right in determining the amount of the subscribed, issued and outstanding stock of the corporation in question to be that which was in existence during the month of May.

Respectfully,

JOHN G. PRICE,

Attorney-General.

891.

COUNTY BRIDGES—CONTRACTS COSTING LESS THAN $1,000—PLANS MUST BE SUBMITTED TO COUNTY COMMISSIONERS, COUNTY AUDITOR AND SURVEYOR AND APPROVED BY THEM.

Contracts for the construction, alteration or repair of county bridges, costing less than $1,000, cannot be made by the county commissioners unless the plans, specifications and estimates of the cost thereof have been submitted to the board of county commissioners, county auditor and surveyor and approved by them and filed in the auditor's office, nor can such contract be made for more than the estimated cost.

COLUMBUS, OHIO, December 24, 1919.

HON. WALTER B. MOORE, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

"I am writing you at this time asking your opinion upon the question submitted below:

Statement of Facts: On July 7, 1919, the commissioners of Monroe county, Ohio, instructed the county auditor to advertise for sale the contract to build what was known as the Trembly Run bridge. This appears upon their journal, under the above date. So far as the records show, the county surveyor was not ordered to prepare any plans and specifications or make any estimate for the same.

There is no further record in this case until August 4, 1919, when the county auditor was again instructed to advertise this bridge, and after that date, there was no entry upon the journal of any kind relating to the bridge until the commissioners began to allow claims as hereinafter set out.

It might be well to state here that said bridge was, in fact, advertised twice, and no bids were received on the day fixed for the same in either notice. The estimate on the bridge was in the neighborhood of $450.00.

The commissioners without any record, except as above stated, have attempted to build this bridge under what they call 'force account'.

An examination of the auditor's records this morning discloses that they have allowed bills to the amount of more than $1,250.00 in connection with this bridge and its construction.

I beg to submit the following questions upon the foregoing statement of facts:

(1) Can the county commissioners build a bridge costing more than $200.00 by 'force account'?

(2) If they can construct such a bridge by 'force account', are they permitted to expend more than the original estimate for its construction?

(3) If they can construct bridge by 'force account' would it be necessary for them to pass a resolution to proceed to build this bridge in that manner?

(4) Is the record above submitted sufficient to authorize them to build this bridge either by contract or by 'force account'?

(5) If this bridge could be built by 'force account', is it necessary that the county surveyor have direct supervision over its construction?

(6) Who has authority to employ the labor and furnish the material (that is, purchase it) for such bridge?

I would like very much to have your opinion as soon as possible upon the above questions, as there are some other bridges which are either in process of construction or in contemplation, under the same plan as the one referred to above, in this county, and I am sending you herewith my idea of this matter in letter enclosed."

The outstanding facts here are that judging from the record, no plans, specifications or estimates of this bridge were ordered or made, nor any action taken by the commissioners approving or adopting any such plans, specifications or estimates. It also appears that so far as the record shows, no contract to build the bridge was made by the commissioners except by what is referred to as "force account".

It is noted that you have some six questions stated, but if a negative answer is given to question No. 1, it would be unnecessary to further consider and decide the following questions.

Section 2343 of the chapter entitled "Building Regulations" provides that when it becomes necessary to erect, alter or repair a bridge, the commissioners shall cause full and accurate plans to be made, particularizing the details of such plans.

Sections 2344, 2345 and 2346 relate to contracts for the superstructure of bridges.

Section 2347 provides that the plans and specifications "shall be kept on file in the office of the auditor".

Section 2350 provides:

"If the plans, drawings, representations, bills of material and specifications of work and estimates of the cost thereof relate to the building; addition to, or alteration of an infirmary, they shall be submitted to the commissioners and infirmary directors. If approved by a majority of them, a copy thereof shall be deposited in the office of the auditor and kept for the inspection and use of parties interested."

Section 2353 defines the bridge contracts, in the letting of which advertisement for bids is not necessary. Under this section bridges, the cost of which does not exceed one thousand dollars, may be contracted for without advertisement.

Under section 2354 the commissioners may let at private contract without publication or notice, a contract for a bridge when its estimated cost does not exceed two hundred dollars.

Section 2358 prohibits the making of any contract for a bridge, additions thereto or repairs thereon, at a price in excess of the estimates "required to be made by the preceding sections." Your letter states that the records do not show the making, submission or approval of any plans, specifications or estimates for the bridge described in your letter, and as the commissioners speak by their records, it is inferred from this and your other statements that no such plans, specifications or estimates were in fact so made, submitted and approved. These sections were reviewed in the common pleas court of Ashland county in the case of State ex rel. vs. Ashland County Commissioners, 14 O. D., 563, the first and second paragraphs of the syllabus of that case being:

1. "The office of county commissioners is a creature of statute, and the incumbent thereof can exercise no power or do any act in his official capacity which will bind the county unless expressly authorized and done in the manner provided by statute; and when the statute conferring power directs what shall be done preliminary to the expenditure of public money,

these requirements, if mandatory, must be complied with or the contract is illegal.

2. The provisions of sections 795, 796, 797 and 798 Rev. Stat., requiring county commissioners, before contracting for the construction of bridges, to procure certain plans, determine the dimensions of the superstructure, advertise for bids and proposals, submit plans, specifications and estimates to the board of county commissioners, county auditor and surveyor, etc., is mandatory. Contracts made in disregard thereof are illegal and will be enjoined."

With reference to the necessity of the commissioners recording their transactions on their journal, the sixth paragraph of the syllabus would be pertinent. It is:

"Contracts made by county commissioners should appear on their journal, and also be entered into at the place where the law provides they shall transact public business, and not at the other contracting party's private office or hotel."

This was an action against the county commissioners in a case in which it was alleged that they were proceeding to award bridge contracts without such plans, as appears on page 571, as follows:

"They never submitted, as commissioners, any plans or specifications, bills of material or estimates, to the auditor or surveyor with the three commissioners for approval."

The effect of the section requiring the submission and adoption of plans and estimates, whether the cost of the bridge is such that it must be advertised or not, is also considered in this case at page 574, where the court observes:

"While the commissioners may let a contract when the estimated cost of the bridge and the substructure does not exceed $1,000, *the other requirements of the statutes cannot be omitted.*

This estimated cost must be passed upon by the auditor and the surveyor in conjunction with the commissioners, before the commissioners can enter into any contract whatsoever, and in no instance was there any estimated cost of the bridge and substructure, or either. * * * This (section 2358, prohibiting contracts in excess of estimates) applies to all contracts."

In the case of Buchanan Bridge Co. vs. Campbell et al., 60 O. S., 406, the syllabus is:

"A contract made by county commissioners for the purchase and erection of a bridge in violation or disregard of the statutes on that subject, is void, and no recovery can be had against the county for the value of such bridge. Courts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party."

In a statement of this case, pages 422 and 423, the court reviews the various sections relating to the duties of county commissioners in the matter of bridge contracts, saying of section 2358, then section 800 R. S., that it provides that no

contract for a bridge or bridge substructure, shall be made at a price in excess of the estimate so required to be made, and

> "To make a valid contract of sale by the bridge company to the county commissioners, and a valid contract of purchase of a bridge exceeding one thousand dollars by the commissioners, it is essential that the foregoing provisions of the statute should be substantially complied with."

On page 425, in the enumeration of the defects in the commissioners' proceedings and contract with the bridge company, it is stated:

> "No plans or specifications were ever made, approved or deposited with the auditor; * * *
>
> These omissions are fatal to the validity of the contract, and by force of the above cited sections of the statute, the contract is totally void and imposed no obligations on either party to it."

This department is not aware of any later decision reversing or modifying the rule laid down in these cases, and it is therefore the opinion of the Attorney-General that contracts for the construction, alteration or repair of county bridges, costing less than $1,000, cannot be made by the county commissioners unless the plans, specifications and estimates of the cost thereof have been submitted to the board of county commissioners, county auditor and surveyor and approved by them and filed in the auditor's office, nor can such contract be made for more than the estimated cost.

In view of the conclusion arrived at in the consideration of your first question, it is not deemed necessary to consider and answer the remaining questions in detail, as it is believed that the authorities above referred to contain an answer to all your questions.

Respectfully,
JOHN G. PRICE,
Attorney-General.

892.

BOARD OF EDUCATION—RURAL OR VILLAGE SCHOOL DISTRICT BOARD MAY SUSPEND ANY OR ALL SCHOOLS TEMPORARILY OR PERMANENTLY—BOARD TO DETERMINE WHAT CONSTITUTES SUFFICIENT CAUSE TO SUSPEND—CONTRACT OF TEACHERS TERMINATED BY LAW WHEN SCHOOL SUSPENDED.

1. *The board of education of any rural or village school district may suspend temporarily or permanently at any time any or all schools in such village or rural school district because of disadvantageous location or any other cause.*

2. *As to what constitutes sufficient cause to suspend temporarily or permanently a school in a village or rural school district, it is for the board of education of such district in its discretion to say.*

3. *Where a board of education has decided to suspend such school, either temporarily or permanently, and where such school is suspended during the school*

term, the contract of the teacher is thereby terminated by law, since such contract was made with knowledge of the provisions appearing in section 7730 G. C.

COLUMBUS, OHIO, December 24, 1919.

HON. A. HARMON HOLDERNESS, *Prosecuting Attorney, West Union, Ohio.*

DEAR SIR:—Acknowledgment is made of your request for an opinion upon the following statement of facts:

> "The board of education employed a teacher in a district where the normal attendance was fourteen. Some of the patrons wanted another teacher, so are transporting their children to a neighboring village at their own expense and paying their tuition, leaving the teacher in the district only two pupils.
>
> In another district a petition was submitted stating that there would be thirteen pupils in the district to attend school. As the enumeration showed the same a school was established there. Since that time a number of the patrons have moved away leaving the school only seven pupils.
>
> May these schools be abolished while the school term is going on? Whose duty is it to abolish them? If abolished is the teacher's contract terminated, or is the board of education still required to pay her salary for the remainder of the year?"

Attention is invited to section 7730 G. C. as amended 108 O. L., 708, effective September 22, 1919, which reads as follows:

> "The board of education of any rural or village school district may suspend temporarily or permanently any or all schools in such village or rural school district because of disadvantageous location or any other cause. Whenever the average daily attendance of any school in the school district for the preceding year has been below ten the county board of education shall direct the suspension and thereupon the board of education of the village or rural school district shall suspend such school. Whenever any school is suspended the board of education of the district shall provide for the transfer of the pupils residing within the territory of the suspended school to other schools. Upon such suspension the board of education of such village or rural district shall provide for the conveyance of all pupils of legal school age who reside in the territory of the suspended district and who live more than two miles from the school to which they have been assigned, to a public school in the rural or village district or to a public school in another district. Notice of such suspension shall be posted in five conspicuous places within such village or rural school district by the board of education within ten days after the resolution providing for such suspension is adopted. Wherever such suspension is had on the direction of the county board of education, then upon the direction of such county board, and in other cases upon the finding by the board of education ordering such suspension that such school ought to be re-established, such school shall be re-established. If at any time it appears that the average daily attendance of enrolled pupils residing within the territory of the suspended school as it was prior to such suspension is twelve or more then, upon a petition asking for re-establishment signed by a majority of the voters of the said territory, the board of education may re-establish such school."

Your statement of facts indicates that there are two school districts in which certain conditions obtain, in the first district there being but two pupils in attendance at the public school in that district although the normal attendance in such district was fourteen. You indicate this is due to the fact that the patrons desired another teacher and are transporting their children to a neighboring village at their own expense and paying their tuition. In the second district the enumeration showed that there would be thirteen pupils in the district to attend a school if established and this was followed by a petition from the patrons in the district, which resulted in the establishment of the school in that district. Since the establishment of the school, several of the patrons have moved away, leaving the school with only seven pupils, and your first question is whether either or both of these schools may be abolished while the school term is going on, there being two pupils in the one district and seven pupils in the other district.

It will be noted that section 7730 G. C. supra, says:

> "The board of education of any rural or village school district *may suspend temporarily or permanently* any or all schools in such village or rural school district because of disadvantageous location or *any other cause.*"

This is the opening sentence of the section and is one giving broad authority to boards of education in the use of their discretion. This language is followed by the remainder of the section providing that where the local board fails to act it is the duty of the county board to direct the suspension of such school provided that the average daily attendance in the school district for the preceding year was below ten. The language of the statute indicates that the county board of education has no direct authority to suspend a public school in a rural or a village district, but its authority is that it can direct the suspension and "thereupon the board of education of the village or rural school district shall suspend such school." This means that the initiative in suspending the school lies with the local board of education and the county board of education is not presumed to act unless the local board of education has failed to suspend a school where during the preceding year the average daily attendance was below ten. It will be noted that section 7730 says the board of education may "suspend temporarily or permanently" and it would thus appear that since the power to suspend temporarily is given, this must mean that the board of education has authority to suspend the school in question at any time, even during the term, as in the instance at hand. You indicate that in one of these districts there are but two pupils in the district and it was clearly not the intent of the legislature that a school should be maintained with a teacher when such school had but two pupils in the district, for if both were absent from the school on any particular day, the daily attendance for that day in that school presided over by a teacher would be nothing.

You also ask as to whose duty it is to abolish these schools, and if abolished are the contracts of the teachers terminated or is the board of education still required to pay the salaries of the teachers for the remainder of the year.

Attention is invited to opinion No. 1321, issued December 23, 1914, and appearing at page 1625, Vol. II, Annual Report of the Attorney-General for 1914, the syllabus of which reads in part as follows:

> "* * * If a township board of education entered into a contract with a teacher for teaching a subdistrict under its jurisdiction, and such subdistrict was abolished in accordance with section 7730, General Code, such act operated as a termination of the contract, provided such act occurred before the termination of the contract because of the lapse of time

such contract was to run. Likewise such contract would be terminated if the school should be suspended in accordance with the mandatory provisions of section 7730, General Code, as amended, 104 O. L., 139. An expenditure of money upon such contract, after being so terminated under the provisions contained in said section as the same existed both prior to its amendment and since its amendment above referred to would be illegal. * * *"

After citing the cases of Railroad Co. vs. Defiance, 52 O. S., 262, and Smith vs. Parsons, 1 Ohio Report, 239, in arriving at the above conclusion the Attorney-General further said:

"The contract with the teacher referred to in your first question was made at a time when the provision contained in said section 7730 was in effect, and it would follow that such provision impliedly became a part of the contract. * * * The teacher so employed entered into the contract under the statutory limitation in section 7730 * * * that the school by which such teacher was so employed to teach might be suspended by the board of education, * * * Therefore, in answer to your first question, it is my opinion that if a township board of education entered into a contract with a teacher for teaching a subdistrict under its jurisdiction and said subdistrict was abolished by such board under and in accordance with the provisions contained in section 7730, *then this act operated as a termination of the contract,* provided such act occurred before the termination of such contract."

While section 7730 G. C. has been amended practically by all of the recent legislatures, the present legislature having amended it twice, it is noticed that the sentence which provides that boards of education may suspend temporarily or permanently the schools in their respective jurisdictions has remained the same throughout all of the various sections that have been amended. Thus, at one time section 7730 provided as follows:

"The board of education of any township school district may suspend the schools in any or all subdistricts in the township district."

This was amended in 104 Ohio Laws so that the sentence read as follows:

"The board of education of any rural or village school district may suspend any or all schools in such village or rural school district."

This sentence has now been further amended giving boards much more latitude in this matter, so that it reads at present as follows:

"The board of education of any rural or village school district may suspend temporarily or permanently any or all schools in such village or rural school district because of disadvantageous location or any other cause."

It thus will be seen that the words "temporarily or permanently" have been added to the statute as well as specifying that such suspension can be made for "disadvantageous location or any other cause," and it therefore seems that it is within the discretion of the board of education to say what schools, if any, are to be suspended and whether such suspension is to be temporary or permanent.

Upon the question of the discretion permitted to boards of education the Ohio Supreme Court has spoken recently in the case of Brannon et al. vs. Board of Education, 99 O. S. 369, appearing in the Ohio Law Bulletin for September 29, 1919, in the following language:

> "A court has no authority to control the discretion vested in a board of education by the statutes of this state, or to substitute its judgment for the judgment of such board, upon any question *it is authorized by law to determine.* Nor will a court restrain such board of education from carrying into effect its determination of any question within its jurisdiction, except for an abuse of discretion or for fraud or collusion on the part of such board in the exercise of its statutory authority."

In conclusion it is therefore the opinion of the Attorney-General:

(1) The board of education of any rural or village school district may suspend temporarily or permanently at any time any or all schools in such village or rural school district because of disadvantageous location or any other cause.

(2) As to what constitutes sufficient cause to suspend temporarily or permanently a school in a village or rural school district, it is for the board of education of such district in its discretion to say.

(3) Where a board of education has decided to suspend such school, either temporarily or permanently, and where such school is suspended during the school term, the contract of the teacher is thereby terminated by law, since such contract was made with knowledge of the provisions appearing in section 7730 G. C.

Very respectfully,

JOHN G. PRICE,

Attorney-General.

893.

SCHOOL SUSPENDED BY COUNTY BOARD OF EDUCATION—HOW IT CAN BE RE-ESTABLISHED BY LOCAL BOARD—AVERAGE DAILY ATTENDANCE OF ENROLLED PUPILS RESIDING WITHIN TERRITORY OF SUSPENDED SCHOOL—REASONABLE TERMS FOR COMPUTING AVERAGE DAILY ATTENDANCE.

1. *When a school is suspended on the direction of the county board of education, as provided in section 7730 G. C., such school can be re-established by the local board of education and without further direction by the county board of education, when it has been made to appear to the local board that the average daily attendance of enrolled pupils residing within the territory of the suspended school, as it was prior to such suspension, is twelve or more pupils attending any other school.*

2. *The average daily attendance of enrolled pupils mentioned in section 7730 G. C. refers to the attendance computed at some time during the current school year.*

3. *A public school that has been suspended by a board of education must be re-established upon proper petition at any time within the school year following such suspension, when it has been made to appear to the local board that there is an average daily attendance of enrolled pupils, residing within the territory of the suspended school, of twelve or more.*

4. *Under the provisions of section 7730 G. C. there is no time mentioned dur-*

ing which the average daily attendance should be computed, but such computation to establish the average daily attendance mentioned in section 7730 G. C. should be a reasonable time, which it is suggested should be not less than one week nor necessarily more than one school month.

5. *In establishing the average daily attendance in other schools of those pupils who reside in the territory of a district whose school has been suspended, the daily attendance records of pupils in the separate schools should be assembled for the same specific days and the average daily attendance computed therefrom for a reasonable time.*

COLUMBUS, OHIO, December 24, 1919.

HON. FRANK B. PEARSON, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your request for an opinion upon five questions growing out of section 7730 G. C., as amended by the present general assembly and effective September 22, 1919. Your first question is:

> "When a school is suspended on the direction of the county board of education as provided in section 7730, H. B. 348, of the eighty-third general assembly, can such school be re-established, except upon the direction of the county board of education, if it appears that the average daily attendance of enrolled pupils residing within the territory of the suspended school, as it was prior to such suspension, is twelve or more?"

Your first question is whether the county board of education has anything to do with the re-establishment of a district school when it appears that the average daily attendance of enrolled pupils residing within the territory of the suspended school, as it was prior to such suspension, is twelve or more, even though such school was, in the first instance, suspended in its operation by direction of the county board of education. The law which is pertinent on this question reads as follows:

> "* * * Wherever such suspension is had on the direction of the county board of education, then upon the direction of such county board, and in other cases upon the finding by the board of education ordering such suspension that such school ought to be re-established, such school shall be re-established. If at any time it appears that the average daily attendance of enrolled pupils residing within the territory of the suspended school as it was prior to such suspension is twelve or more then, upon a petition asking for re-establishment signed by a majority of the voters of the said territory, the board of education may re-establish such school." (Section 7730, 108 O. L., 704.)

In analyzing section 7730 G. C., from which the above is taken, it may be said that the county board of education has no authority to actually close the district school, for the section says that the county board of education "shall direct the suspension and thereupon the board of education of the village or rural school district shall suspend such school". The county board of education can direct the suspension of a district school in only one instance in any year, that is, "whenever the average daily attendance of any school in the school district *for the preceding year* has been below ten", and naturally this would take place during the summer months following the end of the school term of the preceding year, and before arrangements were completed for the operation of the district schools for the new school year beginning on the following September 1st. This, then, is the only instance

in which the county board of education can cause the suspension of a district school, and this rests entirely on the figures of the preceding year, which figures must show that the average daily attendance for that year has been below ten. On the other hand the authority of the local board of education in any rural or village school district is much broader in that it has authority to suspend such schools temporarily or permanently at any time, the opening sentence of section 7730 G. C. reading as follows:

> "The board of education of any rural or village school district may suspend temporarily or permanently any or all schools in such village or rural school district because of disadvantageous location *or any other cause.*"

The powers of the county board of education, under section 7730, are limited, as above stated, to the one instance in which, following the figures of the preceding year, the county board of education can direct the suspension of a district school whose average daily attendance has fallen below ten.

Your first question then is, where the county board of education has exercised the authority of directing the suspension of a district school, can such school be re-established except upon the direction of the same county board of education? That is to say, is it possible for circumstances to arise that will bring about the re-establishment of a school, whose suspension has been directed by the county board of education except by the direction of the county board of education that such school shall be re-established? The answer to this question appears to be in the closing sentence of section 7730, the saving clause which reserves to the people of the district their rights of having a school conducted in that district. This closing language, it will be noted, reads as follows:

> *"If at any time* it appears that the *average daily attendance* of enrolled pupils residing within the territory of the suspended school as it was prior to such suspension is twelve or more, then, upon a petition asking for re-establishment signed by a majority of the voters of the said territory, the board of education may re-establish such school."

The question here is, what was meant by the general assembly in using the words "the board of education may re-establish such school" while speaking of the territory contiguous to the suspended school, as it was prior to such suspension. It is believed that the general assembly meant the local board of education of the village or rural school district as having the power to re-establish any school where the voters in their own territory signed a petition requesting that such school be re-established and then clearly showing that the average daily attendance of enrolled pupils was twelve or more.

An examination of the statutes bearing upon the county board of education shows that where the county board of education is meant, the general assembly uses the words "county board of education" and not the general words "the board of education". Under the decision of the Ohio supreme court, in the case of State ex rel. Myers vs. Board of Education, decided February 13, 1917, and appearing at page 367, 95 O. S. Reports, the court held that the word "may", appearing at the end of section 7730 G. C., must be construed as meaning the word "shall", the syllabus of such decision being as follows:

> "1. The literal meaning of the words 'may' and 'shall' is not always conclusive in the construction of statutes in which they are employed; and one shall be regarded as having the meaning of the other when that

is required to give effect to other language found in the statute, or to carry out the purpose of the legislature as it may appear from a general view of the statute under consideration.

2. Where power is granted by statute to public officers by permissive language, coupled with a provision for invoking the exercise of such power by a petition of voters, or of any part of the public, such language will be regarded as peremptory unless a contrary construction is manifestly required.

3. Under the proviso contained in section 7730, General Code, as amended May 27, 1915 (106 O. L., 398), the board of education of any rural or village district, which has theretofore suspended any or all schools in such village or school district, is required to re-establish such suspended school on a petition therefor, signed by a majority of the voters of the suspended district, at any time the school enrollment of the said suspended district shows twelve or more pupils of lawful school age."

In arriving at this decision the court cited State vs. Budd, 65 O. S., p. 5, Supervisors vs. United States ex rel, 71 U. S., 446, and Columbus, Springfield and Cincinnati Railroad Company vs. Mowatt, 35 O. S., 287. In the latter case this very important language occurs:

"Where authority is conferred to perform an act which the public interest demands, *may* is generally regarded as imperative."

The Myers decision was rendered directly upon section 7730, regarding the suspension of a district school, and applies to section 7730 as it reads today, except that the present general assembly has changed the language of section 7730 to provide that instead of basing the right to have the school re-established at any time on the school enrollment of the said suspended district, under the present law, it must be the average daily attendance of the school enrollment in the territory, which, it will be noted, is quite a different thing from mere enrollment. Thus the school enrollment in a district might be fifteen pupils and the average daily attendance might be less than twelve.

Your second question reads as follows:

"Section 7730 of the same law provides: 'If at any time it appears that the average daily attendance of enrolled pupils residing within the territory of the suspended school as it was prior to such suspension is twelve or more, then upon a petition asking for re-establishment signed by a majority of the voters of the said territory, the board of education may re-establish such school.'

Does the 'average daily attendance' of enrolled pupils refer to the attendance the year previous to such suspension or to the year following such suspension?"

The words "average daily attendance" of enrolled pupils occurring in section 7730 G. C. refers to the average daily attendance at the time it is proposed to re-establish a suspended school, that is, the current year and not the preceding year, for the section says, "if at any time it appears", and again, the word "is" occurs rather than the word "was", which latter word would be used if it was intended that such average daily attendance should be computed on the preceding year.

Your third question reads as follows:

"Must the enrolled pupils residing within the territory of the sus-

pended school be permitted to attend another school or other schools for the entire term in order that the average daily attendance for the year may be determined or may it be re-established at any time within the school year following such suspension that it appears that there is an average daily attendance of enrolled pupils residing within the territory of the suspended school?"

The answer to this question is that the suspended school may be re-established at any time within the school year following such suspension, whenever it appears there is an average daily attendance of enrolled pupils residing within the territory of the suspended school, amounting in number to twelve or more pupils, and it is not required that such attendance should be computed for an entire term in order to discover the "average daily attendance at any time".

Your fourth question reads:

"If the school may be re-established at any time within the following year, for how long a time must the average daily attendance be computed?"

Section 7730 does not say for how long a time the average daily attendance is to be computed in order that the patrons residing in such district where the school has been suspended can again have for their children the educational facilities which they had before. Nowhere in the section is there found any language as to how long the pupils would have to attend school in order to clearly establish what is meant by the average daily attendance, as herein used. This section says "at any time" and this could mean a short period as well as a long period, and rather seems to mean a time when a discovery is made that the average daily attendance *is* twelve or more, in which event, from that time, the right to have a public school in such district would be clearly established and all that would remain would be for the voters in the territory of the old district to prepare a proper petition, signed by a majority of them, to be presented to the local board of education; and if the average daily attendance at any time appears to be twelve or more, the local board of education shall re-establish the school under the decision in the case of State ex rel Myers vs. Board of Education, 95 O. S., 367. As long as the law does not say for how long such average daily attendance shall be computed, except in the words "if at any time it appears", it is left for the local board of education to use its sound discretion as to whether an average daily attendance has been established for a reasonable time. Under the section no person seems to have the authority to say how long this period shall be in arriving at the average daily attendance, but the average grades of school children are frequently computed on only five subjects, and the average daily attendance for a school week could be the sum total of the attendance for five school days in that week, divided by the five days, and thus we would have the average daily attendance established at that time, and the law says "at any time".

Your last question reads:

"Since these pupils may be enrolled in several schools, how must the daily attendance be determined?"

It is but natural that if a school has been suspended in a district, the pupils would be enrolled in several adjacent schools, since section 7730 G. C. says that the board of education of the district shall provide for the transfer to other schools and for their proper conveyance where they live more than two miles from the school to which they have been assigned. The only method of arriving at the daily attendance and thus getting at the average daily attendance of a certain group of

pupils who attended different schools, would be to take their individual record of attendance in the school where they attended and assemble such record with the records of other pupils for exactly the same specific days and the average thus attained from the records of the several schools which are available through the district superintendents would establish the average daily attendance of the group of pupils in question.

It is believed that not more than a school month of twenty days is necessary in order to establish the average daily attendance "at any time", as contemplated by the legislature, and a period less than one week would hardly be a fair criterion for establishing such average daily attendance. The petitioners must show conclusively to the board of education that such average daily attendance is twelve or more in a material way, that is, that twelve or more pupils are, on the average, attending some adjacent school while having their school residence in the old district, and such time of computaton should be a reasonable time in order that the board of education would not re-establish the school and employ a teacher therefor where there was some question as to whether the average daily attendance would keep up in number to the requirement contemplated in section 7730 G. C. The section says that "if at any time it appears", and this means that it must be apparent to any one who might question it that the territory of the suspended school, as it was prior to such suspension, contains a number of pupils whose average daily attendance in the schools to which they have been assigned is twelve or more.

It is therefore the opinion of the Attorney-General that:

1. When a school is suspended on the direction of the county board of education, as provided in section 7730 G. C., such school can be re-established by the local board of education and without further direction by the county board of education, when it has been made to appear to the local board that the average daily attendance of enrolled pupils residing within the territory of the suspended school, as it was prior to such suspension, is twelve or more pupils attending any other school.

2. The average daily attendance of enrolled pupils mentioned in section 7730 G. C. refers to the attendance computed at some time during the current school year.

3. A public school that has been suspended by a board of education must be re-established upon proper petition at any time within the school year following such suspension, when it has been made to appear to the local board that there is an average daily attendance of enrolled pupils, residing within the territory of the suspended school, of twelve or more.

4. Under the provisions of section 7730 G. C. there is no time mentioned during which the average daily attendance should be computed, but such computation to establish the average daily attendance mentioned in section 7730 G. C. should be a reasonable time, which it is suggested should be not less than one week nor necessarily more than one school month.

5. In establishing the average daily attendance in other schools of those pupils who reside in the territory of a district whose school has been suspended, the daily attendance records of pupils in the separate schools should be assembled for the same specific days and the average daily attendance computed therefrom for a reasonable time.

Respectfully,
JOHN G. PRICE,
Attorney-General.

894.

BOARD OF EDUCATION—VILLAGE—CANDIDATES FOR LONG AND SHORT TERMS NOT DESIGNATED ON BALLOTS—ELECTION INVALID.

Where five members of a village board of education were to be elected, two members for the term of two years and three for the term of four years, and the ballots cast did not designate who were the candidates for the long and short terms, no valid election was held, and the present incumbents will hold over until their successors are properly elected and qualified.

COLUMBUS, OHIO, December 24, 1919.

HON. HOMER HARPER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter in which you submit the following question for my opinion:

> "At the November election, 1919, five persons were elected members of the board of education of Wickliffe (village) school district, some for short terms and some for full terms. There was no designation on the ballot to determine who were the candidates for the long term and who for the short term. Would it be valid for the board to designate the two persons receiving the highest number of votes to be elected for four years and the remaining three persons for two years?
>
> In April, 1919, the county commissioners appointed five persons to serve as members of the board of education until the next legal election. This newly elected board succeeds the board appointed by the commissioners."

It is assumed from the facts stated in your letter that the board of education for Wickliffe village school district was appointed under authority of section 4710 G. C., which reads as follows:

> "In villages hereafter created, a board of education shall be elected as provided in the preceding section. When villages hereafter created, or which have been heretofore created, fail or have failed to elect a board of education as provided in the preceding section, the commissioners of the county to which said district belongs, shall appoint such board, and the members so appointed shall serve until their successors are elected and qualified. The successors of the members so appointed, shall be elected at the first election for members of the board of education held in such district after such appointment; two members to serve for two years and three members for four years, and thereafter their successors shall be elected in the manner and for the term as provided by section 4709 of the General Code. The board so appointed by the county commissioners shall organize on the second Monday after their appointment. If the members of such board are elected at a special election held in such district the members so elected shall serve for the term indicated in the preceding section, from the first Monday in January after the preceding election for members of the board of education and the board shall organize on the second Monday after such election."

Under the provisions of this section, at the November election in 1919 two members should have been elected for the term of two years and three for the term of four years, to succeed the board appointed by the commissioners. However

it appearing that in said election there was no designation upon the ballots as to the candidates for the two and four year terms, it was impossible for the electors to make their choice as to which of the candidates they desired to be elected for the long and short terms. Therefore there was no legal election held for the members of the school board of said village

In the case of State ex rel. O'Donnell, etc., vs. Adam Schafer, et al., 18 C. C. 525, the syllabus reads in part as follows:

> "Where several members of the board are to be elected at one election, but for different terms of office, the ballots must state to which term the candidate is elected, otherwise the ballots will be declared void, although the entire election may be invalidated thereby."

A careful analysis of the opinion shows it to support the syllabus above quoted. In short this case is on all fours in point with the question raised by the facts stated in your communication.

From an opinion of the Attorney-General recorded in Vol. II, Ann. Rep. of Atty. Gen. for 1912, p. 1102, the following, which is pertinent to your inquiry, is quoted:

> "Where at an election five positions were to be filled, two for four years and three for approximately two years, and there was no designation upon the ballot to determine who were the candidates for the long terms and who were the candidates for the short terms, the terms were not definitely settled and there was no valid election."

The rule seems to be that no one can make the selection for the different terms except the electors, and the ballots, not designating the terms, are void and should be cast out and not counted.

Inasmuch as you state there was nothing designated on the ballots to indicate the terms for which the candidates were seeking election, it therefore follows that no valid election was held at the November election in 1919, for the members of the board of education of the village of Wickliffe.

You are further advised that under the provisions of section 4710, supra, the members of the board of education appointed by the commissioners "shall serve until their successors are elected and qualified." There having been no valid election in November, 1919, the members of the original board will hold over until such time as a proper and valid election is held, selecting their successors, and until said successors are qualified.

Respectfully,
JOHN G. PRICE,
Attorney-General.

895.

SCHOOLS—COUNTY AND DISTRICT SUPERINTENDENT OF SCHOOLS —CANNOT INCREASE SALARIES DURING TERM—BOARD OF EDUCATION UNAUTHORIZED TO PASS RETROACTIVE RESOLUTION WHEN TERM AND SALARY OF SUPERINTENDENT PREVIOUSLY FIXED.

1. *In effect there is no material distinction in the authority or power granted to appoint and fix the salary or compensation of a county and a district superin-*

tendent of schools. It is the duty of the board of education to fix the salary of a county superintendent before August 1, and when said salary is fixed, the said board can not legally increase the same during the term for which he was appointed.

2. *A resolution passed by a board of education on September 4, 1918, increasing the salary of a county superintendent of schools for the term he was appointed, which said term begins August 1 of said year, when his term and salary had been previously fixed on March 13 of the same year, is retroactive and illegal in so far as it applies to the services rendered prior to its passage.*

COLUMBUS, OHIO, December 24, 1919.

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

GENTLEMEN:—Acknowledgment is made of your inquiry of recent date in which you submit the following question:

> "On March 13, 1918, the county board of education of Ashtabula county employed H. D. C. as county superintendent for a term of three years beginning August 1, 1918. On September 4, 1918, the county board of education increased the salary of the county superintendent from $3,000.00 to $3,450.00 per annum. The resolution appearing on their records being as follows:
>
> 'S. moved that the salary of H. D. C., county superintendent, be increased to $3,450.00 per annum for the term of his election.'
>
> Superintendent C. on September 9, 1918, drew the sum of $287.50, the same being his August salary. Was it legal under the terms of this employment for the superintendent to go back to August 1, 1918, to secure the increase, or should finding for recovery of $37.50 be made against him in this instance on the ground that this action was retroactive?"

Before considering whether a county superintendent of schools can legally draw increased salary for services rendered during the month of August, 1918, by virtue of a resolution of the county board of education passed September 4 of the same year, granting an increase in the salary of said superintendent which said board had previously fixed on March 13 of the same year, it seems important to first consider whether said board had legal authority to increase the salary of said superintendent during the period for which he was appointed.

Sections 4744, 4744-1, 4744-2 and 4744-3 G. C., which relate to the appointment, powers and duties of the county superintendent of schools, are as follows:

> "Section 4744.—The county board of education at a regular meeting held not later than July 20, shall appoint a county superintendent for a term not longer than three years commencing on the first day of August. Such county superintendent shall have the educational qualifications mentioned in section 4744-4. He shall be in all respects the executive officer of the county board of education, and shall attend all meetings with the privilege of discussion but not of voting."
>
> "Section 4744-1.—(108 O. L. 707). The salary of the county superintendent shall be fixed by the county board of education to be not less than twelve hundred dollars per year, and shall be paid out of the county board of education fund on vouchers signed by the president of the county board. Half of such salary up to the amount of two thousand dollars shall be paid by the state and the balance by the county school district. In no case shall the amount paid by the state be more than one

thousand dollars. The county board may also allow the county superintendent a sum not to exceed three hundred dollars per annum for traveling expenses and may employ an efficient stenographer or clerk for such superintendent. The part of all salaries and expenses paid by the county school district shall be prorated among the village and rural school districts in the county in proportion to the number of teachers employed in each district, but the county board of education must take into consideration and use any funds secured from the county dog and kennel fund or from any other source and which is not already appropriated before the amount is prorated to the various rural and village districts."

"Section 4744-2.—(108 O. L. 233). On or before the first day of August of each year the county board of education shall certify to the county auditor the number of teachers to be employed for the ensuing year in the various rural and village school districts within the county school district, and also the number of district superintendents employed and their compensation and the compensation of the county superintendent; and such board of education shall also certify to the county auditor the amounts to be apportioned to each district for the payment of its share of the salaries of the county and district superintendents and of the local expense of the normal school in the county."

"Section 4744-3.—The county auditor when making his semi-annual apportionment of the school funds to the various village and rural school districts shall retain the amounts necessary to pay such portion of the salaries of the county and district superintendents and for contingent expenses, as may be certified by the county board. Such moneys shall be placed in a separate fund to be known as the 'county board of education fund.' The county board of education shall certify under oath to the state auditor the amount due from the state as its share of the county and district superintendents of such county school district for the next six months. Upon receipt by the state auditor of such certificate he shall draw his warrant upon the state treasurer in favor of the county treasurer for the required amount; which shall be placed by the county auditor in the county board of education fund."

Under the provisions of the law relating to the appointment, powers and duties of the county superintendent of schools, it will be observed that the legislature provided with great care that said superintendent should be appointed and his salary fixed before August first of each year, the date upon which the county board of education shall make its certificate to the county auditor as provided in section 4744-2 G. C., for the purpose of enabling the said auditor to make the proper apportionments of the school fund. In fact the other section of said law which relates to teachers and district superintendents discloses the same purpose in the mind of the legislature relative to definitely fixing the amount of funds necessary prior to said date of each year.

In an opinion (No. 797) to Hon. Frank B. Pearson, superintendent of public instruction, which I rendered on November 19, 1919, I held that the salary or compensation of the district superintendent of the county schools could not be increased during the term of service for which he was elected. The following, which logically is applicable to the question under consideration, is quoted from said opinion:

"The above section (Sec. 4744-2 G. C.) provides that the county auditor shall have received prior to the first day of August of each year the certificate from the county board of education as to the number of

district superintendents employed and their compensation, along with the certification as to the compensation of the county superintendent.

This certification is made to the auditor in order that the amounts to be apportioned to each district for the payment of its share of the salary of a district superintendent may be properly entered on the records and provided for in the allotment of school funds. It would thus be seen that promiscuous increases of salary for district superintendents made at any time during the calendar year would have a tendency to disturb the original certificate made by the county board of education to the county auditor prior to the first day of August in each year.

Attention is invited to Opinion 2069, appearing at page 1855, Vol. II, Opinions of the Attorney-General for 1916, wherein it was held:

'There is no power in the appointing authority provided by section 4739 G. C., 104 O. L., 140, to increase the compensation of a district superintendent during the term of service for which he was elected, and his compensation fixed pursuant to the provisions of section 4743 G. C., 104 O. L., 142, after the appointment has been accepted by the person so elected.'

After holding that district superintendents are not officers and are, therefore, not subject to the provisions of section 20, Article II of the constitution, the Attorney-General further said:

'The presidents of the village and rural boards of education and the members of such boards, when in joint session, are, however, in the employment of district superintendents, subject to the familiar rule that public officers, in the discharge of their official duties, have only such powers as are expressly conferred by law or are necessary to the proper performance of duties imposed or the exercise of powers conferred by express provision of law.

The particular officers referred to, in the employment of district superintendents, and the fixing of their compensation, pursuant to sections 4739 and 4743 G. C., supra, have not conferred upon them the general power to contract and be contracted with, as in the case of boards of education, under the provision of section 4749 G. C.

There is found no express statutory provision authorizing the presidents of the board of education of rural and village districts, or the members of such boards in joint session, authorized by section 4739 G. C., supra, to increase or decrease the compensation of a district superintendent, *after the same has once been determined,* pursuant to the provisions of section 4743 G. C., supra, and the same *accepted by the person so elected,* and it is not believed that the exercise of such power is in the way necessary to a proper performance of the duties imposed by law upon such officers in respect to the election of and determining the compensation of district superintendents.'

Speaking of the certification to be made by the county board of education to the county auditor prior to August 1, in each year, as provided under section 4744-2 G. C., the then Attorney-General further said:

'I am aware of no authority to make a second certification under this section and am of the opinion that when a certification has once been made to the county auditor, according to the provisions of section 4744-2 G. C., supra, no subsequent certification may be made for that year.'

In Opinion No. 334, addressed to Hon. Donald F. Melhorn, prosecuting attorney, Kenton, Ohio, under date of June 2, 1917, a later Attorney-General, upholding the view taken by his predecessor, further said:

'Following the reasoning of said opinion (2069), the term, then, of

the district superintendents who were elected in 1914 would extend, as above noted, to August 31, 1915. How, then, could any district superintendents receive another or a different salary covering the said period? If the same district superintendents were re-elected, they had already been paid for said time, or at least their contract covered said period. * * * The various presidents or members of the boards of education who made up the supervision district were without authority to enter into contracts covering a period which was included in the contracts previously entered into. * * * The officers who employed such district superintendents could exercise only such powers as are conferred upon them by law. They had no authority to make a contract overlapping any other contract. The money having been paid thereon, recovery of the same back can be had.'

Section 4743 G. C., supra, has not been amended in any wise since it was enacted in 104 O. L., page 133, and containing the language in the text upon which the two opinions by former Attorneys General were based.

Section 4744-2, providing for the certification by the county board of education to the county auditor of the number of district superintendents and the compensation of the county superintendent prior to the first day of August of each year, was amended in 108 O. L., 233, but such amendment was that the local expense of the normal school in the county should also be certified by the county board of education at the time of the regular August certification.

There has been no change in the law that the salary of the district superintendent shall be fixed by the appointing authority at the same time that the appointment is made, and it is therefore the opinion of the Attorney-General that the appointing authority provided in section 4739 G. C., whose duty it is to elect the district superintendent of schools, has no power to increase the compensation of such district superintendent during the term of service for which he was elected. Under the provisions of section 4743 G. C., the compensation of such district superintendent shall be fixed at the time of his election and such compensation cannot be changed after the appointment has been accepted by the person so elected."

Section 4744, supra, provides that the board of education shall appoint the county superintendent on or before July 20, for a term not longer than three years commencing August 1.

Section 4744-1, supra, provides for the fixing of the salary of the county superintendent, and while said section does not specify the time when said salary shall be fixed, it must be construed with section 4744-2, which requires the county board of education to certify to the county auditor the amount of the compensation of the county superintendent, as it does teachers and district superintendents, on or before August 1. It is very evident that unless the salary of the superintendent is fixed on or before August 1, the board can not comply with the provisions of the law relative to making the proper certification.

There is no authority under the law granting the county board of education the power to increase the salary of the county superintendent during his term of appointment. On the other hand, the legislature granted to county boards of education the power to appoint a county superintendent for a definite term and fix the salary, and it may fairly be implied that it was its intention to provide against the disturbance of the auditor's apportionment of school funds by promiscuous change of salaries.

In effect there is no material distinction between the authority and power

granted to appoint and fix the salary of a county school superintendent and a district school superintendent.

In specific answer to your inquiry as to whether it is legal for a county superintendent of schools to draw an increase in salary which was granted by the board of education on September 4, 1918, when said superintendent had been appointed and his salary fixed on March 13 of the same year by said board, you are advised that if by any possible construction of the law it can be maintained that the county board of education could legally increase the salary of the county superintendent during the term for which he was appointed, said superintendent could not legally draw said increase for services rendered previous to the date upon which said increase in compensation was granted. Such a resolution is retroactive in its provision, in so far as it applies to the compensation of said superintendent prior to the date of its passage. A board of this character has only such powers as are delegated to it by the legislature, and Article II, section 28 of the constitution of Ohio provides in part as follows:

> "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; * * *."

It is evident that the legislature has not the power to enact retroactive measures and it can not delegate a power it does not possess.

Respectfully,
JOHN G. PRICE,
Attorney-General.

896.

DITCHES—PROCEEDINGS COMMENCED PRIOR TO ENACTMENT OF AMENDED SENATE BILL NO. 100, 108 O. L., 956—COMPENSATION OF COUNTY COMMISSIONERS GOVERNED BY RECENT LAW FROM OCTOBER 10, 1919.

The provisions of section 57 of amended Senate bill No. 100, 108 O. L., 956, fixing compensation of county commissioners while engaged on improvements under such law, became operative on October 10, 1919, and are applicable to ditch proceedings commenced prior to the enactment of such law.

COLUMBUS, OHIO, December 24, 1919.

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

GENTLEMEN:—I have your letter submitting the following question:

> "Do the provisions of section 57 of amended Senate bill No. 100 become operative with the taking effect of the bill October 10, 1919? If so, can the present county commissioners charge $5.00 a day for ditch work in ditch proceedings that were commenced prior to enactment of amended Senate bill No. 100, in view of the provisions of section 26 of the General Code?"

Section 3001 G. C., a part of amended Senate bill No. 100 (108 O. L. 969) fixes the "annual compensation" of county commissioners. I have given you my construction of this section in opinions rendered to you on September 12, 1919, (No. 623) and November 17, 1919, (No. 791).

Section 57 of the same bill (which, as you say, became operative October 10, 1919) is as follows:

> "In addition to the regular salary provided by law for the county commisioners, each county commisioner shall receive five dollars per day for each day he is actually engaged on improvements under this act, but in no case shall any commissioner receive an aggregate of more than twenty-five dollars for services on one improvement, nor shall they receive pay for two separate improvements on the same day. Such amounts shall be paid by warrants issued by the county auditor upon the county treasurer, upon the filing in his office of an itemized statement by the commissioner of such service; provided, however, that the aggregate compensation paid a county commissioner under this section for said service shall not exceed in one year five hundred dollars."

Prior to that date, the per diem payment to each county commissioner for similar service was three dollars. Clearly, the provision for a compensation of five dollars a day is applicable after October 10, 1919, unless Article II, section 20 of the constitution prevents officers whose terms began prior to October 10, 1919, from receiving the increased rate of compensation during such terms. The constitutional provision referred to is:

> "The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

It will be noted that the inhibition is against changing the *salary* of any officer during his existing term. Is the per diem payment provided in section 57 a salary? In the first place, as I have stated, the provision which we are considering occurs in an entirely different section from that which purports to fix the annual compensation of county commissioners.

In Thompson vs. Phillips, 12 O. S. 617, the court said, in construing section 20, Article II:

> "It is manifest, from the change of expression in the two clauses of the section, that the word 'salary' was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on the time, and not on the amount of the service rendered."

The syllabus of Gobrecht vs. Cincinnati, 51 O. S. 68, is in part as follows:

> "Compensation of a public officer fixed by a provision that 'each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive five dollars for his attendance,' is not 'salary' within the meaning of section 20, of Article II, of the constitution, which provides that 'the General Assembly, in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.'
>
> An increase in the compensation of such officer during his term is not prohibited by the constitution."

Spear, J., speaking for the court, after approving Thompson vs. Phillips, supra, said (p. 72):

"We think the compensation in the case at bar comes within the principle of the case cited, although a *per diem* compensation. It is not, within the meaning of the section quoted, 'salary.' Hence, an increase in the pay of a member during his term, is not prohibited by the constitution."

The syllabus of Theobold vs. The State, 10 C. C. (n. s.) 175, is in part as follows and accurately states the law of the case:

"A salary is a determined and stipulated sum to be paid for a fixed period. Officers receiving their compensation under a fee system are not salaried officers, and a change in the method of compensation from fees to a salary is not a change which 'affects the salary of any officer during his existing term.'"

Newby, J., in State ex rel. Taylor, Auditor, vs. Madison County, 13 O. D. (N. P.) 97, after reviewing the Ohio authorities in point said: (p. 100)

"From these cases we may extract the rule that certainty as to the amount to be paid is a distinguishing feature of a salary. Where the amount of the pay of an officer is to be ascertained by a method which at different times will produce varying amounts, the pay of the officer thus ascertained is not a 'salary' within the meaning of the constitution."

People ex rel., vs. Wemple, 52 Hun 414, is an authority exactly in point. The statute of New York gave a per diem allowance of five dollars to the judges of the supreme court while officially engaged away from their homes, for their reasonable expenses. Subsequently this provision was changed so as to allow a gross sum of twelve hundred dollars per year in full of all expenses allowed by law. The constitution of the state permitted judges to retire at seventy years of age and provided that compensation must be continued during the remainder of the terms for which they were elected. It was held that relator, having retired as provided by law, was not entitled to receive the twelve hundred dollars per year in addition to the compensation provided.

Other interesting and instructive cases upon which it is not necessary to comment are:

Blick vs. Mercantile Trust & Dep. Co., 77 Atl. 846.
Beach vs. Kent, 105 N. W. 867.
Ruperich vs. Baehr, 75 Pac. 783.
Board of Com'rs. vs. Trowbridge, 95 Pac. 555.

A statement by Maxwell, J., who wrote the opinion in the case last above cited, announces the distinction recognized by the authorities everywhere:

"A salary is a fixed compensation for regular work, while fees are compensation for particular services rendered at irregular periods, payable at the time the services are rendered."

I am clearly of the opinion that the compensation provided in section 57 of Am. S. B. No. 100 is not a "salary" and not within the inhibition of the last clause of Art. II, section 20 of the Ohio constitution.

Is the question affected by section 26 G. C., the provisions of which are as follows:

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

Section 3001 G. C., prior to its last amendment, contained this language:

"In counties where ditch work is carried on by the commissioners, in addition to the salary herein provided, each commissioner shall receive three dollars for each day of time he is actually employed in ditch work, the total amount so received for such ditch work not to exceed three hundred dollars in any one year."

By the amendment to section 3001 G. C., this provision is no longer a part of the law. The right to receive three dollars per day is gone. This provision as to compensation was in my judgment no part of any proceeding referred to in section 26. It might be well argued under the latter section that a proceeding for a ditch should not be affected by any amendment to a statute under which it originated, but to say that the compensation of those who were to supervise the work remains the same, is another matter. The statute did not provide that the commissioners should be compensated for their attention to any particular proceeding, but that they were to have three dollars a day for time actually employed in ditch work. I do not think a construction of section 26 G. C., which would make it applicable to these provisions for compensation, is at all warranted.

A more serious question arises, however, from this language in section 57, supra:

"* * *each county commissioner shall receive five dollars per day for each day he is actually engaged on improvements *under this act*, * *."

The right to compensation of three dollars per day has been taken away by the amendment to section 3001 G. C. and the right to receive it at the rate of five dollars a day seems to be limited to improvements "under this act." Is a ditch proceeding, begun prior to October 10, 1919, within the meaning of this term? In my opinion such was the intention of the legislature. The language is not "begun under this act," but "under this act," and it would be difficult to conceive of an improvement to be finished subsequent to October 10, 1919, to which some provision of the act would not be in some manner applicable. While there is some obscurity in the language used in section 57, supra, I am of the opinion that the intention of the legislature, that the daily compensation of commissioners on ditch work should be increased to five dollars per day on the going into effect of the amendment, is reasonably clear. It is therefore my view that compensation at this rate may be allowed in ditch proceedings, although they were commenced prior to the enactment of Senate bill No. 100.

Respectfully,
JOHN G. PRICE,
Attorney-General.

897.

COUNTY COMMISSIONERS—MAY MAKE AN ALLOWANCE TO MAGISTRATES, AND CONSTABLES FOR FEES EARNED IN FELONY CASES WHEREIN STATE HAS FAILED UNDER SECTION 3019 G. C.—WHEN STATE HAS OR HAS NOT "FAILED."

1. *Under the provisions of section* 3019 *G. C. an allowance may be made by the county commissioners to the proper officers for fees earned in felony cases wherein the state has failed.*

2. *The state has "failed" when at any time after the filing of an affidavit before a magistrate having jurisdiction, charging the accused with an offense against the state, the case is terminated before conviction.*

3. *When the accused under indictment has broken jail and is at large, the case has not terminated, the state has not failed and an allowance for fees can not be made under section* 3019 *G. C.*

COLUMBUS, OHIO, December 24, 1919.

HON. FLOYD E. STINE, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication of recent date, which reads as follows:

> "Will you kindly advise me whether or not fees earned by a magistrate, constable or marshal, in a state case wherein the defendant has been bound over to the grand jury, and the case is ignored by the grand jury, can be allowed by the county commissioners under section 3019 of the General Code? Also whether or not the bill can be allowed where the defendant after being bound over by the magistrate and placed in the county jail, under bond, has broken jail and is at large."

Section 3019 of the General Code, which relates to allowances for fees to officers by the county commissioners in cases wherein the state has failed, provides as follows:

> "In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at any regular session, may make an allowance to any such officers in place of fees, but in any year the aggregate allowances to such officer shall not exceed the fees legally taxed to him in such cases, nor in any year shall the aggregate amount allowed an officer exceed one hundred dollars."

It is assumed that the persons mentioned in your letter were charged with the commission of a felony. Your inquiry raises the issue as to what constitutes a "state failure" under the provisions of the above statute. It is believed that at any time after the affidavit has been filed before a magistrate having jurisdiction charging the accused with an offense against the state, the case is begun and at any time thereafter the case is terminated before conviction, regardless of the method, the state has failed in view of said statute.

In an opinion found in Opinions of Attorney-General for 1917, Volume I, page 226, the then Attorney-General held substantially as above stated. The following is quoted from said opinion:

> "* * * I am of the opinion that prosecution for a felony has been

instituted as soon as the affidavit charging the crime has been presented to and filed by the magistrate, and if any time thereafter the prosecution is terminated by any means other than conviction, the state has 'failed' within the meaning of section 3019 G. C., and the county commissioners may make an allowance to the officer in place of fees under said section."

You are advised that in the first situation your letter presents the county commissioners may allow the fees as provided in said section to the proper officers, provided, of course, that the total amount of said allowance for any year is not more than the legal fees to which said officers are entitled in said cause and does not exceed one hundred dollars in the aggregate.

In reply to the second state of facts you present it would seem that there has been no termination of the case in which the defendant has broken jail and is at large. He may be rearrested, tried and convicted. By no process of reasoning could the conclusion be reached that the state has failed in this instance. Therefore, the statute being clear that the allowance may be made by the county commissioners only in cases wherein the state has failed, it follows that the allowance for fees under section 3019 G. C. cannot be legally made until there is some termination of said case definitely indicating that the state has failed.

Respectfully,
JOHN G. PRICE,
Attorney-General.

898.

COUNTY EXPERIMENT FARMS—PROCEEDS FROM SALE OF PRODUCE MAY NOT BE PAID OUT FOR ERECTION OF FARM DWELLINGS.

Under existing statutes, the proceeds arising from the sale of the produce of county experiment farms may not be paid out for the erection on such farms of dwelling houses for employes and other farm buildings.

COLUMBUS, OHIO, December 24, 1919.

HON. CHARLES E. THORNE, *Director, Ohio Agricultural Experiment Station, Wooster, Ohio.*

DEAR SIR:—Receipt of your recent letter is acknowledged, reading as follows:

"For the equipment of the county experiment farms operated by this station one or two dwellings and as many barns are necessary on each farm in addition to those found on the farms when purchased, to house the necessary help, as from two to three or more men must be kept on each farm throughout the year, and in order to secure the steady and trained help essential to the successful conduct of such work as is done on these farms, it is necessary to employ married men in so far as possible.

Before the present era of high priees it was possible to erect houses suitable for this purpose at a cost of $2,500 to $3,000; but such houses now cost from $4,000 to $5,000.

After the original equipment funds provided for under sections 1177-4 have been exhausted, it is desirable to employ the proceeds of produce sales for this purpose, and as a matter of economy it is desirable to build the houses as far as possible with the ordinary labor of the farms, which

may be employed for this purpose at times when they are not urgently needed for farm work, or when weather conditions are unfavorable for such work. Of course, some parts of the work, such as carpentry, masonry, etc., would be let upon competitive bids.

We therefore ask your advice upon the following points:

1. Under the county farm law can dwelling houses for employes and other farm buildings be erected on county experiment farms and be paid for out of the receipts of said farm?

2. If such buildings can be erected must the approval and consent of the county commissioners be first obtained before such buildings can be erected?

3. Will the erection of such buildings come under the state building code, or can such erection be performed, in part, by the regular county farm laborers?"

The so-called County Experiment Farm law is found in sections 1174 to 1177-9, both inclusive, of the General Code.

Especially important in the consideration of your questions are sections 1177-4 and 1177-8 G. C., which read:

"Section 1177-4.—The equipment of an experiment farm shall consist of such buildings, drains, fences, implements, live stock, stock feed and teams as shall be deemed necessary by the board of control for the successful work of such farm, and the initial equipment shall be provided by the county in which the farm is established, together with a sufficient fund to pay the wages of the laborers required to conduct the work of such farm during the first season. The county commissioners shall appropriate for the payment of the wages of laborers employed in the management of such farms as may be established under this act, and for the purpose of supplies and materials necessary to the proper conduct of such farms such sums not exceeding two thousand dollars annually for any farm, as may be agreed upon between such county commissioners and the board of control."

"Section 1177-8.—The produce of each county experiment farm as may be established under this act, over and above that required for the support of the teams and live stock kept on the farm, shall be sold and the proceeds applied to the payment of the labor and to the purchase of the supplies and materials required for the proper management of the farm as contemplated by this act, and for the maintenance of its equipment. Any surplus beyond these requirements shall be covered into the county treasury and placed to the credit of the general fund of the county, except in the case of the use of farms already belonging to the county, in which case the proceeds shall be placed to the credit of such fund as the county commissioners may designate."

In using the expression "the receipts of said farm," you mean, it is assumed, the proceeds resulting from the sale, pursuant to section 1177-8 G. C., of that part of the produce of the county experiment farm which is not required for the support of the teams and live stock kept thereon.

Section 1177-8 G. C. clearly indicates the disposition of such proceeds. The same are to be applied to the payment of the labor and to the purchase of supplies and materials required for the proper management of the farm, and also to the maintenance of its equipment, any surplus arising after the accomplishment of these objects to be covered into the county treasury.

It would clearly be impossible to construe the phrase "for the maintenance of its equipment" in such a way as to include the erection of new buildings on the farm, such as houses for employes and other farm buildings. The term "maintenance" refers to the up-keep of something already subsisting.

The word "equipment" is given a kind of special definition in this connection by the opening provisions of section 1177-4 G .C., which says that "the equipment of an experiment farm shall consist of" certain enumerated things, some seven in number. In the enumeration we find the word "buildings." The further provision is that the *"initial* equipment" shall be provided by the county in which the farm is established. The occurrence of the adjective "initial" leads one to expect that somewhere else in the act will be found provisions as to the acquisition of equipment which is *not* "initial," that is, *subsequent* equipment. Upon examining the further provisions of the act, however, we find that out of the seven enumerated items of equipment, there are but two, to wit, live stock and teams, as to which any further definite provision is made. As to these, the provision is, in effect, that the farm produce shall first be applied to the support of the teams and live stock kept on the farm. The only mention made of the other five items of equipment is the blanket reference to the effect that the proceeds of the sale of the farm produce shall be used for the "maintenance of its equipment."

In connection with your first question, I have also given consideration to the provision in section 1177-8 G. C. authorizing the application of the proceeds of the sale of farm produce to

> "the purchase of the supplies and materials required for the proper management of the farm as contemplated by this act."

The same words "supplies and materials" also occur in section 1177-4 G. C.

While the words in question are capable of broad meaning, yet having regard to the connection in which they are used, I am inclined to think the legislature did not intend that they should include the idea of new buildings on the county experiment farms, but rather that they refer to things necessary to the operation of the farm when the same was once established in pursuance of a given plan.

You are therefore advised that, under existing statutes, the proceeds arising from the sale of the produce of county experiment farms may not be paid out for the erection on such farms of dwelling houses for employes and other farm buildings.

The nature of my answer to your first question makes it unnecessary to further consider your second and third questions.

Respectfully,
JOHN G. PRICE,
Attorney-General.

899.

SCHOOLS—PART TIME TEACHER IN ELEMENTARY SCHOOL—SALARY, HOW COMPUTED—DISTRICT SUPPLYING PART TIME TEACHERS CAN OBTAIN STATE AID—HOW TO COMPUTE NUMBER OF FULL TIME TEACHERS.

1. *Where a school district employs teachers in the elementary grades, such district is not required to pay such teachers the scale of salaries prescribed in section* 7595-1 *G. C. and require them to teach full time in order to obtain state aid, for there can be a part time teacher in an elementary school as well as in a high school*

and there is no prohibition in the law against paying part time teachers in elementary schools the part time salary mentioned in section 7595-1 G. C., such part time salary to be computed on the full time hours of service performed in each month.

2. *Where a district employs part time teachers in the elementary schools, the fractions representing service of part time teachers shall be added together to ascertain the number of full time teachers employed in such district; that is, two half time teachers to be computed as one full time teacher and the number of persons of school age in such district desiring state aid must be at least twenty times the number of full time teachers employed therein.*

COLUMBUS, OHIO, December 24, 1919.

HON. A. V. DONAHEY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department on the following statement of facts:

> "In one of the school districts seeking state aid the application discloses that they are employing their primary teachers on a part time basis; that is to say, all of the teachers are represented as serving one-half, one-third and two-thirds time in the elementary schools. The application further discloses that they are apparently paying these teachers at the rate per month provided by statute: that is, to a one-half time teacher they are paying one-half of the statutory salary.
>
> The Freeman law makes clear the right of a high school to have state aid where teachers in the high school are employed part time. But the statute is not clear as to the elementary grades and we would like to have an opinion upon the following:
>
> Where a school district employs teachers in the elementary grades, must the district pay them salaries prescribed by the Freeman law and require them to teach full time in order to obtain state aid?
>
> Co-related to the above question is another, namely: If the school district in question employs four part time teachers in the elementary grades, how shall we calculate the number of teachers to the enumeration; that is, how shall we determine whether a district is employing not to exceed one teacher for every twenty pupils?"

Section 7690 G. C. reads in part as follows:

> "Each board of education shall have the management and control of all of the public schools of whatever name or character in the district. * * * Each board shall fix the salaries of all teachers, which may be increased, but not diminished, during the term for which the appointment is made. * * *"

The discretion resting in boards of education has been recently described in the case of Brannon et al. vs. Board of Education, 99 O. S., reported in the Ohio Law Bulletin, September 29, 1919, the court saying:

> "2. A court has no authority to control the discretion vested in a board of education by the statutes of this state or to substitute its judgment for the judgment of such board on any question it is authorized by law to determine.
>
> 3. A court will not restrain a board of education from carrying into

effect its determination of any question within its discretion, except for an abuse of discretion or for fraud or collusion on the part of such board in the exercise of its statutory authority."

It is apparent, therefore, that under the provisions of section 7690 G. C., a board of education can employ a teacher for part time or for full time, as such board in its discretion, having in mind the needs of the district, may determine.

The question which you submit is whether a board of education, exercising its discretion in the employing of part time teachers, in its elementary schools, by so doing eliminates itself from consideration for state aid for such school district.

The state aid law (sections 7594-1 and 7597 G. C.) was enacted by the legislature for the purpose of assisting the public schools in weak school districts and not to hamper them in their progress. It would therefore seem that the intent of the law is, that it should not be construed against weak districts, but rather in favor of weak districts, if the language of such state aid law permits it. The question, therefore, in the first instance is, whether this district, which on account of local contingencies and conditions, saw fit to employ certain teachers below the high school for part time rather than full time, has cut itself off from state aid under the provisions of section 7595-1 G. C. The pertinent part of such section bearing upon the question at hand, reads as follows:

"A school district may make application for state aid to cover deficiencies in its tuition fund, by filing with the auditor of state an application therefor in such form as the auditor of state shall prescribe, by first complying and showing compliance with the following conditions: * * *

3. It shall pay its teachers neither more nor less than the following salaries: In elementary schools teachers without having less than one year's professional training or less than three years' teaching experience in the state, sixty dollars per month; teachers having at least one year's professional training or three years' teaching experience in the state, sixty-five dollars a month; teachers having completed the full two years' course in any normal school, teachers' college or university approved by the superintendent of public instruction, or who have had five years' teaching experience in the state, seventy-five dollars a month. In high schools, inclusive of joint high school districts, an average of ninety dollars a month in each high school. Such salaries shall be for full time and in high schools if any teacher be not employed full time, then, in computing the average, the salary for each hour of service paid such part time teacher shall, *for the purposes of the calculation,* be multiplied by the number of full time hours in each month, and the sum so ascertained shall be assumed to be the salary paid such part time teacher. In no case shall a teacher be employed at less than sixty dollars per month for full time, or at the rate of sixty dollars per month for part time."

It is true, as you indicate, that in the above section there is no clear provision for the employment of a part time teacher below the high school, and yet there is no specific prohibition in such section against a board of education in their discretion employing a part time teacher in the elementary schools. As far as the question at hand is concerned, such paragraph might be condensed to read as follows:

"* * * Such salaries shall be for full time * * *. In no case shall a teacher be employed at less than sixty dollars per month *for full time,* or at the rate of sixty dollars per month for part time."

What did the legislature mean when it said "such salaries shall be for *full time*" if it did not also mean thereby that there would be teachers who would teach part time? The sentence "in no case shall a teacher be employed at less than sixty dollars per month", etc., is the closing sentence of paragraph 3 of section 7595-1 G. C., and the language is "a teacher", and does not necessarily mean that it is limited to any kind of teacher in particular, but rather it means all teachers.

If certain other sections of the statutes are read in connection with the question at hand, it is apparent that the general assembly had in mind that teachers, though teaching in schools that were elementary and not high schools, could be part time teachers in that in certain instances the remainder of their time would be taken up as principal or superintendent, for paragraph 5 of section 7595-1 G. C. reads as follows:

> "It (the board of education) shall not transfer or cause to be transferred to any other fund any monies that may be in the tuition fund, nor shall it expend any monies that may be in the tuition fund except for the following purposes: * * *
>
> (2) Salaries of principals or superintendents, or additional salaries paid teachers as compensation for duties performed as principals or superintendents. Provided, however, that if additional salaries are paid as compensation for duties performed by teachers, as principals or superintendents, the state superintendent of public instruction shall first certify that such additional duties are required and performed."

Thus in an elementary school there could be and the law contemplates that there should be a principal where schools are consolidated, for section 7705 G. C. reads in part as follows:

> "In all high schools *and consolidated schools,* one of the teachers shall be designated by the board as principal and shall be the administrative head of such school."

A consolidated school is one that in most instances is an elementary school and it is not necessary that there be any large number of schools placed in one building to have a consolidated school, that is to say, if but two or three schools were suspended and consolidated, one of the teachers in such consolidated school under section 7705 G. C. must be designated as the principal of such school, and in performing the duties of principal in such school it is entirely possible that the duties of principal would take part of the time of the teacher, in which event there would be a teacher who was a part time teacher and a part time principal in a consolidated school which taught the elementary subjects. A consolidated school of this kind could exist in a weak school district as well as in any of the other school districts of the state and it can easily be seen how a person employed by the board of education as principal of such consolidated school might very well be a part time teacher.

The language in paragraph 3 of section 7595-1 says that in high schools if any teacher be not employed full time, then in computing the average (which is to be ninety dollars per month) the salary for each hour of service paid such part time teacher shall, *for the purposes of calculation,* be multiplied by the number of full time hours each month, and the sum so ascertained shall be assumed to be the salary paid such part time teacher. The language here used is simply to show a method for the purposes of calculation and there is nothing in such section which prohibits the same kind of calculation being made for a part time teacher in an elementary

school, it having been shown before that a board of education, in its discretion, may hire a part time teacher in an elementary school.

It is believed that the general assembly did not intend to discriminate against part time teachers in elementary schools by providing that while the high school teacher should have his salary computed on the number of full time hours in each month, the elementary teacher teaching part time should be denied that privilege. This seems rather to be an inadvertence on the part of the legislature, because in the sweeping clause at the end it says that in no case shall *"a teacher* be employed * * * at the rate of sixty dollars per month *for part time"*. This is but one of the oversights occurring in House Bill No. 406 amending the state aid law providing funds for weak school districts. Thus the sentence above says that in no case shall a teacher be employed at the rate of sixty dollars per month for part time. Technically, this means that no part time teacher can be employed at the rate of sixty dollars per month but could be employed at fifty-nine dollars per month, or sixty-one dollars per month, or a greater amount. As the law reads, as passed by the assembly, the figures arbitrarily put the rate of sixty dollars per month so that no part time teacher shall be paid at the rate of sixty dollars per month. Certain words must have been omitted in this sentence, for the legislature possibly intended that the sentence should read:

> "In no case shall a teacher be employed at less than sixty dollars per month for full time, or more than the rate of sixty dollars per month for part time."

But no one has authority to add these or any other words in the sentence under discussion, and it can hardly be believed that the legislature meant that for part time teachers the exact rate of sixty dollars per month was denied, but any lesser or greater figures could be used. Again, in section 7595-4 provision is made for state aid for a joint high school and the subject under discussion is a joint high school, yet the section says that

> "The high school committee shall place in the tuition fund that part of tuition received from other districts which represents the expense for salaries of teachers as computed pursuant to section 7736."

It is found that section 7736 is the section which provides for the computation of the cost of tuition in *elementary schools* and the section that was possibly meant by the general assembly was section *7747,* which is the section which treats upon the cost of tuition for high school pupils, the subject discussed in section 7595-4.

Again, section 7595-2 provides that:

> "The application to the state auditor for state aid shall be filed between the first day of September and the first day of October for the then current school year."

While section 7596 says:

> "Whenever any board of education finds that it will have such a deficit for the current school year, such board shall on the first day of October, or any time *prior to the first day of January of said year,* make affidavit to the county auditor, who shall send a certified statement of the facts to the state auditor."

Again, section 7595 G. C. reads:

"No person shall be employed to teach in any public school in Ohio for less than fifty dollars per month",

while paragraph 3 of section 7595-1 G. C. says:

"In no case shall a teacher be employed at less than sixty dollars per month for full time * * *."

It is believed that these discrepancies in the state aid law, as well as others that could be given in order to clear up certain situations, should be corrected by the general assembly while the opportunity is at hand, because it is apparent that the time of application conflicts in the two sections named above, and such law uses fifty dollars as the minimum salary for teachers in one place and sixty dollars as the minimum salary for teachers in another place, and high school tuition could not be computed under section 7736, as provided for in section 7595-4. It is entirely possible that the whole question of state aid for weak school districts will be taken from the statute books of Ohio by changes in the taxation laws of the state and providing for such school districts in some other manner, but if the state aid statute is to remain upon the statute books, the errors pointed out herein should be corrected that their meaning might be clear.

Bearing upon the two questions which you submit, it would hardly seem necessary that teachers should teach full time in elementary schools in order that such school districts might receive state aid, and a board of education employing part time teachers in elementary schools is acting wholly within its own discretion as to the needs in its particular district, and such discretion cannot be disturbed as long as it comes within the meaning of section 7690 and section 7620 G. C., giving the board general powers, or, if such discretion is had under other special sections occurring under the school laws.

You ask:

"If the school district in question employs four part time teachers in the elementary grades, how shall we calculate the number of teachers to the enumeration; that is, how shall we determine whether a district is employing not to exceed one teacher for every twenty pupils?"

Section 7597 G. C., the closing section of the state aid statute, reads in part as follows:

"No district shall be entitled to state aid * * * unless the number of persons of school age in such district is at least twenty times the number of teachers employed therein. * * *"

What is meant by the words "the number of teachers employed therein?" It is apparent that the meaning intended here in this section is the number of full time teachers employed therein, and if part time teachers are employed to make up the time of a full time teacher, then the fractional parts of full time put in by the several teachers in such district should be added together and the sum of such fractional parts of service, even though performed by different persons, would be the number of full time teachers employed therein. The section requires that when this number of teachers is ascertained, the number of persons of school age in such district must be at least twenty times the number of teachers so ascertained. Thus, two half time teachers should be figured as one full time teacher, three one-third time teachers should be figured as one full time teacher, if there are districts which have fractions of this kind in computing the service of the teachers in their district.

Your attention is invited to opinion No. 572, issued to the Auditor of State under date of August 16, 1919, which goes very fully into the matter of what is meant by a full time teacher and what is meant by a part time teacher, and such opinion should be read in conjunction with the one here submitted.

Based upon the discussion above made, and the law as herein quoted, it is the opinion of the Attorney-General:

1. Where a school district employs teachers in the elementary grades, such district is not required to pay such teachers the scale of salaries prescribed in section 7595-1 G. C. and require them to teach full time in order to obtain state aid, for there can be a part time teacher in an elementary school as well as in a high school and there is no prohibition in the law against paying part time teachers in elementary schools the part time salary mentioned in section 7595-1 G. C., such part time salary to be computed on the full time hours of service performed in each month.

2. Where a district employs part time teachers in the elementary schools, the fractions representing service of part time teachers shall be added together to ascertain the number of full time teachers employed in such district; that is, two half time teachers to be computed as one full time teacher and the number of persons of school age in such district desiring state aid must be at least twenty times the number of full time teachers employed therein.

Respectfully,
JOHN G. PRICE,
Attorney-General.

900.

BRIDGES—WHEN COUNTY COMMISSIONERS OR MUNICIPAL CORPORATIONS ARE REQUIRED TO KEEP IN REPAIR CERTAIN BRIDGES WITHIN CITIES—SECTIONS 2421, 7557 AND 2421-1 G. C. DISCUSSED.

1. *County commissioners are by virtue of sections* 2421 *and* 7557 *under the duty of keeping in repair those necessary bridges within the cities of the state which are over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use; and they are under a like duty as to similar bridges within those villages which do not demand and receive a portion of the bridge fund as authorized by section* 2421-1 (108 *O. L.* 259.) *If a village does demand and receive a portion of the bridge fund from the county, then the village is under the duty of maintaining such of the bridges mentioned as are wholly within the village.*

2. *Municipal corporations, both cities and villages, are under the duty of maintaining bridges on streets established by the city or village for the use and convenience of the municipality and not a part of a state road, county road, free turnpike, improved road, abandoned turnpike or plank road.*

3. *Section* 2421-1 (108 *O. L.* 259), *in so far as it purports to grant to cities of under fifteen thousand population the right to request from the county a portion of the bridge fund, is in contravention of section* 1 *of Article XVIII of the constitution of Ohio, and to that extent is unconstitutional and void.*

COLUMBUS, OHIO, December 24, 1919.

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

GENTLEMEN:—The receipt is acknowledged of your letter calling attention to

a communication of your department to the city auditor of Lima, Ohio, wherein, after referring to an opinion of this department of date October 28, 1910, on the subject of the right of cities to receive from counties a portion of the bridge fund, you expressed the view that under section 2421 G. C. the commissioners of the county would have to keep in repair bridges within cities.

You state that exception has been taken to your views in this connection, and you are therefore led to submit to this department the question "are bridges within a municipality to be maintained by the county or municipality?"

You say in connection with your inquiry that certain municipalities are without funds to maintain the bridges within the municipality, and that the county in most cases has heretofore taken care of the repair and upkeep.

Section 2421 reads as follows:

> "The commisioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners."

As was pointed out in said opinion of this department dated October 28, 1910, and found in Annual Report of Attorney-General for 1910-1911 at page 781, former section 2824 of the Revised Statutes which made provision that certain cities might receive part of the bridge fund from the county, was omitted from the new General Code of 1910 in so far as it made such provision.

The statutes so far as such omission is concerned remained in the same form as pointed out in said opinion until the present year when on April 16, 1919, section 2421-1 was enacted as appears in 108 O. L. 259.

However, your question will first be considered without reference to said supplementary section, and the latter section will be then discussed.

The real intent and meaning of said section 2421 as it has existed without any accompanying provision of statute permitting cities and villages to demand and receive part of the bridge fund from the county is made plain by the opinion of our Supreme Court in the case of City of Piqua vs. Geist, 59 O. S. 163. As passed on in that case, the section in question was known by its old number, section 860 R. S., and while some slight verbal changes have been since made, the statute for present purposes was substantially the same when passed on by the Supreme Court as it is now. The purport of the opinion of the Supreme Court in the case referred to is fully shown by the syllabus, reading as follows:

> "Under the amendment made February 8, 1894, of section 860, Revised Statutes (91 Laws, 19), county commmissioners are not required to construct and keep in repair bridges over natural streams and public canals, on streets established by a city or village for the use and convenience of the municipality, and not a part of a state or county road, though the city or village receive no part of the bridge fund levied on the property within the same. It is the duty of the city or village to construct and keep in repair such bridges, and is liable in damages to one injured by its neglect to do so."

The Supreme Court in arriving at the conclusion just set out did not find it

necessary to go beyond the terms of the statute itself. However, support is lent to the views of the court by the fact that there are found in the Municipal Code provisions relating to bridges, in substance as follows: By section 3677 municipal corporations have power to appropriate real estate for bridges, aqueducts, viaducts and approaches thereto; by section 3629 they have power to improve, keep in order and repair, light, clean and sprinkle bridges and viaducts within the corporation; by section 3939 they have power to issue bonds for the purpose of procuring real estate and right of way for viaducts, bridges and culverts, and for the purpose of constructing them; by section 4325 the duty of supervising the improvement and repair of bridges, viaducts and aqueducts is in cities charged upon the director of public service, and by section 4364 is in villages charged upon the street commissioner or engineer, under the direction of council.

Section 7557 G. C. reads:

> "The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility, running into or through such village or city."

This section is practically the same as section 2421, so that what has been said as to the latter section applies to the former.

Previous to the enactment of the General Code of 1910, as has been stated, section 2824 was in effect providing in substance that a number of cities throughout the state might receive from the county a portion of the bridge tax. Said section 2824 was held constitutional in the case of State ex rel. Cline vs. Wright, Auditor, 9 N. P. (N. S.) 321. The theory of the opinion in that case seems to be that section 2824 was not special legislation in the sense of conferring corporate power, but on the contrary, constituted a mere agency through which the money thus received was to be expended, and that in constituting such agency it was within the power of the legislature to consider local conditions in authorizing certain cities to receive a portion of the bridge fund.

We are thus brought to said section 2421-1, reading as follows:

> "When the council of any city having a population not exceeding fifteen thousand or of a village shall cause to be filed in the office of the county auditor of the county in which such corporation is situated in whole or in part a certified copy of a resolution of such council demanding some portion of the county bridge fund levied upon property within such corporation, the county commissioners of such county may, by resolution, authorize the county auditor to draw his warrant upon the county treasurer in favor of such corporation for not to exceed sixty per cent of the county bridge fund then levied or collected, or in process of collection, upon the property in such corporation. Such fund so received by such corporation shall be used by it for the construction, repair and maintenance of any bridges and viaducts within such corporation."

It is to be noted that this section does not purport to be based upon local conditions, but is a general enactment applying to all villages in the state, and to all cities having a population not exceeding 15,000. Hence, even if the theory underlying the opinion in the case last cited is correct, it would seem to have no application to said section 2421-1. But in any event the case was decided before

the adoption of the constitutional amendments of 1912. Our Supreme Court has recently held in the case of the City of Elyria vs. Roy F. Vandemark, Ohio Law Reporter for December 15, 1919, at page 379, as shown by the second and third paragraphs of the syllabus, as follows:

> "2. The constitution of the state having classified municipalities on a basis of population, the Legislature is without authority to make further classification thereof for the purpose of legislation affecting municipal government.
>
> 3. The provisions of section 4250 General Code, as amended 106 O. L. 483, purporting to authorize the council in cities having a population of less than twenty thousand to merge the office of director of public safety with that of the director of public service, are in conflict with the provisions of section 1, Article XVIII of the constitution of Ohio."

The principles embodied in these two paragraphs of the syllabus would seem to have full application to said section 2421-1. It is true that the latter section does not relate to broad governmental functions nor to the organization of municipal government; and yet it does purport to confer upon certain cities power to take municipal action which is not granted to other cities, and in that sense is "legislation affecting municipal government." Therefore, it must be concluded that said section 2421-1 is unconstitutional as applied to cities.

The same thing may not be said of it as applied to villages; for it has long been a rule of statutory construction in Ohio that "in construing statutes the rule is to enforce them so far as they are constitutionally made, rejecting only those provisions which show an excess of authority by the enacting power." (Cincinnati vs. Bryson, 15 O. 625-645). See also Bowles vs. State, 37 O. S. 35. The form of section 2421-1 is hardly such as to lay it open to the objection that the unconstitutional provisions in it are so interwoven with the other provisions as to be inseparable, or to the further objection that the whole statute taken together warrants the belief that the legislature would not have passed the valid portions alone. For these reasons, then, and inasmuch as the legislature may constitutionally provide that all villages have the right to demand and receive a portion of the bridge fund, there is no reason for believing the statute unconstitutional so far as it concerns villages.

In conformity with the foregoing, the answer to your question is as follows:

(1) County commissioners are by virtue of sections 2421 and 7557 under the duty of keeping in repair those necessary bridges within the cities of the state which are over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use; and they are under a like duty as to similar bridges within those villages which do not demand and receive a portion of the bridge fund as authorized by section 2421-1 (108 O. L. 259). If a village does demand and receive a portion of the bridge fund from the county, then the village is under the duty of maintaining such of the bridges mentioned as are wholly within the village.

(2) Municipal corporations, both cities and villages, are under the duty of maintaining bridges on streets established by the city or village for the use and convenience of the municipality and not a part of a state road, county road, free turnpike, improved road, abandoned turnpike or plank road.

Respectfully,

JOHN G. PRICE,

Attorney-General.

901.

SCHOOLS—NEWLY CREATED VILLAGE INCLUDES WITHIN ITS LIMITS SCHOOL PROPERTY WHICH WAS ORIGINALLY OWNED BY TOWNSHIP SCHOOL DISTRICT—TITLE REMAINS VESTED IN TOWNSHIP—HOW TRANSFER OF LEGAL TITLE MADE.

When a newly created village includes within its corporate limits school property which was originally owned by the township school district, the title to said property remains vested in the township district and may be transferred by warranty deed at a time agreed upon by the several boards of education, the village board of education entering into an agreement to reimburse the township for the payment of bonds issued for the erection of the school building, as a consideration for said transfer.

COLUMBUS, OHIO, December 24, 1919.

HON. HOMER HARPER, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Acknowledgment is made of your communication of recent date in which you request my opinion as follows:

> "In 1915 the township of Willoughby, Lake county, built a school building and issued bonds therefor in the amount of $60,000, dated April 1.
>
> In 1916 the village of Wickliffe, in said township was incorporated, and the territory included within the corporate limits of said village includes the land of said school house and said new building.
>
> No separation was had of school funds or schools until March, 1919, when the county commissioners, acting in pursuance of law, duly appointed a board of education which organized and took charge of the schools and school funds of said village. I believe that there was no disagreement between the township (rural) board of education and the village board; but the question of the school lands and new school house is not so easy of solution.
>
> The township board has not yet deeded the land, with the new building upon it, to the village board. The building is commodious and modern, and the land, some five acres, valuable and increasing in value.
>
> Twelve thousand dollars ($12,000) of the bonded indebtedness has been paid, leaving $48,000 and interest outstanding.
>
> Inasmuch as the village, when part of the township helped to pay for the land and the first payments on the building, and inasmuch as it was used by both township and village up to 1919, and inasmuch as the village now has the exclusive use of said building and land, I have suggested that the township board deed the village board all said school lands lying within the corporate limits of the village (including, of course, the parcel on which the building stands), and the village on its part assume the payment of the remaining indebtedness represented by the unpaid bonds. In view of all the facts, including the size of the respective duplicates, I think that this would be equitable.
>
> Cannot this be done, the township board executing a deed, and the village agreeing to levy, collect and pay to the township such an amount annually as will pay the bonds and interest as they become due?"

From the statements in your letter, it is assumed that the board of education appointed by the commissioners for the village of Wickliffe in March, 1919, was appointed under the provisions of section 4710 G. C. The question of the disposi-

tion of school property, especially real estate, brought about by the transfer of territory from one district to another, and the establishment of a new district, has been one difficult to solve.

The recent enactment of section 4696 G. C. has solved the problem relative to transfers made by the county board of education. However, this has no application to a village district created in the manner the Wickliffe village school district was established.

Section 4690 G. C. provides:

> "When territory is annexed to a city or village, such territory thereby becomes a part of the city or village school district, and the legal title to school property in such territory for school purposes shall remain vested in the board of education of the school district from which such territory was detached, until such time as may be agreed upon by the several boards of education when such property may be transferred by warranty deed."

It will be observed that if the school building to which you refer, had been outside of the corporate limits of the village of Wickliffe when it was incorporated; and later included in territory "annexed" to said village, the above statute would apply. The question then is, will the same rule apply to territory "detached" from the township district and placed within the corporate limits of a newly created village?

An examination of the various statutes providing for the creation of new districts and transfers of territory, etc., discloses the purpose in the mind of the legislature to provide for the equitable adjustment of the property and financial rights among the districts and boards of education involved.

In the case of Cist vs. State, ex rel. reported in 21 O. S. 339, the court said:

> "In considering questions arising under the school legislation of the state, such construction should be placed on the various enactments, and their several provisions, as will give harmony to the school system and secure, as far as practicable, its equal benefits, and the reasonable facilities for their enjoyment, to every locality, without doing marked injustice to any."

It cannot be argued that it was the intention of the legislature to provide for the transfer of property when "annexed" to a village district and leave no remedy when the newly created village might include the same territory within its corporate limits.

It is believed that section 4690, supra, referred to by analogy furnishes a reasonable rule for a case such as the present one.

Therefore, the title to said premises remains in the township board of education, and may be transferred by warranty deed at such time as may be agreed upon by the several boards of education, the village board agreeing to reimburse the township board for the payment of the bonds issued for the erection of the new school building, as a consideration for said transfer.

Respectfully,
JOHN G. PRICE,
Attorney-General.

902.

POOR RELIEF—DUTY OF TOWNSHIP TRUSTEES TO FURNISH SUCH RELIEF TO POOR IN CITY WITHIN TOWNSHIP WHEN THEY HAVE FUNDS BY REASON OF LEVIES MADE PRIOR TO TAKING EFFECT OF SECTION 3476, 108 O. L. 272—UNDER AMENDED ACT CITY REQUIRED TO LEVY AND FURNISH TEMPORARY RELIEF TO POOR OF CITY.

1. *It is the duty of the township trustees to furnish "outside" relief to the poor residing in a city within the township when they have poor funds by reason of levies made prior to the taking effect of section* 3476 *G. C. as amended,* 108 *O. L.* 272.

2. *The act amending section* 3476 *G. C. was filed in the office of the secretary of state May* 16, 1919, *and did not become effective until ninety days thereafter. Under its provisions the city shall furnish all the temporary relief to be given to the poor residing in the city, and it is the duty of the city officials to provide for same in making future levies. However, poor relief funds collected or in process of collection by the township shall be expended in accordance with the law in force at the time the levies were made.*

COLUMBUS, OHIO, December 24, 1919.

HON. LLOYD S. LEECH, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter of recent date, in which you request my opinion as follows:

> "The incorporated city of Coshocton is located in Tuscarawas township, in Coshocton county, and for a number of years the incorporated city has not made any levy for a poor fund, but the levy has been entirely made by the Tuscarawas township, and paid into the Tuscarawas township treasury, and the necessary relief for both the city and the township has been paid for out of the township treasury. At the present time there is about $1,400.00 in the poor fund, being the balance remaining from the collection of the 1918 year assessments, and the township has made the levy for the poor fund for the tax year of 1919, while the city has made no levy for 1919, and therefore cannot collect any taxes for said purpose for the period of another year.
>
> We have in the city of Coshocton quite a number of families who are in great need of temporary relief, and as Sec. 3476 of the Ohio Laws, Vol. 108, page 272, provides that such cases are not city charges, and the board of trustees of said Tuscarawas township has refused to tender any aid to those who live within the incorporated limits, we desire an opinion from your office as to whether or not the board of trustees under the above section can lawfully use the township poor funds for poor relief within the incorporated city.
>
> I might further add that at least 90% of the poor fund in the hands of the township treasurer was paid by the tax payers of the incorporated city.
>
> In the event that you should be of the opinion that the board of trustees cannot use this money for relief purposes within the city, would an action lie as against the township to recover the city's portion of the poor tax thus collected?"

Section 3476 G. C., as amended in 108 O. L. 272, which pertains to your inquiry, reads as follows:

> "Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each city therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it. It is the intent of this act that townships and cities shall furnish relief in their homes to all persons needing temporary or partial relief who are residents of the state, county and township or city as described in sections 3477 and 3479. Relief to be granted by the county shall be given to those persons who do not have the necessary residence requirements, and to those who are permanently disabled or have become paupers and to such other persons whose peculiar condition is such they cannot be satisfactorily cared for except at the county infirmary or under county control. When a city is located within one or more townships, such temporary relief shall be given only by the proper municipal officers, and in such cases the jurisdiction of the township trustees shall be limited to persons who reside outside of such a city."

Prior to the enactment of said amendment, the rule was that the trustees of the township under the provisions of said section were required to furnish relief to those whose residences and disabilities entitled them to such, regardless of whether they were residing in the township or within the limits of a city situated within the township, except in those cases wherein the confines of a city or village were co-extensive with the township. Ann. Rep. of Atty. Gen., 1911-1912, Vol I, p. 250; Opin. of Atty. Gen., 1917, Vol. I, p. 138.

While concurrent powers are granted to both the city and township, enabling each to furnish "outside" relief under the provisions of said original section, notwithstanding that the indigent entitled to relief reside within the city, it is conceded that the duty finally devolved upon the township trustees. The said trustees are furnished ample means in other sections of the statutes whereby to levy and collect taxes upon the entire township for such purposes, which has ever been considered in fixing their responsibility. However the amended section, as above quoted, in the last paragraph thereof definitely fixes the responsibility and jurisdiction of the township trustees and the city authorities respectively, in connection with temporary relief to be granted under said statute.

The trustees of the township are limited to territory outside of the city and the proper city officers shall furnish relief to those who reside within its corporate limits. The language used in said amendment, "when a city is located within one or more townships", includes every city in the state except cities the confines of which are co-extensive with the township, in which case of course the proper city officials are charged with the furnishing of said relief.

It must be kept in mind in the consideration of this question that the levies made by the trustees in the case at hand were made in accordance with the provisions of law before the amendment to section 3476 G. C. became effective. This amendment was filed in the office of the secretary of state May 16, 1919, and became effective ninety days thereafter. The law requires that the levy for the poor relief and other purposes shall be made by the township trustees on or before the fifteenth day of May, annually. It therefore follows that the trustees in the case under consideration could not have contemplated the provisions of section 3476 G. C. as amended, nor could the city be charged with such notice.

It is the view of this department that when taxes have been levied and collected or are in the process of collection by the trustees of the township for a

given purpose as provided by law, it is the duty of said trustees to expend said funds in accordance with the provisions of law in force at the time said levies were made. Art. XII, Sec. 5 of the Constitution provides:

> "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

Construing the constitutional provision in connection with the present statement of facts, it seems clear that the poor funds under control of the township trustees should be expended in the manner provided by the law in force at the time said levies were made.

Therefore you are advised that it is the duty of the trustees in the case you mention to grant relief to those legally entitled to the same, even though they reside in the city of Coshocton, so long as they have funds for said purposes, collected by reason of the levy made prior to the amendment to section 3476 becoming effective.

It is believed that the construction given to Sec. 5 of Art. XII of the Constitution by the Supreme Court in the case of State ex rel. Grant vs. Sayre, 89 O. S. 351, supports the view herein taken.

Undoubtedly under the provisions of section 3476 as amended, it is the manifest duty of city authorities, in making future levies, to provide for sufficient funds for all the temporary relief to be given to the poor within its corporate limits. On the other hand, the trustees in making their next levy may take into consideration the fact that the township will be relieved of furnishing temporary relief to those who reside in the city.

In view of the foregoing it is assumed that a reply to your second inquiry is unnecessary.

Respectfully,
JOHN G. PRICE,
Attorney-General.

903.

APPROVAL, BOND ISSUE, CITY OF DEFIANCE, OHIO, IN THE SUM OF $180,000.

Industrial Commission of Ohio, Columbus, Ohio.

COLUMBUS, OHIO, December 30, 1919.

904.

APPROVAL, BOND OF ELMER HILTY, FINDLAY, OHIO, DIVISION ENGINEER, STATE HIGHWAY DEPARTMENT, IN SUM OF $4,000—THE AETNA CASUALTY AND SURETY COMPANY, SURETY.

COLUMBUS, OHIO, December 30, 1919.

HON. HARVEY C. SMITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am transmitting herewith bond of Elmer Hilty of Findlay, Ohio, in the sum of $4,000.00, covering the faithful performance of his duties as Division Engineer in the State Highway Department, with the Aetna Casualty and Surety Company as surety.

The bond, as you will note, has been approved by Hon. A. R. Taylor, State Highway Commissioner, as to amount and surety.

I am approving it as to form, and in accordance with the provisions of section 1183 G. C., I forward it to you for filing.

I am sending copy of this opinion to the State Highway Commissioner.

Respectfully,
JOHN G. PRICE,
Attorney-General.

905.

APPROVAL, FINAL RESOLUTIONS FOR ROAD IMPROVEMENTS IN CUYAHOGA, HURON AND TRUMBULL COUNTIES.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

COLUMBUS, OHIO, December 30, 1919.

906.

APPROVAL, LEASES, CANAL LANDS IN DAYTON AND SUGAR GROVE —PROPERTY IN DEFIANCE, OHIO.

COLUMBUS, OHIO, December 30, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of December 19, 1919, in which you enclose the following leases, in triplicate, for my approval:

	Valuation.
To Defiance Machine Works, Defiance, Ohio, part of lots 114 and 115, as shown on original plat at Defiance, Ohio	$6,250 00
C. P. Harley, Defiance, Ohio, all of lot No. 113 except five feet off of the south side thereof, as shown on recorded plat of the city of Defiance	3,066 66
Mary L. Kinsler, Dayton, Ohio, part of Old Mad River Feeder Canal, fronting 54 feet on Fifth street in the city of Dayton, and extending back 100 feet	4,333 33
Sugar Grove Store Company, Sugar Grove, Ohio, a portion of the abandoned Hocking Canal in Sugar Grove, Ohio	500 00

I have carefully examined said leases, find them correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.

907.

APPROVAL, CONTRACT WITH L. G. FOLTZ AND SONS, OF COLUMBUS, OHIO, FOR COMPLETION OF TEACHERS' TRAINING SCHOOL BUILDING—CONTRACT WITH THE STEINLE CONSTRUCTION COMPANY, TERMINATED—SEE OPINION NO. 627, SEPTEMBER 13, 1919.

COLUMBUS, OHIO, December 31, 1919.

Board of Trustees, Bowling Green State Normal College, Bowling Green, Ohio.

GENTLEMEN:—On December 19, 1919, you submitted to me for my approval,

as per section 2319 G. C. (107 O. L. 455), a contract between your board and L. G. Foltz and Sons, of Columbus, Ohio, relative to the construction and completion of the teachers 'training school building (exclusive of plumbing and heating and ventilating systems) at the Bowling Green State Normal College. You have also submitted the bond covering said contract. The amount payable to said contractor under said contract is $56,600.

It is understood that the letting of such contract becomes necessary by reason of the fact that the employment of the original contractor, The Steinle Construction Company, was terminated, following the refusal, neglect and failure of said contractor to carry on the work.

The certificate of the Industrial Commission of Ohio is now before me, to the effect that said contractor, L. G. Foltz and Sons, has complied with the act of February 26, 1913, known as the workmen's compensation law, in the matter of premium payment.

Following the opinion of this department, No. 627, rendered to you on September 13, 1919, holding that the unexpended balance in the appropriation for the building in question (106 O. L. 739, 814) was not available to discharge liabilities arising under the contemplated new contract, your board made application, under section 2313 G. C., to the state emergency board, and received from that body authority to expend, for the purpose stated in the contract hereinabove mentioned, the sum of $56,600, which is the amount payable under the Foltz contract.

I have before me the certificate of the auditor of state, that there are funds in the emergency appropriation heretofore made for the purpose set forth in said contract, sufficient to cover the amount payable thereunder.

Being satisfied that said contract and bond are according to law, I am this day certifying my approval thereon.

I have this day filed with the auditor of state the contract, bond and all other papers submitted to me relative to the improvement above stated.

Respectfully,
JOHN G. PRICE,
Attorney-General.

908.

APPROVAL, LEASE OF OHIO CANAL LANDS IN CITY OF AKRON, OHIO, TO THE HIPPODROME ARCADE COMPANY.

COLUMBUS, OHIO, December 31, 1919.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of December 30, 1919, enclosing for my approval lease in triplicate form to the Hippodrome Arcade Company, of Akron, Ohio, covering Ohio canal property in the city of Akron.

I note that the rental is arranged on a sliding scale, and is based upon a valuation of $48,888.89.

While, as I have heretofore advised you, it is, to say the least, doubtful whether the statutes permit of the arrangement of rentals on a sliding scale, I note that the lease above mentioned is being entered into as the result of the cancellation of a previous lease, and that such previous lease was approved by the then Attorney-General with the rental stipulated as payable on a sliding scale.

Under the circumstances, I am approving the lease and returning it with such approval endorsed thereon.

Respectfully,
JOHN G. PRICE,
Attorney-General.