IV.

OPINIONS OF THE ATTORNEY GENERAL FROM JANUARY 1, 1908, TO JANUARY 1, 1909

(To the Governor)

NOTARY PUBLIC—BOND.

Notary public must file a copy of his bond with clerk of common pleas court of county; governor not obliged to furnish blanks for such copies.

May 19th, 1908.

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

DEAR SIR:—Your communication is received in which you inquire whether or not under section 112 of the Revised Statutes it is necessary for a notary public to file a copy of his bond in the office of the clerk of the court of common pleas of the county in which he resides.

In reply I beg to say, section 112 of the Revised Statutes is as follows:

> "Each notary public so appointed and commissioned shall hold his office for the term of three years (if so long he behave well) unless his commission shall be revoked, and before entering upon the duties of his office he shall give bond to the state of Ohio in the sum of fifteen hundred dollars, with sureties to be approved by the governor, conditioned for the faithful discharge of the duties of the office, *a copy of which bond shall be filed in the office of the clerk of the court of common pleas of the county in which he resides, and of each county for which he shall have been appointed.* And he shall take and subscribe an oath to be endorsed on his commission."

This section plainly provides for the filing of a copy of the bond in the office of the clerk of the court of common pleas of the county in which he resides. No duty is imposed, however, upon the governor or the state of Ohio to furnish a copy of said bond for such filing purpose.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

GOVERNOR—POWER OF REMOVAL FOR CAUSE.

Governor's power to remove appointive officer for cause is limited as to such cause to acts affecting the discharge of the duties of the office from which he is to be removed.

September 10th, 1908.

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

DEAR SIR:—Your communication of this date is receved in which you submit the following statement of facts:

Mr. C. H. Ganson, of Champaign county, who was a member of the state board of agriculture prior to the passage of the act of May 1st, 1908 (99 O. L. 592*a*), was appointed a member of the reorganized board under the provisions of said act.

The Colored American Independent League of Columbus has passed a resolution (a copy of which is enclosed) making certain charges against the said C. H. Ganson in connection with a lynching which took place at Urbana while he was mayor of that city, and requesting that you, as governor, demand his resignation as a member of the state board of agriculture.

That you are not informed as to the truth of the charges against the said C. H. Ganson while mayor of Urbana, but assuming them to be true, you request an opinion as to your powers in the premises.

In reply I beg to say the act providing for the reorganization of the Ohio state board of agriculture, passed by the last legislature, is in part as follows:

> "Not later than May 15 the governor shall appoint, *by and with the advice and consent of the senate*, ten persons who shall constitute a board to be known as 'The Ohio State Board of Agriculture,' whose term of office shall be for five years, except that of those first appointed under this act, two, each, shall hold office respectively for one, two, three, four and five years from February 1, 1908; the terms to be fixed by the governor in their commissions; and thereafter the governor shall annually appoint two members. The governor shall have the power and right to remove a member or members at any time."

Under the above provision the governor shall appoint members of the Ohio state board of agriculture by and with the advice and consent of the senate, and while this act expressly gives the power and right to the governor to remove a member or members at any time, yet the governor in exercising the power of removal will be required to comply with the provisions of section 12*a* R. S., by reason of the fact that the members of the Ohio state board of agriculture are only appointed by and with the advice and consent of the senate.

Section 12*a* R. S. contains the following provision:

> "Any officer who holds his office by appointment of the governor, by and with the advice and consent of the senate, may, when not otherwise provided by law, if it be found that he is inefficient or derelict in the discharge of his duties, or that he has used his office corruptly, be removed from office by the governor, by and with the advice and consent of the senate; and, if in the recess of the senate the governor be satisfied that such officer is inefficient or derelict or corrupt as aforesaid, he may suspend such officer from his office and report the facts to the senate at its next session; and, if in such report, the senate so advise and consent, such officer shall be removed, but otherwise he shall be restored to his office."

Inasmuch as the charges contained in the resolution submitted do not relate to the official conduct of the said C. H. Ganson as a member of the Ohio state board of agriculture, but refer to acts committed by him several years past while mayor of the city of Urbana, I am of the opinion that you are without authority under the above provisions of section 12*a* R. S. to cause either his suspension or removal upon the charges contained in said resolution.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BENEVOLENT INSTITUTIONS— SUPPLIES.

Supplies for benevolent institution must be purchased from penitentiary or state reformatory if made therein; competitive bids not required from such penal institutions, but are required from all other sellers.

October 6th, 1908.

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

DEAR SIR:—I am in receipt of your letter of October 6th, in which you inquire whether or not the provisions of law requiring that certain supplies used by state institutions be purchased from the state reformatory or penitentiary have been repealed by the act of the general assembly, which provides that supplies for state institutions are to be purchased by competitive bidding.

In reply thereto I desire to say that by an act of the general assembly passed March 29th, 1906 (98 O. L., p. 177), the employment of convict labor was abolished, and the board of managers of the Ohio penitentiary and the board of managers of the Ohio state reformatory were authorized to install a system whereby the inmates of said institutions were to perform labor in the manufacture and production of supplies for said institutions and for the state, its political divisions, and other institutions. Section 9 of that act provides:

> "No articles or supplies manufactured under the provisions of this act by the labor of convicts of the penitentiary or Ohio state reformatory, shall be purchased from any other source for the state or its institutions; unless the board of managers of the penitentiary and of the Ohio state reformatory shall first certify, on requisition made to them, that the same cannot be furnished; but all requisitions shall be honored to such extent as may be possible."

By an act of the general assembly passed May 9th, 1908 (99 O. L., p. 382), it was made the duty of the board of trustees and the managers of the various state benevolent and correctional institutions to make specific rules and regulations to provide a system whereby the supplies for said institutions were to be purchased by competitive bidding, and it was made the duty of the superintendents of those institutions to purchase the supplies in accordance with such rules and regulations adopted by the board.

In my opinion there is nothing in this last act which repeals, by implication, section 9 of the first named act and the two acts are not in conflict. These acts should be so construed as to require the various institutions to purchase their supplies at competitive bidding unless such articles are manufactured at the Ohio penitentiary or Ohio state reformatory, and then it becomes the duty of any of said institutions to make requisition upon these penal institutions for any supplies which it needs, and which are produced or manufactured by convict labor, as provided by law.

It is my opinion that the Ohio penitentiary and the Ohio state reformatory are not required to submit bids to the various institutions for supplies which they manufacture, nor have any of such institutions authority to purchase either by competitive bidding, or otherwise, any such supplies unless the same cannot be furnished by the Ohio penitentiary or the Ohio state reformatory.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

(To the Secretary of State)

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Authority to conduct general manufacturing and mercantile business may not be joined with authority to manufacture certain articles.

Articles of incorporation of the V. & W. Up-Hang Company disapproved.

January 3d, 1908.

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

DEAR SIR:—I return herewith the articles of incorporation of the V. & W. Up-Hang Company, which you have submitted to this department for an opinion as to the legality of the purpose clause contained therein.

Such purpose clause is as follows:

> "Said corporation is formed for the purpose of manufacturing, selling and distributing the Kros-Lox Up-Hang, and to engage in a general manufacturing and mercantile business."

In its present form the foregoing purpose clause violates section 3235 of the Revised Statutes in that it contemplates that the corporation is to be formed for multiple purposes. It has been frequently held that the purpose for which a corporation is formed must be stated with clearness. The statute requires the specification of the business, and it is not a compliance with the law to state that the company is formed to do a general manufacturing and mercantile business following that with a specific purpose of manufacturing and selling a certain article. (Marshall on Corporations, page 98.)

I therefore return the same not approved, and advise that until such modification be made therein as will comply with the foregoing, you do not file or record the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Authority to manufacture all articles capable of being produced from certain raw material may not be granted.

Articles of incorporation of the Lima Brake-Shoe Company disapproved.

January 3d, 1908.

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

DEAR SIR:—I herewith return the articles of incorporation of the Lima Brake Shoe Company, which you have referred to this department for an opinion as to the legality of the purpose clause contained therein. Such purpose clause is as follows:

> "Said corporation is formed for the purpose of manufacturing and placing upon the market brake-shoes for car wheels, and all other commodities that may be manufactured from artificial wood or substitute

material and sold at a profit; and all other articles that may be manufactured from wood and sold at a profit; and for the further purpose of carrying on the business of a foundry and machine shop, for purchasing and owning necessary real estate, buildings, machinery, tools, fixtures, supplies for manufacturing and selling the products of said factory, mill, foundry and machine shop, including iron and steel castings or forgings, or mouldings, castings or forgings of other metal or material, and generally to be carried on a manufactory for the purpose of making and placing upon the market commodities that may be manufactured from artificial wood or substitute material, or from any of the metals known to trade or commerce."

In my opinion said purpose clause is violative of section 3235 R. S., in its present form, and it should be made more definite as to the articles to be manufactured. After specifically mentioning brake-shoes for car wheels there is contained the following language: "And all other articles that may be manufactured from wood and sold at a profit." This is too indefinite. The purpose for which a company is formed must be stated with clearness. The statute requires the specification of the business, and it is not a compliance with the law to state that a company is formed to manufacture articles from wood that may be sold at a profit. (In re Crown Bank L. R. 4 Ch. Div. 634 (1890); State ex rel. v. Central, etc., Association, 29 O. S. 399; Marshall on Private Corporations, page 98.)

I therefore return the same to you, advising that until the same be modified in the particulars above cited you do not file or record the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Public service corporation may be authorized to furnish light and water. Purposes which may be consolidated may be authorized in the first instance. Articles of incorporation of the Union Light and Water Company approved.

January 9th, 1900.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of the 9th inst., enclosing the articles of the Union Light and Water Company, which you have referred to this department for an opinion as to the legality of the purpose clause contained therein.

Uniting in one purpose clause that of furnishing electricity for lighting and water for domestic and other purposes is authorized by the act of April 23d, 1904 (97 O. L. 281), being section 2485*a* of the Revised Statutes, as amended. That statute confers the authority to consolidate light, power, water, heating, inclined movable or rolling road companies, which are doing business in the same municipal corporation, or which are incorporated and organized for the purpose of doing business in the same municipal corporation. It expressly mentions that any two or more of the companies mentioned in section 2478 may be so consolidated.

Pursuant to an opinion of this department, when it is proper to organize

two separate corporations and combine them it would be lawful to organize them for the same joint purposes in the first instance, thereby permitting to be done directly that which is authorized to be done indirectly.

I therefore approve the purpose clause contained in the articles referred to and return the same herewith.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE.

Real estate company may not be authorized to conduct general agency business.

Articles of incorporation of the George W. Thomas Company disapproved.

January 22d, 1908.

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

DEAR SIR:—Acknowledging the receipt of the articles of incorporation of the George W. Thomas Company, accompanying your letter of the 18th inst., I beg to advise that the purpose clause thereof evidences an intention to create a real estate corporation pursuant to the provisions of section 3235 R. S., which by the provisions of that statute should be limited to twenty-five years. Other powers are included therein, such as "to maintain and conduct a general real estate agency and broker's business," and in general terms a general agency business. The purpose of buying or selling real estate must expire by limitation in twenty-five years from the date of the articles of incorporation, but the powers of a general agency or brokerage corporation are without limitation.

It is my opinion that these several powers should not be combined in one corporation. I advise that until such alteration be made therein as to comply with this view, the same be not filed or recorded.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION.

Corporation may be formed to conduct loan business.

Articles of incorporation of the Security Company approved.

January 27th, 1908.

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

DEAR SIR:—Replying to your letter relative to the articles of incorporation of the Security Company, I beg to say that the purpose clause therein set forth evidences the intention of creating a corporation for the purpose of making loans secured by mortgages on personal property as specified in section 3806*b* R. S. By authority of that section such company may be authorized under the general incorporation laws of this state.

I find that the articles in question comply with the provisions of that sec-

tion, and I therefore return them to you together with the check for $50.00 thereto attached. As such corporation is not a bank, pursuant to the provisions of section 3767 R. S., it does not require the indorsement of approval of the attorney general thereon.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—CENTRAL ORGANIZATION OF FRATERNAL ORDER.

Articles of incorporation of central organization of association having subordinate lodges or chapters must state names and residences of principal officers.

Articles of incorporation of the Bohemian Roman Catholic Benevolent Women's Union disapproved.

February 6th, 1908.

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

DEAR SIR:—I acknowledge receipt of the articles of incorporation of the Bohemian Roman Catholic Benevolent Women's Union, under the auspices of our Lady of Lourdes, concerning which you have asked an opinion of this department as to the legality of the purpose clause and the proper fee to be charged by your department for the filing of the same. The purpose clause in question is as follows:

> Said corporation is formed for the purpose of combining all Bohemian Roman Catholic Women of good moral character and good bodily health into one strong union, whose duty it shall be to promote the advancement of the Roman Catholic religion and see that its members fulfill the duties prescribed by the Roman Catholic church; it shall also advocate the use of the mother language and uphold and patronize the Roman Catholic schools, give moral and physical aid to all its members and to organize societies in places where there are no branches of this organization; to provide by assessment a "widower and orphan" fund for the purpose of paying the heirs (after obtaining sufficient proof of the death of a member) a sum amounting to no more than stated on certificate of membership of deceased member.
>
> All subordinate and branch societies are permitted to form a fund for the benefit and protection of their sick members. However, the union will not bind itself or be responsible for any debts or liabilities incurred by any action on the part of said subordinate branch societies. All meetings and correspondence of the union or its subordinates shall be conducted in the Bohemian language.
>
> This organization reserves the right to regulate the assessment as well as its laws, and can exact the obedience of its constitution and by-laws from its members, subordinate societies and branches.

I am not advised by the articles of incorporation, nor the letter of the counsel accompanying the same, as to the specific section of the Revised Statutes under which it is claimed such corporation is organized. But from the form

adopted it is apparent that it is not a fraternal beneficiary association, as defined by section (3631-11) et seq. Revised Statutes, and the limitations of the fraternal beneficiary act (92 O. L. 360; 97 O. L. 433) do not apply thereto.

These and similar associations are recognized by the following sections of the Revised Statutes: Sections (3631-23*p*), 3631*a*, par. 5 of section 3236, par. 5, section 148*a*. If such association is proposed to be organized under paragraph 5, section 3236 R. S., which I assume, it should state in its articles the name and place of residence of its principal officers, as required by the following language:

> "Such association must name in its articles of incorporation the place where it is to be located, or where its principal business is to be transacted at the time of its incorporation, with the name and place of residence of its then principal officers."

I am of the opinion that the proper fee to be charged for filing such articles is that contained in par. 5 of section 148*a*, to-wit: $2.00.

Subject to this criticism I think the purpose clause contained in such articles is lawful.

I herewith return the articles of incorporation together with the check of J. J. Sacha for $2.00, and his letter accompanying the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—MUTUAL INSURANCE COMPANY.

Articles of incorporation of mutual fire insurance company must state that members agree to be assessed specifically for incidental purposes, etc.

Articles of incorporation of the Tri-County Mutual Insurance Company disapproved.

February 6th, 1908.

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

DEAR SIR:—I acknowledge receipt of the articles of incorporation of the Tri-County Mutual Insurance Company. By the purpose clause contained therein it is provided that:

> Said corporation is formed for the purpose of protection against loss or damage by fire or lightning or wind storm.

Such form of association is provided for by sections 3686, 3687 R. S., and it will be observed that the articles are required to contain a provision:

> "By which those entering therein shall agree to be assessed specifically for incidental purposes and for the payment of losses which occur to its members."

And shall also contain the kinds of property proposed to be insured, whether business buildings, dwellings, outbuildings, etc.

For the reason that these articles do not contain the foregoing requirements,

I return the same to you without my approval, together with a draft on the First National Bank of Cleveland, Ohio, for $25.00, which is attached thereto.

Very truly yours,

WADE H. ELLIS,
Attorney General.

THE WHEELING & BELMONT BRIDGE COMPANY IS A FOREIGN CORPORATION.

February 10, 1908.

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

DEAR SIR:—There has been pending in this department since 1904 a claim against the Wheeling & Belmont Bridge Company of Wheeling, West Virginia. It was originally certified by the secretary of state as a foreign corporation, but during the investigation some doubt developed as to whether it should be treated as a foreign or domestic corporation.

In this connection great care has been exercised to determine the exact facts relating to the organization of this company with the result as follows:

On February 17, 1816, the general assembly of the state of Virginia passed a special act entitled "An act incorporating a company to erect a toll bridge over the Ohio river at Wheeling," by the terms of which there was conferred upon Noah Zane and his associates the powers of a body politic and corporate, under the name and style of "The Wheeling & Belmont Bridge Company," for the purpose of erecting a toll bridge across the Ohio river at Wheeling. The capital stock was fixed at $200,000, divided into 8,000 shares of $25.00 each.

The act contained the following provision:

> "20. This act shall be in force so soon as the assent of the legislature of the state of Ohio to its provisions shall have been obtained."

On December 30, 1816, the general assembly of the state of Ohio passed an act entitled "An act giving the assent of the state to the erection of a toll bridge across the Ohio river at Wheeling." (15 Ohio L. 14.)

Referring to the passage, by the state of Virginia, of the act above referred to, the Ohio act recognized and declared the Wheeling & Belmont Bridge Company to be a body corporate and politic "within this state," with all the powers and privileges and subject to all the restrictions of the Virginia act "to the provisions of which act the general assembly of the state of Ohio do hereby assent as fully and completely as if the same were herein particularly cited."

The Ohio act contained the following additional provision:

> "Provided, the same shall be completed within ten years from and after the passage of this act."

On February 18, 1830, the general assembly of the state of Ohio passed a further act entitled "An act to revive an act entitled 'An act giving the assent of this state to the erection of a toll bridge across the Ohio river at Wheeling.'" (28 Ohio L. 39.)

This act provided that the former act, setting forth its title, "be revived and continued in force for *ten years from and after the passage hereof.*"

The acts of December 30, 1816, and February 18, 1830, are the only acts of the Ohio general assembly that had any relation to the Wheeling & Belmont Bridge Company, and comprise the entire Ohio legislation with regard to that

company, or any bridge company at Wheeling, excepting one or two joint resolutions submitted to the congress of the United States.

It will be noted that by the act of December 30, 1816, the assent of the state of Ohio to the provisions of the Virginia act of February 17, 1816, and the granting of the corporate rights, were made to depend upon the requirement that the bridge should be completed by the company within ten years from the date of the adoption of the Ohio act.

The Ohio act of February 18, 1830, revives the act of 1816, a thing possible to do under the constitution of 1802, for the period of ten years from the date of the act of 1830. In other words, in order that the Ohio legislation should have any force or effect, the condition subsequent therein required must have been performed, to-wit, the completion of the bridge by the company on or before February 18, 1840.

As a matter of fact the bridge company did not build, nor did it have, a bridge across the Ohio river at Wheeling, until the year 1847. And that bridge was built by private individual enterprise and not by the Wheeling & Belmont Bridge Company.

There is nothing, on record or elsewhere, to show that Noah Zane, to whom and whose associates the original powers were granted by the original act of Virginia, in 1816, ever did anything in pursuance of said act, and on the contrary, the records show that they did not.

There is on record, in the office of the clerk of the county court of Ohio county, West Virginia, an agreement dated November 13, 1835, which was after Noah Zane's death, between the sons of Noah Zane, Daniel Zane and Ebenezer Zane, in which it is recited that Daniel Zane has contracted with one, William LeBaron, for the construction, by him, of a bridge across the west channel of the Ohio river; that the Wheeling & Belmont Bridge Company was not yet organized and was not legally able to contract. The contract provided that Ebenezer Zane should assume and become responsible for one-half the contract price, the other one-half to be paid by Daniel Zane.

The two Zanes, Daniel and Ebenezer, were the owners of the greater part of Wheeling Island. They owned both the banks of the river on the west side of said island, and on the Ohio shore, and the abutments of any bridge would have to be upon their land or land acquired from them, or either of them.

No conveyance of any lands for abutments, or for any other purpose, to any bridge company, by the Zanes or either of them, appear of record in Ohio county, West Virginia, until the year 1847, and then only the conveyance hereinafter referred to of Moore & List, trustees, and Daniel Zane to the Wheeling & Belmont Bridge Company.

On November 27, 1838, Ebenezer Zane executed and delivered to Henry Moore and James C. Johnston, his deed of trust, whereby he assigned and conveyed to them as trustee for the benefit of his creditors, all of his property.

On September 10, 1845, Daniel Zane executed and delivered to Daniel C. List a like deed of trust of all his property.

Early in the year of 1847 a number of public-spirited citizens of Wheeling met and determined to do something toward getting bridges across the Ohio river at Wheeling; the old The Wheeling & Belmont Bridge Company had, and could then do nothing, its corporate powers having lapsed by reason of non-organization and non-user. As a matter of fact its powers had never been used or exercised at all. A committee was appointed which proceeded to Richmond and secured the passage by the general assembly of Virginia, March 19, 1847, of an act entitled "An act to revive and amend an act entitled an act incorporating a company to erect a toll bridge over the Ohio river at Wheeling, passed February 17, 1816, and the act amendatory of said act passed March 10, 1836."

The act of 1847, in terms undertaking to revive and continue in force the old act, except such portions thereof as were repealed, was, in effect, a new act of incorporation of a company under the same name—omitting "The"—; providing for the acquirement by the company, then created, of the bridge across the west channel of the Ohio river, and providing, that after the doing of certain things "the said Wheeling & Belmont Bridge Company shall be deemed to be completely organized as a body politic, in full possession of all the rights, privileges and powers conferred on the same company by the said acts hereby revived," thus recognizing that the old company was dead, and that nothing could be done except in pursuance and by virtue of the new Virginia enactment of 1847, and the authority by it conferred.

The act provided that the capital stock might be any amount not exceeding $135,000, over and above the amount which might be appropriated or reserved in money or stock to "pay for the said bridge," thus recognizing the fact that the bridge then existing had not been built by, and that it was not then owned by the Wheeling & Belmont Bridge Company. The act provided for a board of managers of nine persons instead of thirteen as directed by the original act. The council of the city of Wheeling was authorized to purchase for the city 2,000 shares of stock in the company and issue the bonds of the city to pay therefor. The directors of the Northwestern Bank of Virginia were authorized to purchase for that bank 1,000 shares of the capital stock of the company, and the directors of the Merchants' and Mechanics' Bank of Wheeling were likewise authorized to purchase 1,000 shares of the stock of the company.

The next record is that of an indenture, dated September 20, 1847, between Henry Moore (acting in that behalf as trustee under and by virtue of the deed of trust from Ebenezer Zane to said Moore and James C. Johnston of date September 27, 1838), Daniel C. List (acting in that behalf as trustee under and by virtue of the deed of trust from Daniel Zane, bearing date September 10, 1845), Daniel Zane, individually, and the Wheeling & Belmont Bridge Company. In consideration of $64,000 paid by the bridge company (that is to say, $32,000 paid to Moore as trustee, and the like amount of $32,000 paid to said trustee List, and Daniel Zane, receipt of which was acknowledged), the grantors, granted, bargained and sold to the bridge company and its assigns, "the bridge heretofore erected across the west branch of the Ohio river from the town of Bridgeport, in Belmont county, in the state of Ohio, to the island lying opposite said city of Wheeling, with all and singular the abutments, piers, landings, embankments, tollhouses and appurtenances of said bridge and the land on which the same are built."

This conveyance was of the land that had been previously conveyed to said trustee for the benefit of creditors, by the Zanes, namely, their individual property; the conveyance of 1847 to the bridge company is of the bridge itself, abutments, embankments, piers, etc.—not of grantors' shares in a bridge company or interests therein.

The original and earlier minute book of the company is still in its possession. The first entry in it relates to a meeting held in the council chamber of the city of Wheeling, May 14, 1847, of the board of managers for the purpose of organizing. After the organization was perfected by the election of officers a report of the proceedings of stockholders, held the preceding day, was submitted, from which it appeared that the stockholders had met and elected a board of managers. Rules and regulations were adopted and other business transacted.

In 1852 an act was passed by the general assembly of the state of Virginia entitled "An act to enable the Wheeling & Belmont Bridge Company to raise money by an issue of new stock or by loan." The act provided that the author-

ized capital stock should be $300,000, and that bonds to the amount of $100,000 might be issued. The present capital stock paid in, of the company, is $294,000 and the company has issued bonds to the amount of $50,000.

It is to be noted that the Ohio act of 1830, as stated supra, is the last Ohio legislation on the subject.

This company never held any of its directors' or stockholders' meetings outside the states of Virginia and West Virginia, and never considered that it derived any powers from the state of Ohio, but always considered itself solely a Virginia corporation.

The foregoing statement may be thus summarized: The bridge across the west channel was built by private individuals, Daniel and Ebenezer Zane; was acquired, not from any company but from said individuals, by the Wheeling & Belmont Bridge Company; was acquired in 1847 by that company, seven years after the expiration of the time limitation of the last Ohio act on the subject, and was acquired only then in pursuance of authority derived from an entirely new Virginia act, to-wit, that of 1847, and by virtue of the Virginia act alone; the company created in 1816, and as to which company alone there was any concurring legislation by the state of Ohio, was never organized, never held any meetings, was never in a position to have built a bridge, did not in point of fact build any bridge; no bridge company at Wheeling ever had a bridge across the Ohio river until the year 1847, and then in pursuance of the act of that year; Virginia acts subsequent even to 1847 have materially altered the company's powers, while there never has been any Ohio enactment on the subject since the aforementioned act of February 18, 1830, except resolutions submitted to congress of the United States, and the company never did anything indicating that it was other than solely a Virginia corporation.

From this statement of fact it is my opinion that the Wheeling & Belmont Bridge Company has no powers which it has derived from any special act of the general assembly of Ohio, but that on the other hand, it is a foreign corporation doing business in this state and therefore liable as other foreign corporations.

In this connection it appears from your record that the company has now complied with sections 148*c* and 148*d* and filed annual reports for the years 1906 and 1907. I enclose herewith additional reports covering the years 1902, 1903, 1904 and 1905 and their check for $40 in payment of the fee for filing same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Public service corporation desiring to furnish electricity and water must limit such business to a single municipality.

Articles of incorporation of the Coshocton Public Service Company disapproved.

February 19, 1908.

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

DEAR SIR:—I beg to acknowledge the receipt of the articles of incorporation of the Coshocton Public Service Company, which you have transmitted to this department for an opinion as to the legality of the purpose clause contained therein.

The articles provide for producing, purchasing, selling and distributing electric current, natural and artificial gas and steam and hot water for the purpose of light, heat and power, or any of them. It specifically provides for constructing and maintaining poles, wires, conduits and appliances, pipes and pipe lines and all the necessary adjuncts for distributing light, heat and power. It further provides for lighting streets, avenues, public and private places and buildings by any of the means mentioned. Certain other provisions are mentioned there, which it is unnecessary to consider.

Counsel who prepared these articles evidently sought to invoke the power contained in section 2485*a* Revised Statutes (97 O. L. 281), which is as follows:

> "Any two or more of the companies mentioned in section 2478 or an electric light and power company and any water company or any heating company, which are doing business in the same municipal corporation or which are incorporated and organized for the purpose of doing business in the same municipal corporation, may consolidate into a single corporation in the same manner and with the same effect as provided for the consolidation of railroad companies in sections 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3390, 3391 and 3392 of the Revised Statutes, and any and all acts amendatory and supplementary to said sections."

It will be observed from the foregoing that authority is given to combine any two or more of the companies therein mentioned, but that right is limited to those companies which are "organized for the purpose of doing business in the same municipal corporation." It is the opinion of this department that when the statute authorizes the consolidation into a single corporation of various other corporations, such declaration on the part of the general assembly is tantamount to authorizing the creation of a single corporation for the several purposes enjoyed by the separate corporations which may be combined thereunder. The authority is therefore conferred by the act to consolidate into a single corporation the companies mentioned in sections 2478 and 2485*a* R. S., but the articles which so provide must declare that all such combined purposes or businesses are to be engaged in "in the same municipal corporation."

The incidental powers of purchasing, leasing or otherwise acquiring real estate and personal property, and of obtaining, registering, etc., patents used in connection with the business of such corporation need not be specifically mentioned under the head of the purposes of the company. The rule regarding the same, as heretofore stated by this department, is, that it is improper to state under the head of the purpose of the company all the incidental powers such as it would necessarily have by general law. (People ex rel. v. Gas Co., 130 Ill. 268; Wendell v. State, 62 Wis. 300; In re Gas Co., 4th Pa. Dist. Rep. 349.)

For the reason that the articles in question do not comply with the foregoing requirements, I return the same to you advising that until they be so modified as to comport therewith, the same be not filed or recorded by you.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION OF THE HOLDEN CO-OPERATIVE COMPANY DISAPPROVED.

February 22, 1908.

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

DEAR SIR:—I beg to acknowledge receipt of your favor containing the articles of incorporation of the Holden Co Operative Company, upon which you request the opinion of this department as to the legality of the purpose clause contained therein.

I return the same to you without my approval for the reason that it attempts to confer upon such corporation the right to sell all merchantable articles "at wholesale and retail."

In my opinion this would violate section 3235 Revised Statutes, providing that a corporation shall have but a single purpose.

I therefore advise that until the articles be so modified as to comply with the foregoing that you do not file or record the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Training school for nurses may be authorized under general corporation act to issue certificates of completion of prescribed courses.

Articles of incorporation of the Canfield-White Training School for Nurses approved.

March 6th, 1908.

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

DEAR SIR:—Replying to your recent letter regarding the articles of incorporation of the Canfield-White Training School for Nurses, I beg to advise that the purpose clause contained therein, to-wit: "To train and educate women to become nurses and to grant them certificates as trained nurses," does not constitute such proposed corporation a college or institution of learning as defined in sections 3726, etc., R. S.

In my opinion a corporation may be formed for the instruction of nurses in the treatment of disease and in hygiene, and as an incident thereto it may grant to the individuals who have taken the prescribed course of training a certificate evidencing such fact, but such certificate is in no sense a diploma or degree as issued by schools and universities. It follows therefrom that such corporation need not file a schedule of property as provided for by universities, colleges and other schools of learning

I return the articles and the $2.00 silver certificate attached thereto, together with the letters of the attorneys representing the incorporators, with the advice that the articles be filed and recorded as provided by law.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BANK MAY HAVE PREFERRED STOCK.

March 17th, 1908.

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

DEAR SIR:—Replying to yours of recent date presenting the question as to whether a bank organized under the laws of Ohio can have preferred stock, I beg to say that section 3235 R. S. provides that,

> "If the organization is for profit, it must have a capital stock. Such stock may consist of common and preferred or of common only, but at no time shall the amount of preferred stock exceed two-thirds of the actual capital paid in cash or property."

In section 3269 R. S., it is provided that the provisions of the general chapter on corporations do not apply when special provisions are made in any of the special chapters for incorporating companies.

There are no special provisions with regard to preferred stock of banks, and so I am of the opinion that banks, subject to the limitations of other corporations, may issue preferred stock.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BOND INVESTMENT COMPANY—WHAT IS.

Corporation engaged in business of selling investment securities on installment plan must comply with section 3821r.

In re American Guaranty Company of Chicago.

March 21st, 1908.

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

DEAR SIR:—I beg to acknowledge the receipt from your department of the form of statement prescribed by you pursuant to the provisions of section 148*e* R. S. having been made by the American Guaranty Company of Chicago and filed in your department preliminary to such corporation engaging in business in this state. The statement is accompanied by a draft for the sum of $10.00 drawn upon the National City Bank of New York City, and endorsed payable to your order. It is further accompanied by certain literature of the American Guaranty Company showing the form of contracts for bonds which this company is engaged in selling, and its manner of doing business.

The application for authority to do business in Ohio has, upon the request of the company, been submitted by your department to this department for the purpose of having it determined whether or not the business which such company purposes to engage in and carry on in this state brings it within the provisions of an act of the general assembly of Ohio entitled: "An act to provide for the better protection of persons dealing with bond investment companies," otherwise known as section 3821*r* and section 3821*z* R. S.

The counsel representing the American Guaranty Company has filed exten-

sive arguments in writing bearing upon the question submitted to this department, and which have received my careful consideration.

The question of the authority of this company to do business in Ohio of the character set out in its prospectus and application, is even broader than that suggested by its counsel. It first involves an examination of section 148c and section 148d of the Revised Statutes of Ohio as to whether the requirements of those statutes have been complied with. Section 148d R. S. prescribes that:

> "No foreign stock corporation * * * shall do business in this state without first having procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as can be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business * * *.
>
> "The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of the laws of this state. * * * Before granting such certificate, the secretary of state shall require every such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal particularly setting forth the amount of capital stock, the business or objects of the corporation which it is engaged in carrying on, or which it proposes to engage in or carry on within the state, and a place within this state which is to be its principal place of business, and designating in the manner prescribed in the code of civil procedure in this state, a person upon whom process against such corporation may be served within this state."

The copy of the charter or certificate of incorporation has not been filed. The form of contracts transmitted to me evidence that the contract, whatever be the amount thereof, is sold to the holder "on the partial payment or installment plan." The business of this company will be the placing or selling of such certificates. The contract itself provides that it is made "in consideration of the application of ..... of ..... and the payment of $10.00 due ..... day of ..... the receipt of which is hereby acknowledged, and the further payment of the same amount to be made on the fifth day of each and every month thereafter until payments for ..... months shall have been made in all, after which the coupons hereto attached will be countersigned on presentation."

Of the various forms of contract submitted, each contains, in substance, the foregoing provision. They only vary in the amount of the principal mentioned therein and in the times of their maturity. While we have no judicial determination by the courts of this state as to the meaning of that portion of the act above cited containing the language "partial payment or installment plan," yet it seems clear that that character of business which is prohibited within this state, except upon full compliance with the requirements of the act above cited, is embraced in the contracts referred to. Whether they be in strict legal terminology "certificates, bonds or debentures" it is not necessary now to determine, but they certainly are embraced within the more general language used within such act, namely: "or other investments" of securities of any kind or description, on the "partial payment or installment plan." The plan of payment being by partial payments or installments constitutes the *res* forbidden by the act, unless there has been full compliance therewith. The deposit with the state treasury is made for the protection of the investors in such investment

securities. Without this deposit being made, there would be no security for such investors, this company being a corporation of the state of Virginia, and otherwise making no deposit within the state of Ohio to insure the payment of the obligations thus entered into. In the case of State ex rel. Prout v. Northwestern Trust Co., 72 Neb. 497, s. c. 101 N. W. Rep. 14, the supreme court of Nebraska (1904) in construing an act of the general assembly of that state, similar in nature to section 3821*r*, et seq., said:

> "If the organization of a corporation and its plan of doing business involves receiving from each of its members a stated sum at stated intervals until a specified amount is received from such members, and investing this money in property for the benefit of its members, it is an installment investment company within the meaning of chapter 29, page 299, laws of 1903."

Although the trust company under examination in the opinion above cited did not in all respects measure up with the requirements of the companies described in the act, yet the spirit of the act was construed to include those companies engaged in the business of receiving from their members stated sums at stated intervals until a specified amount is received. So in the contracts before us. The business engaged in is selling investment securities on the partial payment or installment plan, and it is therefore my opinion that such company should make its deposit with the treasurer of state as required by the act in question, and that it should qualify with the department of the superintendent of insurance, and not through your department, as provided for by the exceptions contained in section 148*d* R. S.

I therefore return to you the papers submitted to me as hereinbefore noted.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BUILDING AND LOAN ASSOCIATION—CAPITAL STOCK.

Par value of shares of stock of building and loan association may not exceed $100.00.

Articles of incorporation of the Blue Ash Building and Loan Company disapproved.

March 23d, 1908.

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

DEAR SIR:—I have again given consideration to the articles of incorporation of the Blue Ash Building and Loan Company presented by your department, and upon which I have heretofore expressed the opinion that the shares of stock therein should be limited to $100.00 each. It is true that the act authorizing the creation of building and loan associations does not fix the size of the shares, but it is the view of this department that as the shares of stock are made the basis for loans, they should be of such size as would accommodate the greater number of borrowing members and thus carry out the primary purpose of such association.

Section (3836-3) R. S. forbids that any one person shall vote more than

twenty shares in any such corporation, which is for the express purpose of extending the control of such association to the largest number of members instead of limiting it by increasing the size of the shares.

Having reviewed the question presented by the inquiry of the building and loan association, I adhere to the opinion formerly expressed by me, that the size of the shares should be not greater than $100 each.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CORPORATION—FOREIGN—COMPLIANCE WITH LAWS OF OHIO.

Trust company of another state accepting in such state trust involving real estate situated in Ohio is not "doing business" in Ohio and need not comply with sections 148*c and* 148*d.*

March 26th, 1908.

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

DEAR SIR:—You have submitted for an opinion the enclosed letter from Drausin Wulsin, of Cincinnati, dated March 17th, 1908.

The facts stated are that a trust company organized and existing under the laws of the state of New York, having its principal place of business in the city of New York, is appointed trustee for minor children, residents of New York, in an estate consisting partially of real estate located in Hamilton county, Ohio.

The inquiry made is, whether the trust company, in accepting this trust and in taking title as trustee to this property, will become liable for compliance with our foreign corporation laws relating to the doing of business by foreign corporations in this state.

The provisions of section 148*c* have been judicially construed by our supreme court. Section 148*d* was construed in the case of Toledo Commercial Co. v. Glen Mfg. Co., 55 O. S. 217, in which it was held that the section "*did not apply to a foreign corporation whose business within the state consisted merely of selling through traveling agents and delivering goods manufactured outside of the state.*" In this opinion the court says:

> "The holdings are numerous that it is the right of persons and of corporations residing in one state to contract and sell their commodities in another, unrestrained except where restraint is justified under the police power. This rule does not deny the right of any state to impose conditions upon the power of foreign corporations to establish themselves within its boundaries for the performance generally of their business, *involving the exercise of corporate franchises and powers.*"

The trend of opinion has universally been to the effect that in order to make a corporation liable, some act must be done which would clearly be the exercise of a corporate power not interstate commerce; and also,

> "That the doing of a single act of business by a foreign corporation does not constitute doing and carrying on of business within the meaning of the statutory and constitutional provisions."

The obvious construction of this provision is that no foreign corporation shall begin any business in the state for the purpose of pursuing or carrying it on without compliance therewith;

> "But to require such compliance as a prerequisite to the doing of a single act of business, when there was no purpose to do any other business or have a place of business in the state, would be unreasonable and incongruous."
>
> Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.

In addition to the above holdings it has not been the policy of this state to require compliance on the part of foreign corporations, under circumstances such as those set out in the enclosed letter, and it is my opinion that this company may be permitted to accept the trust and take title, as trustee, in this instance, without becoming liable for compliance with section 148*c* and section 148*d* of our Revised Statutes.

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

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Oil and gas development company may not be authorized to maintain and operate pipe lines nor to deal generally in personal property.

Articles of incorporation of the Knox-Morrow Oil and Gas Company disapproved.

April 1st, 1908.

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

DEAR SIR:—I beg to acknowledge the receipt of the articles of incorporation of the Knox-Morrow Oil and Gas Company. You have submitted the same to this department for an opinion as to the legality of the purpose clause contained therein.

I express the opinion that the purpose clause violates section 3235 R. S., in that it seeks to assume the powers of a pipe line company and those of an oil and gas development company, also of dealing in and disposing of personal property, rights or privileges, which the corporation may think necessary for the advantage of its business."

The powers of pipe line companies are those mentioned in section 3878 Revised Statutes, and it is only corporations of that character, so organized, which possess the power of eminent domain. If the company in question desires to construct a pipe line for the general transportation of oil, it should specifically provide therefor as provided for by section 3878 R. S. If it desires to construct lines for the transportation of its own oil, the articles of incorporation should specifically provide that such pipe lines are for the transportation of its own oil and merely incidental to its own business. The distinction between the two being, that the former becomes a common carrier and the latter merely for the transportation of the oil of the individual company.

The right to deal in and dispose of any personal property is an incidental power of all private corporations, so long as such power is limited and made incidental to the main purpose of the corporation, which is, that of doing an oil

and gas business. This clause is too broad as now contained in the articles referred to, because it confers upon the corporation the right to "deal in and dispose of any personal property, rights or privileges which the corporation may think necessary for the advantage of its business."

Such a statement is too indefinite. (In re Crown Bank, L. R. Ch. Div. 634; State ex rel. v. Central, etc., Ass'n, 29 O. S. 399; State ex rel. v. Taylor, 55 O. S. 61.)

For the reason that the articles in question do not comply with these requirements, I return them to you advising that until so amended as to comply therewith you should not file or record the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—AMENDMENT.

Manufacturing company may not by amendment acquire power to construct and maintain buildings or to deal in real estate.

Amendment to articles of incorporation of the J. F. Bender & Brothers Company disapproved.

April 1st, 1908.

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

DEAR SIR:—Yours of the 30th ult. received. With it you have submitted an amendment to the articles of incorporation of the J. F. Bender & Brothers Company, which amendment provides for a change of the corporate name of the company and the purpose for which the corporation is formed.

Section 3238*a* of the Revised Statutes permits the adoption of amendments,

> "So as to modify, enlarge and diminish the objects and purposes for which it is formed; or so as to add thereto anything omitted from, or which might lawfully have been provided for in such articles originally; provided, however, that nothing in this supplementary section contained shall authorize a corporation, by amendment, to increase or diminish the amount of its capital stock; nor shall any corporation, by amendment, change substantially the original purpose of its organization."

This corporation provides in its amended purpose clause as follows:

> "Said corporation is formed for the purpose of conducting the business of buying and selling lumber and other building materials; for carrying on a sash, door and blind manufactory, and manufacturing therein for use or sale, all building materials and such other articles of wood as are usually made in similar manufactories, and for constructing, erecting, altering, repairing and maintaining buildings to be used for hotels, theaters, storerooms, offices, warehouses, factories, dwellings or other purposes, on its own real estate, or real estate owned by others, and to acquire by purchase or lease, and to hold, use, mortgage, lease and sell, any and all such real estate and personal property as may be necessary for carrying on such business, and for doing all things incident thereto."

Its primary purpose is that of manufacturing. It is sought to add thereto the further power of erecting and maintaining buildings used for hotels, theaters, factories, etc. This could only be done by incorporating a company such as is provided for in section 3235 R. S., or a corporation possessing the powers mentioned in section 3884*a* R. S. But manifestly a corporation cannot be oranized for the purpose of manufacturing and also for the purpose of constructing and maintaining buildings or dealing in real estate, and if a corporation cannot be organized for such purpose it cannot lawfully provide for such powers by amendment to its articles.

For the foregoing reasons I return the amendment to you without my approval.

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

CORPORATIONS—APPREHENSION OF CRIMINALS—AMENDMENT TO ARTICLES.

Corporation organized under general incorporation laws may not, by amendment to articles of incorporation, acquire powers of corporation for the apprehension and conviction of criminals.

In re the Park Inspection Company.

April 8th, 1908.

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

DEAR SIR:—Acknowledging the receipt of your favor of the 7th inst., I beg to say the correspondence which you have enclosed with your letter concerns the right of the Park Inspection Company, a corporation of the state of Ohio, duly incorporated on the 8th day of November, 1906, to assume the powers of a corporation organized pursuant to section (3705-11) R. S., being an act providing for the incorporating of companies for the apprehension and conviction of criminals.

The procedure by which such first mentioned corporation undertakes to assume such additional powers is that provided for in section 3238*a* R. S., viz: by amendment to its articles of incorporation.

The Park Inspection Company was organized under the general incorporation laws of this state. It had five incorporators. Its purpose, as expressed in its articles, was that of

> "Buying and dealing in confidential information; making investigations relative to individuals, associations, businesses and corporations, conducting investigations for individuals, mercantile and manufacturing companies, contractors and steam and street railroads, transacting a general information and inspection business, both public and private and doing all things necessary and incident thereto for profit."

The provision of the act for the apprehension of criminals (section (3705-11) R. S.) is that,

> "Any number of persons, not less than fifteen, a majority of whom shall be residents of the state of Ohio, are hereby authorized to become incorporated for the purpose of apprehending and convicting any person or persons accused of either felony or misdemeanor."

The act then enumerates in detail the powers of the officers and members of the company; the power to make and collect assessments from its members and further powers unnecessary to consider in this connection. It is a special form of corporation. A special method of procedure is required as preliminary to incorporating such companies. It is distinguished from corporations provided for by the general code (chapter 1, title II, division 2, R. S.). Such corporations are required to have not less than fifteen incorporators. The general code provides for five (Sec. 3236 R. S.). It is limited to the specific purpose of apprehending and convicting persons accused of either felony or misdemeanor. It cannot engage in a general inspection or detective business such as is provided by the original articles of incorporation of the Park Inspection Company. Such corporation cannot be created *under the general incorporation laws*, but if created at all, must be pursuant to the provisions above cited. Section 3238*a* R. S., which authorizes the procedure for amending the articles of incorporation in certain particulars restricts such procedure to those corporations which are incorporated "under the general incorporation laws of the state."

Corporations for the apprehension and conviction of criminals (section (3705-11) R. S.) cannot adopt such procedure for amending their corporate purposes, and as it is forbidden such special forms of corporations to add to their powers, by amendment, the purpose or purposes conferred upon corporations organized under the general incorporation laws, so by parity of reasoning it would be forbidden the latter class of corporations to assume, by amendment to their articles, the powers of corporations organized under the specific provisions enumerated.

A further objection should be entered to such procedure because section 3238*a* R. S. provides as follows: "Nor shall any corporation, by amendment, change substantially the original purposes of its organization."

I am, therefore, of the opinion that the procedure sought to be adopted by the Park Inspection Company cannot be authorized by you, and the amendment to its articles tendered you for filing and record should not be filed or recorded.

Very truly yours,

WADE H. ELLIS,
Attorney General.

INCORPORATOR MUST BE A NATURAL PERSON.

April 13th, 1908.

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

DEAR SIR:—Replying to your inquiry of the 11th inst., I beg to advise that the articles of incorporation of the Central Delivery Company of Barberton, Ohio, contain among other names those of firms, companies or associations. The question presented by you is whether or not such signatures should be considered as incorporators as required by section 3236 Revised Statutes. That section in part provides:

> "Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge before an officer authorized to take acknowledgments of deeds, articles of incorporation, the form of which shall be prescribed by the secretary of state."

In my opinion the use of the word "persons" in such section is limited to natural persons and cannot be extended to associations, firms or corporations. As there are five persons who have individually signed such articles, there is a compliance with section 3236 R. S., but the firm or corporate names should be removed therefrom.

I therefore return the articles of incorporation to you advising that the parties filing the same be required to strike therefrom the firm, corporate or association names contained therein before you file or record the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Manufacturing company may not be authorized to develop and sell power. Articles of incorporation of the Parrock Company disapproved.

April 14th, 1908.

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

DEAR SIR:—I have received from you under even date herewith the articles of incorporation of the Parrock Company with a request for an opinion as to the legality of the purpose clause contained therein.

For the purpose of considering whether or not the various objects stated in such purpose clause are or are not related, I have divided them into four paragraphs as follows:

"1. Said corporation is formed for the purpose of designing, erecting, buying, selling, operating and leasing blast-furnaces, steel converting, rolling mill, copper-smelting and other plants for the manufacture and fabrication of iron, steel, copper, coke, manganese and all or any products thereof."

"2. Steam, hydraulic, gas, electric, hydro electric power plants, for the manufacture, production, use and sale of power of all kinds for all purposes."

"3. For the purpose of designing, manufacturing, buying, selling, dealing in and installing blast-furnace, steel converting, rolling mill, copper-smelting, foundry, steam, hydraulic, gas, electric, hydro-electric machinery, equipment and supplies, machine tools, pneumatic tools, mill supplies, building materials and equipment of every nature and description."

"4. For the purpose of designing, constructing, maintaining, buying, selling and leasing reservoirs, dams, canals and raceways for the development, conversion, use and sale of water power."

Paragraphs 1 and 3, above set forth, relate to the subject of manufacturing iron, steel and other metals. Paragraphs 2 and 4 relate to the subject of power plants, paragraph 2 being the erecting and operating of steam, hydraulic, gas, etc., plants, and paragraph 4 for the development, conversion, use and sale of water power by use of reservoirs, dams, canals, etc.

This purpose clause presents the query as to whether a company can be incorporated for the purpose of manufacturing, and also for the further purpose of developing power and making a business of selling the same.

I am of the opinion that these are dual purposes and are forbidden to be owned in the same corporation by section 3235 R. S., as construed by the supreme court of Ohio in the case of State ex rel. v. Taylor, 55 O. S. 67.

I herewith return to you the papers transmitted to me.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—WHOLESALE AND RETAIL BUSINESS.

Articles of incorporation of the Uthe & Hiltz Company approved.

April 16th, 1908.

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

DEAR SIR:—I am in receipt of yours of the 14th inst. transmitting to this department the articles of incorporation of the Uthe & Hiltz Company. You request an opinion as to the legality of the purpose clause contained therein. The purpose clause is as follows:

> "Said corporation is formed for the purpose of carrying on a wholesale and retail drug, cigar and tobacco business, buying and selling drugs, druggists' supplies, surgical instruments and supplies, cigars, tobacco, confectionery and stationery and also for the purpose of manufacturing, compounding and selling pharmaceutical preparations, and of purchasing, owning, leasing and otherwise acquiring all such real estate and to do such other things as may be necessary or useful for the accomplishment of the corporate purpose."

The accompanying letter advises this department that the sole objection to the articles in question is that the purpose clause confers upon the corporation the power to carry on a wholesale and retail business.

I am of the opinion that a corporation may lawfully be formed in this state to carry on the business of merchandising at wholesale and retail

Very truly yours,

WADE H. ELLIS,
Attorney General.

DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS—RECOMMENDATION FOR APPOINTMENT.

Secretary of state, as state supervisor and inspector of elections, must regard all recommendations of county executive committees of political parties made five days before the first of May, and in case of recommendations by rival committees of the same party must submit the controversy to the state central committee of such party, which has ten days in which to decide.

April 22d, 1908.

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

DEAR SIR:—I beg to acknowledge receipt of your favor of April 21st, in which you seek my advice as to your duty under the following statement of facts:

> "A committee purporting to be the regular Democratic committee of Lucas county, submitted on the fourteenth day of April, a person to be appointed as a member of the board of deputy state supervisors and inspectors of elections of Lucas county. On April 24th, a second committee claiming to be the regular Democratic committee of Lucas county, will submit a person for said appointment, as I am officially informed by said committee."

You express the wish to be advised specifically as to your duty to consider the recommendation to be filed with you on the 24th, and in the event of your taking such a course your duty to submit the question as to which of the two rival committees is the regular Democratic executive committee of Lucas county to the Democratic state central committee.

In my opinion the language of the statute (section (2966-3)) which provides that the appointment of deputy state supervisors and inspectors of elections shall be made on or before the first day of May, bienially, is directory, and such appointment if made after such date would be valid. On the other hand, I believe the requirements that the recommendations of the county executive committee shall be regarded by the state supervisor and inspector, and that in case of recommendations by rival committees the state supervisor and inspector shall submit the question to the state central committee of the interested political party, are mandatory. It is therefore the duty of the secretary of state as such chief supervisor and inspector of elections to regard every recommendation by such committee or committees made five days before the first day of May and to submit such disputes to the state central committee. The fact that the state central committee would have ten days in which to make their return to the secretary of state, which time would make it impossible for the secretary of state to appoint until after the first of May, would not, in my opinion, affect the question; nor is it significant that the provision for submitting to the state central committee was incorporated in the section by a subsequent act. The clause of the original act which provides that the appointment shall be made on or before the first of May being directory merely, there is no such irreconcilable conflict between the act in its original form and the amendment under consideration as would repeal or modify by implication any of the other provisions of the former act. The old law would yield at its weakest point.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—RAILROAD COMPANY.

Articles of incorporation of the Ohio, Lake Erie & Eastern Railroad Company disapproved for failure to set forth motive power.

April 27th, 1908.

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

DEAR SIR:—Referring to the articles of incorporation of the Ohio, Lake Erie & Eastern Railroad Company, I beg to advise that the motive power should be

specified in the purpose clause, or, unless it is specified, the company would not have the right of eminent domain, as provided in section (3443-10) R. S. It should further be specified for the purpose of classifying such railroad company as either steam or electric."

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

NEWSPAPER CORPORATION—POLITICAL AFFILIATION.

Act in 99 O. L. 23, prohibiting corporations from using their property in aid of political parties does not apply to partisan newspapers.

April 29th, 1908.

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

DEAR SIR:—I have your letter of yesterday requesting an opinion as to whether or not H. B. No. 719, which has now become a law, includes within its inhibitions the publication of a party newspaper by a corporation This act provides in section 1, that no corporation doing business in this state shall, directly or indirectly, pay, use or offer any of its money or property for, or in aid of, any political party, committee or organization, or for any candidate for political office or "in any manner use any of its money or property for any political purpose whatever." Penalties by fine and imprisonment are provided.

If a literal construction were given to this language, it would make it a criminal offense in Ohio for any corporation to publish a newspaper in aid of a political party, or to support in the columns of such paper the candidates of its choice for public office. More than this, it would be unlawful for a corporation to print tickets or pamphlets for a candidate or a party, or to rent its premises or building for the use of a political committee or a party convention.

Section 2 of the act requires that every corporation doing business in this state shall, through an appropriate officer, file an affidavit annually that it has not violated the law in this respect during the preceding year.

It is no doubt true that the general assembly may, and properly should, forbid corporations to make contributions either of money or property to be expended or used by candidates or committees in the aid of political parties, and to punish them or their agents for violating such law. Corporations are peculiarly the creatures of the state; their funds ought not to be used for any purpose except those for which they were created, and all such funds are held by the directors or other officers of a corporation in trust for the stockholders. It is not so clear, however, that the general assembly may prohibit the publication of newspapers that support political parties or candidates, even though the owners of such newspapers organize themselves into a corporation; nor is it so clear that it may require a corporation of any character to make an annual affidavit of innocence of a penal offense.

With respect to the question you ask, however, I am inclined to give that construction to this act which would express the purpose the legislature must have intended, and which, at the same time, would obviate constitutional difficulties. For these reasons I express the opinion that this statute forbids only the contribution, by corporations, of money or property to be expended or used by party organizations, committees or candidates for political purposes, and

does not apply to the use of money or property by a corporation in the publication of a newspaper, even though the newspaper supports or aids a political party or candidates for office.

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

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Mining corporation may not be authorized to deal generally in real estate.
Articles of incorporation of the Cincinnati Coal, Iron and Timber Company, disapproved.

May 1st, 1908.

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

DEAR SIR:—The articles of incorporation of the Cincinnati Coal, Iron and Timber Company transmitted to this department by you, have received my consideration. You request an opinion as to the legality of the purpose clause contained therein, which is as follows:

> "Said corporation is formed for the purpose of buying, selling and dealing in coal, iron, timber, oils, minerals and other commodities; to buy and sell coal lands, oil lands, timber land and mineral lands, and to do a general mining business, and to do all things incidental thereto."

Said purpose clause is defective in that it provides for buying, selling and dealing in coal and other minerals, and also buying and selling coal lands and other mineral lands.

A corporation may be formed under favor of section 3235 R. S., for the purpose of buying and selling real estate generally, but all such powers expire by limitation in twenty-five years from the date of the articles of incorporation.

Another character of corporation, separate and distinct from the foregoing, is authorized by section 3862 R. S., which provides that a mining or manufacturing corporation, limited as therein set forth, may, in its corporate name take, hold and convey such real estate as is necessary and convenient for the purpose for which it was incorporated. The latter statute does not confer the authority to buy and sell real estate generally. It does not place a limitation upon the life of the articles granted thereunder. If thereby contemplates the purchase of real estate for the single purpose, viz., such as is restricted to the business objects of such corporation.

It might be sufficient to say that these several purposes, conferred by section 3235 and section 3862 R. S., cannot be embraced in one corporation; but the subject requires further statement. The public policy of this state has always been against corporations obtaining unqualified authority to acquire, own and hold real estate. A mining or manufacturing corporation can only acquire such real estate as is "necessary and convenient" for its business of mining or manufacturing; but cannot under such assumption of authority "take, hold and convey real estate" other than is necessary and convenient for its lawful purpose.

Confusion will be avoided in considering the question of such powers if we adhere to the purpose or business for which the corporation is organized. Its

business purpose, if organized under section 3862 R. S., must be either that of mining or manufacturing, as therein described. If so, its power to take, hold and convey real estate, is limited to such as is necessary and convenient for conducting such business. It cannot deal in real estate.

If its business purpose is that of buying and selling real estate, pursuant to section 3235 R. S., its life is limited to twenty-five years, and the articles should so recite; but if so organized it cannot engage in a "general mining business."

In either view it is apparent that the purpose clause in the accompanying articles offends against the provisions of section 3235 R. S., because of the dual purposes combined therein of selling coal, iron, timber and oils with that of buying and selling real estate. It further contravenes the same section by combining the purpose of buying and selling lands with that of a "general mining business."

I therefore return the articles of incorporation to you with the papers thereto attached, advising that until the same is so amended as to comply herewith you do not file or record the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—AMENDMENT—REAL ESTATE COMPANY.

Real estate company may not by amendment to its articles of incorporation acquire power to erect buildings to be used as hotels, etc.

May 4th, 1908.

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

DEAR SIR:—Your letter of the 30th ult. is received. In it you present the inquiry whether a corporation organized under section 3235 R. S. for the purpose of buying and selling real estate, can, by amendment to its articles of incorporation, under section 3238*a* R. S., provide thereby that "said corporation is formed for the purpose of providing and managing one or more buildings for the accommodation of guests as a public hotel and doing all things incident thereto."

The limitation contained in section 3238*a* R. S. should be observed as follows: "Nor shall any corporation by amendment, change substantially the original purpose of its organization."

If, as you inform me, the original purpose of this corporation was to buy and sell real estate, the foregoing power could not be added thereto, as it would violate section 3235, providing that corporations can only have a single purpose.

The power requested is that contained in section 3884*a* R. S., and is recognized by the provisions thereof as a separate and distinct power not vested in corporations which have been organized for dealing in real estate. The prohibitive provision contained at the close of that section would seem to so indicate, viz.: "Nothing herein shall be construed as authorizing corporations to buy and sell or to deal in real estate for profit."

I return the certificate of amendment to you, advising that you do not file or record the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

NAME OF THE "JOHN CASHATT COMPANY" APPROVED.

May 5th, 1908.

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

DEAR SIR:—Replying to your letter of today with respect to the filing of the proposed articles of incorporation of the "John Cashatt Company," I beg to advise you that, in my opinion, the name of such company is not so similar to that of the "Cashatt Cigar Company," another corporation already in existence, as to mislead the public within the meaning of section 3238 of the Revised Statutes.

You may therefore accept and file the articles as presented.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Oil and gas company may not be authorized to operate pipe line save for transportation of its own product; nor to produce and deal in electric power.

Articles of incorporation of the Hopedale Gas Company disapproved.

May 13th, 1908.

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

DEAR SIR:—You have submitted to this department the articles of incorporation of the Hopedale Gas Company, with request for an opinion as to the legality of the purpose clause, which is as follows:

> "Said corporation is formed for the purpose of searching and producing petroleum oil and natural gas; buying, owning, operating and selling oil and gas property; buying and selling petroleum oil and natural gas; constructing, owning and operating pipe lines for the transportation of petroleum oil and natural gas; buying and selling oil and gas leases and leasing lands to be operated for the production of petroleum oil and natural gas; generating, producing, conducting and selling electricity; buying, selling and leasing gas and electric appliances and devices of every kind, and doing and performing all other acts or things incident to the foregoing operations."

Replying thereto, I beg to advise that the opinion of this department given you under date of April 1st, 1908, relative to the articles of incorporation of the Knox-Morrow Gas Company, is in point in the consideration of the question here presented. The purpose clause is violative of section 3235 R. S. because containing more than one purpose. It has joined with the power of producing, buying and selling petroleum, oil and natural gas that of constructing, owning and operating pipe lines for the transportation of petroleum, oil and natural gas. The construction, the owning and operating such pipe lines is not limited specifically to that of the transportation of the oil of this particular company. This should be done.

The powers of pipe line companies, generally, are those mentioned in section 3878 R. S. and it is only corporations of that character so organized which possess the power of eminent domain. If the company in question desires to

construct a pipe line for the general transportation of oil, it can specifically provide therefor as included in the last numbered section, but such power cannot be included with the first power mentioned in the purpose clause. This rule does not forbid joining in the same corporate articles a pipe line provision with that of producing, buying and selling petroleum. But in so doing the articles should contain an express declaration that "such pipe lines are for the transportation of its own oil." The distinction between the two is that a pipe line company with general powers for transporting oil becomes a common carrier under section 3878 R. S., while a private line for the transportation of oil of an individual company has no such power.

I am also of the opinion that it is improper to join an electric power company, such as is described in the purpose clause in these articles, with that of buying and selling oil and oil property. If an oil company of this character deems it necessary to erect an electric plant in order to carry out such specific purpose, and if it should have a surplus of electric power beyond that necessary for its own purposes, it may sell such surplus power to any consumer, but this is by virtue of the rule announced by the supreme court of Ohio in the case of State ex rel. v. Taylor, 55 O. S. 67, viz.: a power incidental to its main business, and should not be deemed to be an authority for creating a corporation with these separate, distinct and unrelated purposes.

I therefore advise that until the articles in question are so amended as to comply with these requirements you should not file or record them.

I herewith return the original articles and check for $25.00 thereto attached.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BANKS—INCORPORATION UNDER ACT OF MAY 5, 1908.

Under act of May 5, 1908, 99 O. L. 269, bank may not be incorporated under general corporation law; articles of incorporation must state definitely the nature of the banking business sought to be authorized; corporation desiring to use name similar to one already in use must add thereto name of city or village wherein it is to be located.

Articles of incorporation of the Farmers' and Merchants' Bank Company disapproved.

May 14th, 1908.

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

DEAR SIR:—I am in receipt of yours of the 13th inst., submitting therewith the articles of incorporation of the Farmers' and Merchants' Bank Company.

You inquire relative thereto whether these articles should be rejected and the individuals filing the same be required to file others in conformity with the recent act of the general assembly providing for the organization of banks.

The date of the signing and acknowledgement of the signatures to the articles is of no particular consequence when considering the law in force governing such corporations. They were presented to you, as I am advised by your letter, on the 13th inst. On the 5th inst. the act entitled "An act relating to the organization of banks and the inspection thereof," was approved by the governor. As to banking corporations then or thereafter created, the law went into effect as of the latter date.

Section 119 of that act repeals sections 3797 and 3798 of the Revised Statutes under which the proposed corporation sought to be incorporated. Such statutes now being repealed, would seem to be a sufficient reason for the rejection of the articles. But it is further apparent that they do not comply with the requirements of the act of May 5th, 1908, and therefore should not be accepted by you, in this, to-wit, they should recite in the language of paragraph (c) of section 2 of such act,

> "The purpose for which it is formed, whether that of a commercial bank, savings bank, safe deposit company, trust company, or a combination of any two or more, or all of said classes of business."

Again, it is required by section 3 of such act that when a bank corporation seeks to adopt a name similar to one engaged in business, the corporation so adopting such name should add thereto the words "of .....," indicating thereby the name of the city, village or township in which its principal place of business is situated. As there may be numerous banks in the state of Ohio which have adopted the name "Farmers' and Merchants'," it should be required of those hereafter incorporated to strictly comply with the provisions of section 3 of the act named.

In this connection, you will permit the suggestion that the blanks heretofore furnished by your department to incorporators for the purpose of incorporating banks, should be so modified as to comply with the requirements of the new bank law. The blank upon which the articles in question have been drawn contains the language that the incorporators desire to form a corporation "under the general corporation laws of said state." Hereafter banks cannot be incorporated under the general corporation laws, but are required to comply with the provisions of the act under consideration.

For the reason that the articles in question do not so comply I return them to you, advising that you do not file or record the same.

Very truly yours.

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Traction company may not be authorized to do investment business. Articles of incorporation of the General Engineering & Construction Company disapproved.

May 19th, 1908.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of the 18th inst. enclosing articles of incorporation of the General Engineering & Construction Company, which you have submitted to this department for an opinion as to the legality of the purpose clause contained therein. The purpose clause is as follows:

> Said corporation is formed for the purpose of constructing electric and steam railways, and doing all things necessary in connection therewith, also for constructing and erecting bridges, piers, abutments, break-

waters, masonry, power plants for electric railways, plants for furnishing electric motor power, plants for heating and lighting by electricity, mining machinery and plants; also construction and contract work of every kind for cities and towns, and the erection of residences, public buildings, factories and hotels; also the buying and selling of electric and steam railways, power plants and factories; for the buying of electric and steam railway bonds and stocks and other investment securities relative to electric and steam railways, power plants, factories and mines; and to acquire by purchase or lease and to hold, use, mortgage and lease all such real estate and personal property as may be necessary for carrying on such business.

This clause is violative of section 3235 R. S. in that it provides for more than one business purpose. It is, first, a traction company; second, an investment company. If it seeks to take the securities of electric and steam railways, power plants and factories for the purpose of securing the claims due it from such railways, plants and factories, it has such power as an incident to the general engineering and constructing business, and such incidental power it is unnecessary and improper to set forth in the purpose clause. (It is improper to state under the head of the purpose of the company all the incidental powers such as it would necessarily have by general law. People ex rel. v. Gas Co., 130 Ill. 268; Wendell v. State, 62 Wis. 300.) But a corporation cannot be organized in Ohio for the purpose of engaging in these two separate, distinct and unrelated businesses.

I return the articles herewith, advising you that until they be so modified as to comply with the foregoing requirements, you do not file or record the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Mercantile corporation may not be authorized to conduct general invention development business.

Articles of incorporation of the Fisher Brothers Company disapproved.

May 20th, 1908.

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

DEAR SIR:—I am in receipt of yours of the 19th inst., transmitting to this department the articles of incorporation of the Fisher Brothers Company, in which you request an opinion as to the legality of the purpose clause contained therein. Such purpose clause is as follows:

"Said corporation is formed for the purpose of owning, operating and conducting wholesale and retail grocery stores in Cleveland and other places in Ohio, and in any other states, territories, colonies or dependencies of the United States, in the District of Columbia, and in any and all foreign countries, and to purchase, hold, mortgage, sell and convey real and personal property therein, subject to the laws thereof, and as necessary and convenient to the above business, deal in, make, manufacture and prepare all and every kind of groceries,

both wet and dry, including preserves, vegetables, fruits, condiments, cigars, brooms, brushes and all and every article of goods, wares and merchandise usually dealt or traded in, in the grocery business.

"To apply for, purchase or otherwise acquire, and to hold, own, use, operate and to sell, assign or otherwise dispose of, to grant licenses in respect of and otherwise turn to account any and all inventions, improvements, processes and trademarks used in connection with, or secured under, letters patent or copyright of the United States of America, or elsewhere or otherwise, and with a view to the working and development of the same, to carry on any business to effect these objects, acquire and undertake the good will, property, rights, franchises, privileges and assets of every kind and the liabilities of any person, firm, association, partnership or corporation engaged in the grocery business, and pay for the same in cash, stock or bonds of said corporation or otherwise."

The first paragraph above quoted clearly provides for operating and conducting wholesale and retail grocery stores. This paragraph is in full compliance with the requirements of the statutes.

The second paragraph attempts to confer upon this company the right to purchase, own and sell any and all inventions, improvements, processes and trademarks used in connection with, or secured under letters patent or copyright of the United States of America or elsewhere; to carry on *any business* to effect these objects.

This is not limited to the wholesale or retail grocery business nor is it directly related thereto, but leaves the question of the character of the business to be carried on under this latter paragraph in doubt. If it contained the language that such additional powers would be used as incidental to the grocery business it might thereby escape criticism, but in its present form it evidences an intention to engage in as many diversified businesses as would be necessary to the working and development of the inventions, improvements, processes, etc., secured under the letters patent or copyrights.

Section 3235 of the Revised Statutes provides that only one main purpose may be stated in incorporation articles, and it must be stated with clearness. The business must be specified and it is not a compliance with the law to state that the company is formed to do any business it may find profitable, as is contemplated in the second paragraph above quoted. (Marshall's Private Corporations, p. 48.)

I therefore return the same to you with the accompanying enclosures, advising that until the purpose clause is so modified as to comply with the foregoing, you do not file or record the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

WILLIS LAW—APPLICATION OF PROVISO OF SECTION 7 TO CONSOLIDATED CORPORATIONS.

June 4th, 1908.

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

DEAR SIR:—In your communication of May 27, enclosing the letter of Mr. Barton Griffith, you inquire whether upon the consolidation of two domestic

corporations in April, 1908, the new consolidated company will be required to pay the Willis law franchise tax during the month of May, 1908. As the right of consolidation of corporations in this state is limited to certain classes I have no means of knowing whether this consolidation is a proper one under our statute and it must not be assumed that that question is in any way passed upon.

A corporation arising from the consolidation of two or more companies becomes a new corporation with a new capital stock equal to the capital stock of the consolidated companies unless otherwise specified.

Ashley v. Ryan, 49 O. S. 504;
Affirmed 153 U. S. 436;

where it is said that the effect of a consolidation is to form a new company by the extinguishment of the old ones.

The provisions of the Willis law with respect to new corporations are contained in section 7 thereof as follows:

> "Provided further, that a corporation shall not be required to file its first annual report under this act until the proper month hereinbefore provided for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state."

It is my opinion therefore that if the Hamilton Parker Fuel Supply Co. is a corporation resulting from the proper and legal consolidation of corporations in this state, having filed its certificate of consolidation in your department during April, it will not be required to make report and pay franchise taxes under the Willis law during May, 1908.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

ARTICLES OF INCORPORATION—PURPOSE.

Incidental powers of a corporation should not be expressly authorized.
Real estate company may not act as agent for estates.
Articles of incorporation of the Bonded Rental and Realty Company disapproved.

May 23rd, 1908.

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

DEAR SIR:—I beg to acknowledge receipt of your letter of the 20th inst. enclosing articles of incorporation of the Bonded Rental and Realty Company, concerning which you ask an opinion of this department as to the legality of the purpose clause contained therein. The following portion of the purpose clause is approved:

> "Said corporation is formed for the purpose of taking, acquiring, buying, holding, owning, maintaining, developing, selling, conveying, leasing, mortgaging, exchanging, improving, building, allotting, ap-

praising, protecting, and otherwise dealing in, and disposing of real estate and real property, or any interest or rights therein without limit as to amount; and to maintain a general real estate agency and brokerage business."

The purposes thereinafter mentioned are disapproved. Certain portions thereof are incidental to the main purpose of buying and selling real estate, which is included in section 3235 R. S., and such powers are limited to twenty-five years from the date of the articles. The incidental powers should not be stated, as they are conferred by law without being enumerated.

"It is improper to state under the head of the purpose of the company the incidental powers such as it would necessarily have by general law."

People ex rel. v. Gas Co., 130 Ill. 268;
Wendell v. State, 62 Wis. 300.

In addition thereto there are several independent purposes which cannot be assumed by this corporation, such as "the right to manage estates; to act as agent, broker or attorney in fact for any person, firm or corporation." If such independent powers were permitted to be incorporated therein it would violate section 3235 R. S. as construed by the supreme court of Ohio in State ex rel. v. Taylor, 55 O. S. 61.

For the foregoing reasons I return the articles to you, together with the accompanying check, advising that until the same are amended so as to comply herewith you do not file or record the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

WILLIS LAW—EXEMPTIONS.

Organization of corporation dates from filing of articles of incorporation, not from filing of certificate of subscription, for purpose of determining question of exemption under Willis law.

June 22, 1908.

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

DEAR SIR:—With your letter of June 15th you submit a communication from the Taplin, Rice-Clerkin Company of Akron, Ohio, requesting the opinion of this department respecting the liability of that company for annual report and franchise tax in May, 1908. From your letter it appears that the corporation filed articles in your department in September, 1907, and that the organization was completed and certificate of subscription filed October 30, 1907. The provisions of the Willis law are to the effect that all corporations organized under the laws of Ohio shall be required to make annual reports and pay franchise taxes each year, except *only* certain classes of corporations specifically exempt and new corporations not organized more than six months prior to the first of May.

Whatever the hardship may be in specific cases, tax laws are to be construed strictly in favor of the taxing authority. The Taplin, Rice-Clerkin Com-

pany is a corporation organized under the laws of Ohio more than six months prior to May, 1908, and is therefore liable for annual report and franchise tax during that month.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CORPORATION—AID OF POLITICAL PARTY.

Corporation may, under act in 99 O. L. 23, pay for insertion of advertisement in program of convention of political party.

June 30th, 1908.

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

DEAR SIR:—I have your inquiry of the 26th inst., enclosing a letter from Mr. F. M. McCartney of Columbus, Ohio, in which is presented the following inquiry:

> The local committee of the Prohibition party is making arrangements to entertain the national convention in this city. It desires to solicit advertisements from the business men of the city and state, including corporations, which advertisements are to be inserted in the program issued by such convention, and the money thus secured will be used to pay the expense of printing the program.
>
> You present the question whether the foregoing would be in violation of an act passed Feb'y 25th, 1908, entitled "An Act to prevent the corruption of elections and political parties by corporations"?

Section 1 of said act is as follows:

> "Sec. 1. That no corporation doing business in this state shall directly or indirectly pay, use or offer, consent or agree to pay or use, any of its money or property for, or in aid of, any political party, committee or organization, or for, or in aid of, any candidate for political office or for nomination for any such office, or in any manner use any of its money or property for any political purpose whatever, or for the reimbursement or indemnification of any person or persons for moneys or property so used."

The balance of the act provides the form of affidavits that shall be made by the officers of corporations in connection therewith and how the act shall be enforced.

In my opinion the plan adopted by the local committee, as above outlined, is not in violation of said section of the act in question. The money so expended is not given, subscribed or used in aid of a political party, committee or organization, within the contemplation of the act. Such payments so made are in return for advertising space supplied by such committee, and whether the same be done by the committee or by the individual members thereof, the plan is not prohibited by the act.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION OF ROUMANIAN BENEFICIAL SOCIETIES APPROVED.

July 30th, 1908.

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

DEAR SIR:—The articles of incorporation of the "Union of Roumanian Beneficial Societies of the United States of America" referred to this department for an opinion as to the legality of its purpose clause, has received my consideration and replying to such inquiry I beg to advise that, in my opinion, the purposes of such organization are lawful and such articles should be filed and recorded in your department.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

AUTOMOBILES—REGISTRATION OF—EXPENSE OF CERTIFICATES.

June 30th, 1908.

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

DEAR SIR:—Replying to yours of the 26th inst., I beg to advise that in my opinion the expenses incident to issuing a certificate of registration, pursuant to the provisions of the automobile law, for the purpose of identifying the chauffeur, or recipient of the badge, provided for in such law, would be a valid, legal charge against the fund used for defraying the expenses incident to the administration of such law. As such law does not provide for the recipient of the badge paying for any such certificate, no additional charge could be made against such individual or individuals therefor.

Very truly yours,

WADE H. ELLIS,
Attorney General.

AUTOMOBILES—REGISTRATION OF—MANUFACTURERS.

Manufacturers need obtain one certificate and number only for each style of vehicle; employe of manufacturer or dealer may not operate automobile of employer without obtaining state license.

July 1, 1908.

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

DEAR SIR:—In your letter of June 23rd, you ask for a construction of the automobile law, approved May 11, 1908, as to the certificate issued under section 11 of this law and as to the licensing of chauffeurs in the case of manufacturers and dealers.

The certificate issued and the number assigned to the manufacturer and dealer are similar to the certificate and number provided for the owner of a motor vehicle under sections 7, 8, 9 and 10 of the automobile law. The following differences may be noted: 1. A separate application for the certificate

is filed by the manufacturer or dealer for each "make," "style" or "type" of motor vehicle manufactured or dealt in by him. All gasoline motor cars are considered as one "make," "style" or "type." 2. Only one certificate need be issued to the manufacturer or dealer for each make, regardless of the number of cars operated. 3. The number assigned for a certain make designated in the certificate is to be used upon each motor vehicle of such make until sold or let for hire by the holder of the certificate. 4. The manufacturer or dealer may secure as many certified copies of such certificate as he may desire. Lists of such certificates and numbers are to be furnished to county clerks by the secretary of state, as provided for in section 8.

A certified copy of such certificate cannot take the place of a chauffeur's license under any circumstances.

The contention that an expert mechanic employed by an automobile manufacturer may operate a motor vehicle upon the public highway, without a license, is untenable. Section 3 of the automobile law defines the term "chauffeur" as meaning, "any person operating a motor vehicle for hire, or as the employe of the owner thereof." Such an operator is an employe under this section. That manufacturers and dealers are owners within the meaning of section 3, is shown by the fact that the words of section 6, "every owner * * except as herein otherwise provided," can refer only to section 11, which refers to manufacturers and dealers. In addition to this, it is one of the objects of the law, as set out in sections 16, 19 and 20, to insure greater safety to the public by fixing more definitely the identity and responsibility of persons operating motor vehicles.

Respectfully submitted,

WADE H. ELLIS,
Attorney General.

INSURANCE COMPANY—CHANGE OF NAME.

Casualty insurance company may change name under general corporation act.

July 2nd, 1908.

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

DEAR SIR:—I beg to acknowledge receipt of yours of the 2nd inst. containing the inquiry relative to the Ohio Casualty Company as to whether such company may, pursuant to the provisions of section 3238*a* R. S., change the name which it has adopted; also whether the name "The Columbus Casualty Company" may be substituted therefor.

Replying thereto I beg to say that section 3238 R. S. provides:

> "The secretary of state shall not in any case file or record any articles of incorporation in which the name of the corporation is such as is likely to mislead the public as to the character or purpose of the business authorized by its charter, or is the same as one already adopted or appropriated by an existing corporation of this state, or so similar to the name of such existing corporation as to be likely to mislead the public," etc.

You are better qualified to determine, with the information contained in your department, whether such name "The Columbus Casualty Company" is such as is already adopted or appropriated by an existing corporation or so

similar to the name of such corporation as to be likely to mislead the public.

I know of no reason why such name should not be assumed by such company.

Section 3238*a* is a general section governing all corporations and provides the method of procedure for changing the name of all forms of corporations, unless the special provisions of the statutes governing any particular class of corporations excludes such inference. There is no special provision in the chapter on insurance or casualty companies as to changing the names of such corporations and I, therefore, conclude that section 3238*a* provides the exclusive method therefor.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—PUBLIC SERVICE COMPANY.

Public service company seeking to exercise powers enumerated in sections 2478 and 2485a may not be authorized to join with such powers that of manufacturing and dealing in artificial ice.

Articles of incorporation of the Van Wert Public Service Company disapproved.

July 3rd, 1908.

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

DEAR SIR:—I beg to acknowledge the receipt of your letter of the 2nd containing the articles of incorporation of the Van Wert Public Service Company. You have requested an opinion upon the legality of the purpose clause contained therein, which is as follows:

> Said corporation is formed for the purpose of producing, manufacturing and vending electrical current for light, heat, power and all purposes for which the same is now, or hereafter may be, used and purchasing, leasing, acquiring, constructing, owning, maintaining and operating a plant or plants, therefor; of producing, manufacturing and vending artificial gas, of producing and vending natural gas, for light, heat, power and all other purposes for which the same now are, or either of them now is, or may hereafter be, used, and purchasing, leasing, acquiring, constructing, owning, maintaining and operating a plant, or plants, therefor; of producing, manufacturing and vending heat, by means of steam, exhaust steam, heated water, or other liquids, or combinations of the same, or of some of them, now, or hereafter, used for such purpose and purchasing, leasing, acquiring, constructing, owning, maintaining and operating a plant, or plants, therefor; of producing, manufacturing and vending, artificial light by the means aforesaid, or by any means hereafter used for such purpose and purchasing, leasing, acquiring, constructing, owning, maintaining and operating a plant, or plants, therefor; of producing, manufacturing and vending artificial ice, for the purposes for which ice now is, or hereafter may be used, and purchasing, leasing, acquiring, construct-

ing, owning, maintaining and operating a plant, or plants, therefor; and of doing all things needful, or convenient, to be done, in behalf of the purposes aforesaid, or in behalf of any one, or any ones, of them.

The question presented involves the construction of section 2485*a* R. S. as amended in the 97 O. L. 281, and section 2478 R. S. and, in connection therewith, the provisions of section 3235 R. S.

Section 3235 R. S., as construed by the supreme court of Ohio in the case of State ex rel. v. Taylor, 55 O. S. 61, forbids, without any legislative enactment authorizing the same, the organization of a corporation with more than one main purpose. In the case of public service corporations the intention of the general assembly, as evidenced in the foregoing sections of the Revised Statutes, seems to be to authorize the combining or the consolidation into a single corporation of any two or more of the companies mentioned in section 2478 R. S. Section 2485*a*, which confers this authority (97 O. L. 281), is as follows:

> "Any two or more of the companies mentioned in section 2478 or any electric light and power company and any water company or any heating company and any inclined movable or rolling road company, which are doing business in the same municipal corporation or which are incorporated and organized for the purpose of doing business in the same municipal corporation, may consolidate into a single corporation in the same manner and with the same effect as provided for the consolidation of railroad companies in section 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3390, 3391 and 3392 of the Revised Statutes and any and all acts amendatory and supplementary to said sections."

By a former opinion of this department, which is here adhered to, whenever the statutes authorize the consolidation of two or more companies into one corporation it is lawful, in the first instance, to incorporate a company with the several purposes of such mentioned companies. Does section 2478 R. S. include all of the companies mentioned in the purpose clause of these articles? The latest amendment to said section is in 98 O. L., and includes electric lighting companies, natural or artificial gas companies, gaslight or coke companies and companies for supplying water for public or private consumption.

Section 2485*a* mentions electric light and power companies, water companies, heating companies, any inclined movable or rolling road companies which are doing business in the same municipal corporation or which are incorporated and organized for the purpose of doing business in the same municipal corporation.

The purpose clause contained in these articles mentions light, heat, and power companies, artificial and natural gas companies. It again mentions heating companies and specifically mentions the means used in the production of heat. It further mentions artificial ice companies. The latter companies have not been included by the general assembly of this state in either section 2485*a* or section 2478 R. S. The purpose of the amendments of these various acts has been to vest additional powers in single corporations and thereby avoid the limitation contained in section 3235 R. S.. These acts cannot be extended, by construction, to include any other powers than those specifically named therein. I therefore conclude that the business of producing, manufacturing and vending artificial ice cannot be joined with the other powers men-

tioned in the purpose clause of these articles and I return the same to you without my approval advising that until the same be altered by striking therefrom such claim of power, you do not file or record the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

EXTENSION OF TERM OF OFFICE—NEW COMMISSION UNNECESSARY.

July 13, 1908.

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

DEAR SIR:—In your recent letter you ask whether a county treasurer whose term has been extended under Art. XVII of the Constitution by the act of April 2, 1906, 98 O. L. 272, is required to secure a commission for the period of extension.

The object of granting a commission issued by the governor and countersigned by the secretary of state seems to be to identify the person who is entitled to a particular office by election or appointment and the tenure of his office. The county treasurer holding a regular two years' commission does not require such an identification for the extended period since he alone is entitled to the extension under 98 O. L 272, which provides:

> "The incumbents in said several offices, at the time when said existing terms would otherwise expire, shall continue to hold and enjoy the same until the expiration of said respective terms as so extended, subject to all the provisions of law relating to removals and vacancies therein."

No commission, therefore, need be issued in the above case.

Respectfully submitted,

W. H. MILLER,
Assistant Attorney General.

BANKS—CONSTRUCTION OF LAW OF 1908.

Act in 99 O. L. 269, in so far as it provides for the reorganization of banks, is optional until April 1, 1910, and mandatory thereafter.

July 15th, 1908.

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

DEAR SIR:—I beg to acknowledge the receipt of an inquiry, presented through your department, as follows:

> "Are commercial banks, organized after the passage of the Thomas act, required to subscribe and pay in, authorized capital in the manner prescribed in sections 5, 6 and 11 of that act, or does the language contained in section 91 of the said act delay the operation of the requirements thereof until April 1st, 1910?"

Section 36 of the act of the 77th general assembly (special session) entitled "An Act relating to the organization of banks and the inspection thereof," provides that all character of banks *heretofore incorporated*, may avail themselves of the provisions of the act in question. That section provides how such banks may signify their intention to accept the privileges and powers conferred by such act. A provision is further contained therein as follows: "Provided that after April 1, 1910, every such corporation or association shall in all respects conform their business and transactions to the provisions of this act." Such section relates alone to the banks "heretofore incorporated," and applies to such banks the provisions of the act, after April 1, 1910, but makes it elective with such banks to avail themselves of the privileges and powers conferred by the act at any time. Before that date it is elective, after that date it is mandatory.

Section 91 of the act provides, in this regard, that banks "now existing and chartered or incorporated, or which may hereafter become incorporated, shall be subject to the provisions of this act * * * and no corporation or association shall be required to comply with the provisions of sections 1 to 77 inclusive of this act before April 1, 1910, but every such corporation and association shall be subject to the inspection, examination and supervision of the superintendent of banks, as provided in this act."

This section, unlike section 36, applies to banks now existing or which may hereafter become incorporated and delays the operation of the act, except as to the inspection, examination and supervision of the superintendent of banks, until April 1st, 1910.

I therefore conclude that sections 5, 6 and 11 are not operative upon banks organized after the passage of said act and before April 1, 1910, unless they so elect to avail themselves of the privileges and powers conferred by the act by appropriate action as prescribed therein.

Yours very truly,

SMITH W. BENNETT,
Special Counsel.

UNION LABEL—REGISTRATION OF.

In re American Society of Equity.

July 16th, 1908.

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

DEAR SIR:—I am in receipt of your request for an opinion upon the application of the American Society of Equity of Indianapolis, Indiana, for registration of its union label, pursuant to the act of the general assembly of the state of Ohio contained in section (4364-49) et seq., Revised Statutes.

The application for registration is made out upon the customary blank used by your department and required by the law in question. The label submitted with the application seems to comply in all respects with the requirements of that act and there is no objection apparent why this organization should not have such label recorded and registered in your department. As there is nothing contained in your letter or in the matter submitted with such application, defining the character of the organization seeking to have such registration, I cannot express any opinion whether this is such an association

of union working men as is contemplated by such act. Upon this question of fact I submit the matter to your department and if found to be such organization, I would advise that the same be recorded.

Yours very truly,

SMITH W. BENNETT,
Special Counsel.

JUSTICE OF THE PEACE—ELECTION OF.

Election of justice of the peace in November, 1905, to take office in 1906, was valid.

July 17, 1908.

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

DEAR SIR:—In your letter of July 15, enclosing a communication from M. L. Phillips, a justice of the peace, you inquire as to the validity of an election of a justice of the peace in November, 1905, to succeed a justice elected at the April election of 1903, for a term of three years ending April, 1906, under the ruling of the supreme court in State ex rel. Votava v. Brown.

As explained partially in an opinion of this department dated July 6, copy of which is herewith enclosed, the decision of the court in the above case is based upon the provisions of section 1442 R. S., as amended by the act passed March 31, 1906, 98 O. L. 171, which section reads as follows:

> "Township officers shall be chosen for a term of two years and justices of the peace for a term of four years, by the electors of each township, on the first Tuesday after the first Monday in November in the odd numbered years, and their terms of office shall commence on the first day of January next after their election."

Section 1442 in effect in November, 1905, is contained in the act approved March 31, 1904, 97 O. L. 62, and reads as follows:

> "Township officers and justices of the peace shall be elected on the first Tuesday after the first Monday of November, annually, in the manner provided by law. All township officers hereafter elected shall begin their respective terms on the first Monday in January, after their election, and all township officers now holding office, including assessors in municipalities who are serving as such by appointment, and those hereafter elected shall hold their offices until their successors are elected and qualified."

It is to be noted that justices of the peace are not deemed township officers in the section last quoted and that the act approved March 31, 1904, does not provide that justices of the peace shall take office the following January. For these reasons I am of the opinion that an election of a justice of the peace in November, 1905, to take office April, 1906, was valid. Had the supreme court taken any other view of the act approved March 31, 1904, the election of

John Brown, in the case above, in November, 1904, to take office in April, 1905. would have been invalid and the decision of the court entirely different.

The provision of article 17 that

> "every elective officer holding office when this amendment is adopted shall continue to hold office for the full term for which he was elected and until his successor shall be elected and qualified as provided by law,"

applies to officers elected at the November election, 1905, as well as to persons holding office at that time.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

AMERICAN SOCIETY OF EQUITY—UNION LABEL.

July 30th, 1908.

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

DEAR SIR:—Replying to yours of the 22nd inst. with the inquiry as to whether the organization known as the American Society of Equity comes within the provisions of section (4364-49) et seq. Revised Statutes, I beg to say that considering the purposes and objects of such organization as set forth in Art. 2 of its constitution, I am of the opinion that it is entitled to have the label design or device used by it recorded in your department as provided in said act.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

AUTOMOBILES—REGISTRATION.

Chauffeur's certificate under automobile registration act should be for one year only.

August 3rd, 1908.

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

DEAR SIR:—In your letter of July 28th you enclose a form to be used as a chauffeur's registration certificate authorizing chauffeurs to operate motor vehicles for one year from the date of the certificate and ask if the one year provision is in accord with the new automobile law.

No specific provision of the automobile law provides that chauffeurs shall register annually. Yet, from the fact that all owners of motor vehicles and all manufacturers of and dealers in motor vehicles must register annually, and from the language of the law, especially of sections 17 and 18, I believe it was the intention of the general assembly that chauffeurs should register annually rather than only once for all time.

I should, therefore, advise that the certificate be issued for the period of

one year. As this question can hardly come before a court until the expiration of one year, the general assembly will have an opportunity to make the language more clear in the meantime. Should there be no change in the law, a test case may be brought after one year in case this ruling is disputed as being too favorable to the state.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

AUTOMOBILES—INJURY TO PROPERTY, ETC.—JURISDICTION OF ACTION.

August 11th, 1908.

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

DEAR SIR:—I desire to acknowledge receipt of your letter, in which you inquire:

> "In what court should an action be brought for injury to property caused by the negligence of the owner of an automobile?"

In reply thereto I desire to say that under section 33 of the automobile law, passed May 11th, 1908, an action may be brought in the county where the injured party resides and that a summons against the defendant may issue to the sheriff of any county within the state of Ohio, to be served upon such defendant as in other civil actions. A court of common pleas would have jurisdiction in such cases unless the amount involved was less than $100, in which case the action should be brought before a justice of the peace.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

ELECTIONS—LOCAL—LEVY FOR EXPENSE OF—WHEN MADE.

August 8th, 1908.

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

DEAR SIR:—I beg to acknowledge the receipt of your letter in which you inquire what time the taxes should be levied by municipalities to meet the expenses of the 1909 election, as provided by section (2966-27) R. S., as amended April 9th, 1908. In reply thereto I desire to say that it is my opinion that the political divisions of the county should make this levy in 1909, the first half of which tax would be paid into the county treasury in December, 1909.

The expenses of such election should be paid out of the county treasury, as other county expenses, and the same should be deducted from funds due said political divisions by the county auditor at his semi-annual settlement in February, 1910.

The county commissioners no doubt in making the county levy in 1908 have anticipated this expense, which the county is to pay as other county

expenses, and which cannot be retained by the county auditor from the funds due to the various taxing districts until the first settlement after the election.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

POLITICAL PARTY--NOMINATIONS—AUTHORITY OF STATE SUPERVISOR OF ELECTIONS.

Secretary of state, as state supervisor of elections, may not determine the validity of nominations for county and local offices unless board of deputy state supervisors fails to agree.

August 18th, 1908.

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

DEAR SIR:—Your communication of August 11th is received, in which you submit the following statement of facts, with the request for an opinion as to your official duty relative thereto:

> Rival certificates of nomination have been filed with the board of deputy state supervisors of elections for Gallia county for each of the county officers to be elected at the coming November election. One set of certificates is known as the "Eagle ticket" and the other as the "Switzer ticket." Prior to August 7th, 1908, you, as state supervisor of elections, in rendering a decision upon a hearing had before you in which charges were preferred against the individual members of the board of deputy state supervisors of Gallia county, directed the said board of deputy state supervisors of elections of Gallia county to meet at once and, by appropriate action, to accept the set of certificates known as the "Switzer ticket" as the duly nominated county Republican ticket of Gallia county; that the state board of deputy state supervisors of Gallia county met on August 7th, 1908, and, in disregard of your direction as state supervisor of elections, refused to accept the ticket known as the "Switzer ticket," but did accept the ticket known as the "Eagle ticket," and ordered the same to be placed upon the official ballot."

Upon this statement of facts two questions are submitted:

1. Did you, as state supervisor of elections, act within your authority in directing the deputy state supervisors of elections of Gallia county to accept the "Switzer ticket" and place the same upon the official ballot?

2. If you were authorized to give said direction what authority have you, under the law, to compel obedience to the same?

In reply I beg to say the question of your authority to order or direct the board of deputy state supervisors of elections to accept the names of certain candidates as the rightful candidates, where rival certificates of nomination have been filed with said board in accordance with section (2966-22) R. S. is determined by the provisions of section (2966-23) R. S. Section (2966-23) is, in part, as follows:

"Certificates of nomination and nomination papers, when filed, shall be preserved and be open, under proper regulations, to public inspection; the certificates of nomination and nomination papers being so filed, if in apparent conformity to the provisions of this act, shall be deemed to be valid, unless objection thereto is duly made in writing within five days after the filing thereof, * * * such objections or other questions arising in the course of nominations of candidates for county offices or offices of a district lying within a county shall be considered by the deputy state supervisors of the county, * * * and their decision shall be final; * * * but in case no decision can be arrived at, the matter in controversy shall be submitted to the state supervisor of elections, who shall summarily decide the question thus submitted to him and his decision shall be final."

Under the above provisions of section (2966-23) R. S., the state supervisor of elections is without jurisdiction to consider or determine any questions arising in the course of the nomination of county officers until after the board of deputy state supervisors of the county have met and considered the controversies in question and failed to agree.

I am therefore of the opinion that you, as state supervisor of elections, were without authority to direct the board of deputy state supervisors of elections of Gallia county to accept the Switzer ticket and place the same upon the official ballot, until after said board had met and failed to decide the question and it had been regularly submitted to you, as is provided in the above quoted provisions of section (2966-23) R. S.

It necessarily follows that you are without authority to compel a compliance with said direction when the same was given without authority of law.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

BANKS—INCORPORATION OF.

Bank may not be incorporated under free banking act after enactment of banking law in 99 O. L. 269; articles of incorporation filed under said free banking act with county recorder prior to enactment of said law should, however, be recorded by secretary of state.

In re articles of incorporation of the Farmers' Bank Company of Jenera.

September 1st, 1908.

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

DEAR SIR:—Replying to yours of the 25th ult., I beg to advise that in the opinion of this department section 18 of the act of the general assembly approved May 5th, 1908, entitled "An act relative to the organization of banks and the inspection thereof" (99 O. L. 269-296), should be so construed as to forbid the organization of corporations for the purpose of banking under any other act of the general assembly than that above designated.

The free banking act, together with many of the other statutes regulating banking prior to the enactment of the present banking law, are kept in full

force and effect for the government of such corporations as have been incorporated under their provisions and doing business thereunder, but that does not authorize the incorporation of companies under such laws after the enactment of such statute.

As the articles of incorporation of the Farmers' Bank Company of Jenera, Hancock county, Ohio, which you present to me, were filed pursuant to the free banking act (Sec. (3821-65) R. S.) with the recorder of the proper county before the enactment of the new banking law, and was in all respects properly organized thereunder, this corporation is included within the saving clause contained in such act, and its articles when transmitted by the county recorder should be recorded in your department. I therefore advise that record of the same be made as provided by section (3821-65) R. S.

Yours very truly,

WADE H. ELLIS,
Attorney General.

VOTING MACHINES.

Deputy state supervisors and inspectors of elections may not use voting machines at election when such machines are inadequate for accommodation of entire ticket, by supplementing such use with the use of the printed ballots; one method or the other must be exclusively used.

Deputy state supervisors and inspectors may not be compelled by mandamus to use voting machines which are inadequate, nor to purchase adequate machines when their funds are insufficient.

September 30th, 1908.

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

DEAR SIR:—In your letter of September 22nd, you state that certain voting machines, used in the city of Cleveland, are said to be too small to permit the names of all the candidates on the various tickets at the November election to be placed upon them, and ask whether paper ballots may be used separate from the voting machine for a part of the ticket and the voting machine for the balance of the ticket in an election precinct..

In my opinion, the so-called Australian ballot and the voting machine are two separate and distinct means of voting by ballot, and either the one or the other should be used exclusively. I am led to this conclusion chiefly by reason of the provisions of section (2966-35) R. S. as to voting "for each and every candidate of one party, etc.," by making "a cross mark in the circular space below the device, etc.," and other provisions of this and other sections of the statutes relating to the so-called Australian ballot, on the one hand, and on the other hand by reason of the provision of section 3 of the voting machine law (Sec. (2966-56) R. S.) that:

> "The voting machine or machines to be used * * * must be so constructed as to meet all requirements specified in this act."

Among such requirements of the voting machine law, we find in Sec. (2966-54) R. S. that the voting machine used shall be such "that it enables each elector, if he so desires, to cast one written or printed ballot of his own selection for all the officers for whom he is entitled to vote at such election; that

it affords each elector an opportunity of voting for all the candidates for whom he is entitled to vote * * *; that such machine admits of the enjoyment of each elector of his full right and privilege in the exercise of the elective franchise under the constitution and laws of this state, etc."

In precincts where the voting machine has been legally adopted for use, and where no voting machine has been purchased or where a voting machine which fits the legal requirements of a particular election is not available, the constitutional right of an elector "to vote at all elections," provided in Art. V, Sec. 1 of the constitution, cannot be taken from him and the elector is therefore entitled to the other means provided for his voting, namely, the use of the Australian ballot as adopted in Ohio. This is illustrated in the case of State ex rel. v. Board of Elections, 24 O. C. C. 654, the syllabus of which reads partly as follows:

> "1. Mandamus will not lie to compel board of elections to provide voting machines.
>
> "A writ of mandamus to compel a board of elections to grant the petition of sixty-five per centum of the electors of a voting precinct for the providing of a voting machine for their precinct, under the provisions of 95 O. L. 420, will not be issued, where it does not appear that there are funds on hand applicable to payment for such a machine, or that the board has been derelict in providing for proper levy a fund applicable to such purpose."

The court in this case decided that the purchase of voting machines by the board of elections was dependent upon other conditions, such as the provision of the necessary funds, and further that the board should be allowed reasonable time in which to make investigation and arrange for the purchase of such machines.

I take it, therefore, from this decision, that the Cleveland board, since it is prevented from purchasing machines by proceedings in court, and since it will probably not have sufficient time and perhaps not sufficient funds for such purchase prior to the next November election, is in a situation similar to the board of elections in the case cited and may dispense with the use of voting machines. The fact that voting machines have been already purchased for certain precincts makes no legal difference where such machines do not fill the legal requirements at the coming election.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

ELECTIONS—COMPENSATION OF ELECTION OFFICERS AND REGISTRARS IN REGISTRATION CITIES.

October 1st, 1908.

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

DEAR SIR:—I beg to acknowledge receipt of yours of even date, presenting to this department, for its opinion thereon, the question as to the proper compensation to be paid registrars, judges and clerks of election in registration cities, as well as other cities of the state.

Replying thereto I beg to advise that section (2966-52) as amended in the act of the general assembly of April 23rd, 1904 (97 O. L. 237), and section (2966-6)

being a portion of the same act (97 O. L. 222), and section 2926*t* R. S., being the act of May 9th, 1908 (99 O. L. 512), determine the proper answer to be given to the questions presented.

Section (2966-6) *supra*, provides as follows:

> "The judges and clerks shall each receive as compensation the sum of $3.00 for their services, which services shall be the receiving, recording, canvassing, and making return of all the votes that may be delivered to them in the voting precinct in which they preside on each election day; provided, that in any county containing a city having a population of 300,000 or more, by the last preceding federal census, the compensation of judges and clerks of election, for such services, shall be $5.00; and in cities where registration is required the compensation of judges and clerks of election shall be as otherwise provided in this act."

Section (2966-52), *supra*, provides as follows:

> The judge of election called by the deputy state supervisors to receive and deliver ballots, poll-books, tally-sheets and other required papers, shall receive $2.00 for such service, and in addition thereto mileage at the rate of five cents per mile to and from the county seat, if he live one mile or more therefrom. The judge of election carrying the returns to the deputy state supervisors, and the judge carrying the returns to the county or township clerk, the clerk or auditor of the municipality, shall receive like compensation. Judges and clerks shall each receive as compensation the sum of $3.00 for their services for each election day; provided, however, that in cities where registration is required the compensation shall remain as now fixed by law, except that the chairman elected at the meeting for organization shall receive $1.00 for calling for the sealed package of ballots."

It will be observed, by the preceding sections, that the compensation of judges and clerks for their services for each election day is fixed at $3.00 each. There is a repetition of the language contained in section (2966-6) and that of section (2966-52), except in the first numbered section the character of the service thus compensated is designated as "the receiving, recording, canvassing and making return of all the votes that may be delivered to them," etc.

This amount of $3.00 per day does not apply to registration cities, as you will observe by each of the sections above cited, registration cities are exempted therefrom; nor does it apply in counties containing a city having a population of 300,000 or more, by the last preceding federal census, for in such counties and cities the compensation of judges and clerks, for such service, shall be $5.00.

In addition to the foregoing compensation the judge of election that is called by the deputy state supervisors to receive and deliver the ballots, poll-books, tally-sheets and other required papers, shall receive, for such service, $2.00, and, in addition thereto, mileage at the rate of five cents per mile to and from the county seat, if he live one mile or more therefrom. The same compensation applies likewise to the judge of election 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.

Special emphasis should be laid upon the fact that the foregoing applies only to counties which do not contain registration cities. The counties con-

taining registration cities, which may be included in the foregoing, are governed by the law of May 9th, 1908 (99 O. L. 512), as follows:

> "The registrars of each precinct shall be allowed and paid $4.00 per day and no more, nor for more than six days in any one election, for their services as registrars."

In registration cities containing a population of 30,000 or more, the judges of elections, including the registrars as judges, and the clerks of election shall each be allowed and paid $5.00 for each election at which they serve, and no more.

In other registration cities registrars, judges and clerks shall each be allowed and paid $5.00 for each election at which they serve, and no more. Observe the distinction in compensation between the amounts paid to an individual acting as a registrar, which is $4.00 per day, and that of a registrar acting as a judge, who, in cities of 30,000 or more, receives $5.00 for each election at which he servies. Further observe that the language—"in other cities"—refers to cities other than those containing a population of 30,000 or more; in such cities such officers are paid $5.00 for each election at which they serve, and no more.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—MULTIPLICITY.

Articles of incorporation of the Buckeye Distributing Company disapproved.

October 14th, 1908.

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

DEAR SIR:—You have requested an opinion of this department as to the legality of the purpose clause contained in the articles of incorporation of the Buckeye Distributing Company. The purpose clause thereof is as follows:

> "Said corporation is formed for the purpose of transacting a general brokerage business, acting as manufacturer's agents, buying and selling any and all kinds of merchandise; buying, selling, manufacturing and operating any and all kinds of vending machines, distributing and displaying advertising matter of any kind, distributing samples of any and all kinds of merchandise; and acting as agent for general lines of insurance."

In my opinion "a general brokerage business" is not related in any way to "manufacturing and operating * * vending machines, distributing and displaying advertising matter of any kind, distributing samples of any and all kinds of merchandise," nor can it be said that "a general brokerage business" is similar to that of "acting as agent for general lines of insurance."

In the case of State ex rel. v. Taylor (55 O. S. 67) the supreme court in construing section 3235 R. S. denies the authority for incorporating a company

for more than one specific purpose, and the opinion therein expressed seems to be determinative that several distinct and unrelated purposes are here sought to be combined in the one corporation.

I therefore return the articles in question to you, advising that the same be not filed or recorded.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE.

Purpose clause of the articles of incorporation of the Fleischmann-Clark Company approved.

October 27th, 1908.

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

DEAR SIR:—Acknowledging the receipt of your letter of the 23rd, in which you enclose articles of incorporation of the Fleischmann-Clark Company and ask my opinion as to the propriety of the form used and the legality of the purpose clause, I beg to advise you as follows:

1. The form used is not in strict accordance with section 3236 of the Revised Statutes, and it no doubt would have been better if the incorporators had followed the statute. However, no harm is done by inserting other matters in the articles of incorporation and the words used by these particular incorporators, "the duration of the corporation shall be perpetual," do not add to or take from the powers of the company. It is still subject to dissolution at any time, either by its own action or in the proper exercise of the state's authority.

2. The purpose clause contains, in express terms, a recital of many proposed powers which would be incidental to the main powers and need not have been expressed. This, however, does not affect their legality.

I therefore advise you that unless the incorporators on their own account desire to change the articles in accordance with the suggestions here made, you may file and record them just as they are.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARTICLES OF INCORPORATION—PURPOSE CLAUSE—AMENDMENT.

Telephone company may not, by amendment to articles of incorporation, acquire authority to furnish electric light and power.

Proposed amendment to articles of incorporation of the Newton Falls Telephone Company disapproved.

November 10th, 1908.

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

DEAR SIR:—I have the honor to acknowledge having received your request for an opinion upon the question presented by the proposed amendment to the

articles of incorporation of the Newton Falls Telephone Company, namely: Whether a telephone company may include the business of furnishing electric light and power as part of its corporate purposes.

It is provided by section 3238*a* of the Revised Statutes that any corporation incorporated under the general incorporation laws of the state may amend its articles of incorporation so as to modify, enlarge or diminish the objects or purposes for which it is formed, or so as to add thereto anything omitted from or which might lawfully be provided for in such articles originally. In such connection it is provided that a corporation cannot, by amendment, change substantially the original purposes of its organization.

The power is thus conferred upon existing corporations to enlarge or diminish the objects or purposes for which such corporations may be formed, but not in any regard to add thereto any purpose except that which might lawfully have been provided for in the original articles, nor can it change the original purposes of its organization.

The question of the assumption of such power by amendment is thus to be determined from the consideration of section 3235 R. S., limiting and defining the purposes for which corporations may be formed. The portion thereof which it is necessary to consider in this connection is as follows:

> "Corporations may be formed in the manner provided in this chapter for any *purpose* for which individuals may lawfully associate themselves, except for carrying on professional business."

In construing the foregoing language the supreme court of this state, in the case of State ex rel. v. Taylor (55 O. S. 67), said:

> "The word 'purpose' is designedly in the singular number. This limitation must have been by design. It is a most wise and reasonable one. We cannot assume that the general assembly would intentionally clothe corporations with capacity to unite all classes of business under one organization, as this would tend strongly to monopoly. Construing this section wholly by itself, it will not justify the contention that a corporation organized for one purpose can be changed by amendment into a company having authority to pursue a number of differing and unrelated purposes. Indeed, the only rational deduction is the exact opposite.

The court then examines the different chapters and subsections under Title 2, "Corporations," and comments upon the various character of companies that may be formed pursuant to their provisions. It then proceeds:

> "If it had been the design of the general assembly, by section 3235, to give the unlimited power contended for, why the subsequent provisions referred to? These enactments taken together, we think, support the conclusion that a corporation may, except where distinct provision is made, be organized for one main purpose, not for a half dozen. Nor is this unreasonable. It would seem to be a sufficient extension of the words of any grant to corporations to hold that they may possess such incidental powers as are necessary to carry into effect the powers expressly conferred."

In that case it was contended that, pursuant to the authority conferred by section 3238*a* R. S., articles of incorporation providing for the purpose of forming and organizing a manufacturing company to engage in the business of

manufacturing gas, electricity and furnishing gas for light, heat and power, might, by amendment, add the further power of owning and operating a gas, electric and traction company, with power to acquire, own, operate, lease and maintain a street railway, to be operated by electricity or other motive power, etc. The court thus held against such claim of power and that the same would be violative of section 3235 R. S.

In my opinion, the power to own and operate a telephone company is as unrelated to that of furnishing electric light and power as was that of owning and operating a gas and electric plant with that of operating a street railway, and unless the same has been specially authorized by the general assembly of this state such right does not exist.

Examining this question, it is apparent that the general assembly has provided for the consolidation and joint incorporation of certain classes of companies commonly designated as quasi public in character. For instance, by section 3470 R. S. two or more telegraph lines may consolidate; by section 3471 R. S. two or more telephone lines may be consolidated; by section 3471*a* R. S. the previous sections are made applicable to any company organized for the purpose of supplying the public and private citizens with electric light and power or automatic package carriers; by section 2485*a* R. S. consolidation of these companies mentioned in section 2478 R. S. is expressly authorized. Pursuant to former opinions of this department, unnecessary to here cite, your department has been advised that where the consolidation of certain corporate purposes or powers has been authorized by legislative act those same powers may be included in the original articles of incorporation, and, if so, the same may be added by amendment pursuant to the provisions of section 3238*a* R. S.

After examination of each of these civil acts it becomes apparent that nowhere has the general assembly authorized the incorporation of a company to engage in the business of owning and operating telephones, together with that of furnishing electric light and power. The powers of electric light and power companies are defined in section (3471-3) and related sections. And by section 3471 R. S. telephone companies are granted the same powers and made subject to the same restrictions as are prescribed for magnetic telegraph companies (sections 3454 to 3470 R. S.). No such authority anywhere appearing to authorize the adoption of the amendment, including the power of buying, manufacturing, selling and furnishing electric light and power, by a company organized for conducting the telephone business, I advise that you do not file or record the same.

Very truly yours,

U. G. DENMAN,
Attorney General

VITAL STATISTICS—LOCAL REGISTRARS.

November 27th, 1908.

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

DEAR SIR:—I am in receipt of your request for an opinion of this department involving the construction of the provisions of an act to establish a bureau of vital statistics, etc., found in 99 O. L. 296. The questions presented by you are as follows:

> "Is the registrar of the state compelled to appoint the clerks of the board of health of cities, as local registrars?"

"In the cities wherein boards of health have elected secretaries instead of clerks, do they come within the provisions of the act?"

The act in question requires that in villages the village clerk shall be the registrar; in cities the clerk of the board of health shall be the registrar, and in townships the township clerk shall be township registrar; that they shall be subject to all the rules and regulations of the state registrar and to all of the provisions and penalties of the act. These respective officers are known as local registrars. There is no authority, where such officers exist, to appoint others than the officers named. The duties of local registrar are those imposed upon existing officers as above named. If boards of health in any of the cities of this state have elected secretaries, designated by such name instead of being designated as clerks, such officers performing the duties of clerks will serve as local registrars.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

CORPORATION DEALING IN INVESTMENT SECURITIES MUST COMPLY WITH SECTION 3821r R. S.

In re the International Guarantee Company.

December 3rd, 1908.

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

DEAR SIR:—I return to you the enclosed articles of incorporation of the International Guarantee Company. The same provide in their purpose clause for the power of selling and guaranteeing debentures and otherwise dealing in certificates, bonds and investment securities. In the opinion of this department such corporation would have to qualify under section 3821r et seq. Revised Statutes. As the enclosed does not evidence that such is the intention on the part of this corporation, I return the same to you without my approval, advising that they be not recorded or filed by you.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Auditor of State)

NATIONAL WOMEN'S RELIEF CORPS—RIGHT TO ACQUIRE AND DISPOSE OF LAND.

March 23rd, 1908.

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

DEAR SIR:—I beg to acknowledge the receipt of your letter of March 14th, enclosing a copy of the articles of incorporation of the National Women's Relief Corps, together with certain letters and documents bearing upon the acquisition by that organization of the site of Andersonville prison. The papers are referred to me as to the legality of a proposed transfer of this property to the federal government.

The corporation is formed not for profit and its objects appear to be charitable and patriotic in nature. The right to dispose of this property stands upon the right to acquire it. If such right exists at all it must be under the first section of the purpose clause, which provides in part, "to assist the Grand Army of the Republic and to perpetuate the memory of their heroic dead."

Assuming the land in question to have been acquired for the purpose of preserving it as a memorial to the Union prisoners who died at Andersonville or as a result of infirmities received while confined in the prison, I believe that the ownership of this tract by the National Women's Relief Corps is within its corporate power. That being the case a transfer of the property to the federal government, if designed to perpetuate the memorial more effectively than could be done by the corporation itself, would be entirely legal.

I herewith return the papers submitted to me.

Yours very truly,

WADE H. ELLIS,
Attorney General.

COMPENSATION OF PERSONAL PROPERTY ASSESSORS MAY BE CHANGED AFTER THEIR ELECTION.

March 23rd, 1908.

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

DEAR SIR:—Replying to your favor of March 16th, enclosing letter of J. B. Hopkins of Batavia, Ohio, I beg to state that in my opinion the compensation of personal property assessors is not such as is included within the meaning of the term "salary" as used in article II, section 20 of the constitution of the state, and therefore the limitations of that section do not apply. The general assembly accordingly had power to increase the compensation of assessors elected in November, 1907, for services to be performed in April and May of 1908.

Very truly yours,

WADE H. ELLIS,
Attorney General.

DOW-AIKIN LAW—APPLICATION OF TAX.

Brewery selling through agent on order liable for Dow-Aikin tax.
Social club selling to its members intoxicating liquors procured by dumb waiter from cafe on lower floor of building liable for Dow-Aikin tax.

April 6th, 1908.

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

DEAR SIR:—You have requested an opinion of this office upon the following questions:

1. Can an outside brewery sell its product within a city which is "wet" territory, through a solicitor or agent, to individuals, without being liable to the payment of the Aikin tax; the solicitor or agent to take orders, forward the same to such brewery, the brewery to mark each package to correspond with each order; shipment to be made in care of the solicitor or agent, who, in turn, makes delivery from the railroad car to the purchaser, payment to be made to the solicitor or agent at time of delivery?

2. Will a social club be liable for the Aikin tax under the following conditions: Club located on top floor, liquors delivered to club by dumb waiter or elevator from a cafe located on lower floor in same building; liquors to be paid for when drunk, to an officer of the club; settlement for liquors to be made to the cafe at stated periods?

Section (4364-9) R. S. provides:

"Upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors, there shall be assessed yearly, and shall be paid into the county treasury, as hereinafter provided, by every person, corporation, or co-partnership, engaged therein, and for each place where such business is carried on by or for such persons, corporations, or co-partnerships, the sum of one thousand dollars."

1. The courts have been strict in the enforcement of the assessment provided for in this section, largely on the ground that the Dow law and the Aikin law were enacted for the purpose of "providing against the evils resulting from the traffic in intoxicating liquors," under the authority of article XV, section 9, of the constitution, which sets out that: "The general assembly may, by law, provide against evils resulting therefrom."

Section (4364-16) R. S. makes the following exception:

"The phrase, 'trafficking in intoxicating liquors,' as used in this act, * * does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof *at the manufactory*, by the manufacturer of the same, in quantities of one gallon or more at any one time."

The words "at the manufactory" were not included in the act of 83 O. L. 157, but were added in the act of March 21st, 1887, for the express purpose of confining the sales of manufacturers solely to sales at the manufactory,

and a manufacturer who carries on the business of selling intoxicating liquors elsewhere than at the manufactory, is subject to the tax like other dealers.

Brewing Co. v. Talbot, 59 O. S. 511.

The court in this case further holds that:

> "It is not essential to a valid imposition of a tax that the traffic be carried on in a building or structure or fixed place of business."

Your first inquiry is answered when we determine the place where the sale is completed. The American and English Encyclopedia of Law sets out the following as essentials of a sale: First, a mutual agreement; second, competent parties; third, a money consideration; fourth, a transfer of the absolute or general property in the subject of the sale from the seller to the buyer.

A sale is not completed until the buyer assumes full possession and ownership of the goods, with all the rights and risks attaching to them. There is only a mere executory agreement and not a sale before the transfer of title and possession. The rule that delivery of goods to a common carrier for delivery to the buyer is a delivery to the buyer does not apply in case the seller reserves the *jus disponpendi* or consigns the goods to himself or his agent, in which case title to the goods does not pass at the manufactory. This view is taken in the case of the Village of Bellefontaine vs. Vassaux, 55 O. S. 328.

I am therefore of the opinion that sales under the above stated facts are not sales at the manufactory, and that the brewery making such sales would be liable to the payment of the Aikin tax.

2. It has been held in the case of University Club v. Ratterman, 3 C. C. 18, that:

> "The furnishing of wines and liquors to its members by a bona fide social club, which receives no dividends or profits, pays no salaries and is not engaged with a view to profit, was a 'trafficking in intoxicating liquors,' within the meaning of section 8 of the act of May 14th, 1886 (83 O. L. 157), the same being a sale by said club to its members, and rendered it liable to assessment under the terms of said statute."

The word "traffic" is "the passing of goods or commodities from one person to another for an equivalent in goods or money." Senior v. Ratterman, 44 O. S. 643. Since section (4364-9) R. S. provides for an assessment "for each place where such business is carried on," I am of the opinion that such social club would constitute a different place of traffic in liquors and that such sales would require a payment of the assessment.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

MUNICIPAL CORPORATION—ANNEXATION—TAXATION.

Lien of municipal tax does not attach to property annexed to municipal corporation until ten days after adoption by council of ordinance or resolution accepting annexation; if such time has not expired before second Monday in April, and township levy has been made before that time, lien of township levy attaches, to exclusion of that of municipal levy.

April 10th, 1908.

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

DEAR SIR:—I am in receipt of your request for an opinion based upon the proposition contained in a letter of the county auditor of Butler county. From such letter it is evident that the city of Hamilton has taken preliminary steps to annex certain adjacent territory, pursuant to the provisions of section 1589 of the Revised Statutes; that the petition has been presented to the board of county commissioners, and the prayer thereof has been granted as provided in section 1590 R. S. The proceedings of the county commissioners have been certified back to the city council under date of February 4th last. The necessary transcripts, maps, etc., are now before the city council for final action thereon as indicated by section 1591 R. S. If the council accepts the application for annexation it should be done by ordinance or resolution, which does not become effective until ten days after the first publication of the same.

The question presented is whether the taxes levied by the city council for the current year have become a lien upon the territory annexed.

Under section 40 of the municipal code the council certifies to the auditor of the county on or before the first Monday in July annually, the rate of taxes levied by it on the real and personal property in the corporation, and the auditor is required to place the same on the tax list of the county in the same manner as other taxes are placed thereon.

The lien of the state for taxes on real property attaches thereto on the day preceding the second Monday in April. (Section 2838 R. S.) The territory in question will become a part of the city when the application is finally accepted by the council.

Sec. 1597 provides that

> "When the resolution or ordinance accepting such annexation has been adopted the territory shall be deemed a part of the city or village."

This cannot be completed before ten days succeeding the acceptance of the application by council, which, according to the facts set forth in the auditor's letter, was to be done April 8th, and, allowing for the ten days required for publication, the final date would thus be April 18th.

It would, therefore, appear from the preceding citations that when the annexation of territory to a municipal corporation is not made until after the second Monday in April, and if the township levy has been duly certified by the township trustees to the county auditor in advance of April 18th, and by him placed on the tax list of the county, it becomes and remains a lien thereon to the exclusion of the city levy for the current year, and such annexed territory becomes subject to the payment of such township taxes and not to the payment of the city taxes.

As I am not advised of the date that the township trustees certified their

levy to the auditor, pursuant to section 2827 R. S., the foregoing answer is conditioned upon such township levy being made before the 18th day of April, 1908.

Very truly yours,

WADE H. ELLIS,
Attorney General.

MUNICIPAL CORPORATION—ANNEXATION—TAXATION.

When resolution of annexation to municipal corporation is passed less than ten days before second Monday in April, and township levy is not certified before said date, lien of municipal tax attaches to such annexed territory.
Supplementary to opinion of April 10th.

April 27th, 1908.

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

DEAR SIR:—On the 10th inst. I submitted to your department an opinion relative to the lien for taxes certified by the city council of Hamilton, Ohio, upon certain territory annexed to such city. Therein I stated that if the township levy, made by the township trustees, had been duly certified to the county auditor in advance of the taking effect of the resolution or ordinance accepting such annexation, the township levy became a lien upon such territory to the exclusion of the city levy for the current year, and such annexed territory remained subject to the payment of such township taxes and not to the payment of the city taxes. I further stated that I was not advised of the date that the township trustees certified their levy to the county auditor, and that my answer to the question was conditioned upon such township levy being made before the 8th day of April, 1908.

The county auditor of Butler county, further advising you relative to the facts involved, stated in his letter of the 21st that

> "Neither the St. Clair nor Fairfield township trustees, nor the council of the city of Hamilton have yet made their levy and certified the same to his office."

In the light of these circumstances you desire to know which levy, township or city, should be placed against such annexed territory for the current year. I am of the opinion that this question is solved by the consideration of section 1597 R. S., which is as follows:

> "When the resolution or ordinance accepting such annexation has been adopted, the territory shall be deemed a part of the city or village, and the inhabitants residing therein shall have all the rights and privileges of the inhabitants within the original limits of such city or village."

The acceptance of the annexation by the city council was made on the 8th inst. and the ten days' publication of the ordinance was completed on the 21st inst. The annexation thus became complete. As no township levy

had at that time been certified the territory should now be deemed to be a part of the city of Hamilton and the municipal levy should be placed against such annexed territory when certified to the county auditor.

Very truly yours,

WADE H. ELLIS,
Attorney General.

TAXATION—EXEMPTION.

Securities of municipal corporation located in federal territory are exempt from taxation in Ohio.

May 21st, 1908.

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

DEAR SIR:—Your letter of the 18th presents certain facts of which the following is a summary:

Certain assessors of Clinton county have discovered that municipal bonds, issued by several municipal corporations located in the Indian Territory, were held by parties residing in Clinton county. The assessors reported the facts to the auditor of Clinton county and he in turn asked to be advised by you as to the taxability of such bonds in the hands of such residents of the state of Ohio.

The data presented in connection with such inquiry contain the information that the bonds in question were waterworks construction bonds of the city of Coalgate, in the Choctaw Nation, Indian Territory, and were approved and issued pursuant to the provisions of the act of the 57th congress, July 10th, 1902 (32 U. S. Statutes at Large, 641, 657). Examining the act in question, the following provision is found therein:

> "55. Authority is hereby conferred upon municipal corporations in the Choctaw and Chickasaw nations, with the approval of the secretary of the interior, to issue bonds and borrow money thereon for sanitary purposes and for the construction of sewers, lighting plants, waterworks and schoolhouses, subject to all the provisions of laws of the United States in force in the organized territories of the United States in reference to municipal indebtedness and the issuance of bonds for public purposes; and said provisions of law are hereby put in force in said nations and made applicable to the cities and towns therein the same as if specially enacted in reference thereto; and said municipal corporations are hereby authorized to vacate streets and alleys, or parts thereof, and said streets and alleys, when so vacated, shall become the property of the adjacent property holders."

Upon the cession of the lands described in the act made by the Choctaw and Chickasaw tribes to the government of the United States, the lands therein ceded, of which the lands embraced within the city of Coalgate are a part, thereby became territorial property of the United States government upon which town sites were permitted and authorized to be established.

It was to such town sites that the provisions of section 55, above quoted, were and are applicable, and they are thereby made subject to all the pro-

visions of the laws of the United States in force in the organized territories of the United States in reference to municipal indebtedness and the issuance of bonds for public purposes.

The municipal corporations thus organized and erected upon governmental lands became agencies under the territorial government, for local governmental purposes. They are in effect branches of the general government itself. The evidence of indebtedness issued by such municipalities are as exempt from taxation by the various states as are the bonds of the United States. In the judgment of the supreme court of the United States, in McCulloch v. Maryland, 4 Wheaton, 316, and in Osborne v. Bank, 9 Wheaton, 738, that court established by the most cogent reasoning that a state had no "powers, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional law enacted by congress to carry into execution the powers vested in the general government," and enunciated a principle, which is directly applicable to the question here presented, and which placed beyond the reach of the state "all those powers which are controlled by the people of the United States or the government of the Union, and all those means which are given for the purpose of carrying those powers into execution."

As, in those cases, the court held the means employed by the Bank of the United States were not taxable by the state, so here the means employed by the city of Coalgate for raising money to construct its waterworks, to-wit, by the issuance of bonds of such city, are not taxable. The same principle forbids the United States government to tax the bonds of a municipality created under the laws of a state, and it follows that the bonds issued by similar municipalities, agents of the United States, should be exempt from taxation by the state government.

I, therefore, am of the opinion that no authority exists by which the auditor of Clinton county can list for taxation, against the owners thereof, any of the bonds issued under the authority of congress above referred to.

Yours very truly,

WADE H. ELLIS,
Attorney General.

BENEVOLENT INSTITUTION—PUBLIC BUILDINGS ACT—USE OF EMPLOYES' LABOR.

Provisions of public buildings act as to letting of contract, etc., must be complied with in construction of improvements at benevolent institution, though use of labor of employes of such institution is contemplated.

June 8th, 1908.

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

DEAR SIR:—I have given consideration to your inquiry relating to the method desired to be employed by the superintendent of the Toledo state hospital for the insane in the construction of certain improvements in the buildings of that institution. You inform me that he wishes to use the services of his employes, and possibly the inmates of the institution, and that he desires to know whether this may lawfully be done without complying fully with the public buildings act, being section 782 et seq., Revised Statutes.

From a consideration of section 782 I am of the opinion that the same applies to every improvement made in the public buildings of the state. It

would be impossible to construct such a building without purchasing materials from some person or private corporation. The section seems to provide that where a contract is to be entered into for even a portion of the work of the entire improvement, plans, specifications and estimates of cost must be prepared for the whole improvement; therefore such plans, specifications and estimates must be prepared in every case wherein the total cost of the entire improvement will exceed $3,000.

Section 783 provides that plans, specifications and estimates made in compliance with the preceding section shall be submitted to and approved by the governor, auditor and secretary of state, and a copy thereof shall be deposited in the office of the auditor of state. Section 784 provides that bids shall be advertised for in newspapers of the four largest cities of the state. Section 785 governs the opening and acceptance of such bids.

Apparently it is not contemplated by this chapter, nor do any of the above named sections expressly or impliedly state that labor of the state's employes may be used in the construction of its buildings. If, however, it is desired to use such labor, I suggest that such fact be made a part of the estimate and incorporated in the notice and that the successful contractor or contractors be required to use the labor of the state's employes and to pay the state an agreed sum for such labor. The plans, specifications and estimates may, of course, be made by an employe of the state. I may remark, also, that section 656 requires that all plans for buildings such as those involved in the specific inquiry you make, be submitted to the board of state charities for criticism and approval.

Very truly yours,

W. H. MILLER,
Assistant Attorney General

BENEVOLENT INSTITUTION—FINANCIAL OFFICER—FORM OF MONTHLY STATEMENT.

June 22nd, 1908.

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

DEAR SIR:—I have your inquiry of the 15th inst., requesting an opinion of this department on the following proposition:

> As section 650 of the Revised Statutes requires the monthly statement of the financial officers of the institutions embraced therein to be recorded in a book prepared for that purpose, will it be a compliance with such section to have typewritten carbon copies of the same fastened in a substantial binder?

I am of the opinion that the intention of the general assembly in enacting the provision in question was to secure a record, permanent in form, and not of a temporary or loose-leafed character. To prepare carbon copies and fasten the same together would not, in my opinion, comply with such requirement. The record contemplated is, in all respects, to be as permanent as the record provided for county recorders, clerks and other officers.

Very truly yours,

WADE H. ELLIS,
Attorney General.

TAXATION—EXEMPTION—CEMETERY TRUST.

June 24th, 1908.

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

DEAR SIR:—I am in receipt of yours of the 20th inst., in which you enclose a letter addressed to the county auditor of Darke county, Ohio, upon which you request an official opinion of this department. The letter in question recites the creation of a trust by the last will and testament of K., deceased, in the trustees of the Greenville, Darke county, cemetery, by depositing eight shares of bank stock in the hands of such trustees, the income of which is to be used for keeping in repair and beautifying certain lots in said cemetery. The question presented concerning this fund is as to its taxability under the laws of Ohio.

The provisions of section 2527*a*, Revised Statutes (1536-487), seem to be complied with in the creation of such trust, and the provision therein that "the income thereof shall be exempt from taxation the same as other cemetery property," is applicable to this fund.

I, therefore, advise that a proper order may be issued by your department to the auditor of Darke county, indicating the conclusion aforesaid.

Yours very truly,

WADE H. ELLIS,
Attorney General.

PROBATION OF PERSON CONVICTED OF FELONY—COSTS.

Cost bill when person is convicted of felony and released on probation under suspended sentence, by virtue of act in 99 O. L. 339, should be presented to warden of penitentiary, and ultimately paid by auditor of state, as in case of execution of sentence.

July 2nd, 1908.

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

DEAR SIR:—Your communication of recent date is received, in which you submit an inquiry relative to the payment of costs out of the state treasury made in the prosecutions of persons convicted of felonies and misdemeanors, but whose sentences have been suspended under the provisions of an act passed by the last general assembly, "To provide for probation of persons convicted of felonies and misdemeanors."

In reply thereto I beg to say section 7332 of the Revised Statutes provides for the making up of the cost bill in cases where persons have been convicted of felonies and sentenced to imprisonment in the penitentiary or state reformatory; and sections 7334 and 7336, providing for the payment of such cost bills out of the state treasury. Section 7334, however, contains this provision:

> "If the convict is sentenced to confinement in the penitentiary or is sentenced to death, and no property has been levied upon, the sheriff shall deliver such certified cost bill, having accredited thereon any sums paid on costs, *with the convict to the warden of the penitentiary.*"

It is this provision that the cost bill shall be delivered, together with the convict, to the warden of the penitentiary, that gives rise to the inquiry you have submitted. This provision evidently contemplates that the convict and

cost bill shall both be delivered to the warden of the penitentiary as a condition precedent to the payment of the cost bill; but since the passage of the act providing for the probation of persons convicted of felonies and misdemeanors, and where sentence has been suspended in accordance therewith, it is impossible to *deliver the convict* with the cost bill. This does not, however, in my judgment, relieve the state from its obligation to pay the costs. Therefore the cost bills in all cases of felonies, where sentence has been suspended, after being duly certified, should be delivered to the warden of the penitentiary or the superintendent of the state reformatory, as the case may be, and after being examined and corrected should be transmitted to the auditor of state, and if found by him to be legal, should be paid as other cost bills in criminal cases. Yours very truly,

W. H. MILLER,
Assistant Attorney General

COLLATERAL INHERITANCE TAX—APPLICATION OF.

Collateral inheritance tax does not apply to estate created by devise of testator dying before enactment of law, though such estate is not ascertained nor does it vest in possession until after such enactment.

July 16th, 1908.

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

DEAR SIR:—I have given consideration to yours of the 11th inst., presenting to this department the inquiry whether, under the following circumstances, an estate is liable for the collateral inheritance tax, to-wit:

In May, 1889, B. died testate, leaving a will appointing trustees of the sum of $5,000 to be invested by them for the benefit of M. during her life, and at her death to be paid in equal shares to certain benevolent boards of the Presbyterian church. M. lived until May, 1908. The trustees managed the trust until that date, and it then became their duty to pay over the principal sum to the legatees in remainder. Was the same liable for the tax imposed by the act of April 25, 1904?

It was contended in the case of Executors v. State of Ohio, 72 O. S. 448, that under similar circumstances the interest passing by the will did not vest until after the act in question took effect, and that until after the death of M. neither the persons who would take nor the value of the interest could be ascertained, and that the succession was not complete until the property was distributed, and that the succession was subject to the tax in force at the time of the distribution. It was contended there, as here, on the part of the executors, that the interest vested at the death of the testator, prior to the time the act took effect; that the act is not retroactive and, therefore, does not apply to rights vested prior to the time the act took effect.

The supreme court answered that contention by saying that the act in question is not retroactive and applies only to such rights arising on a death occurring on or subsequently to that date. The court further held that the right of the state to the tax arose upon the death of the owner of the property and was not dependent upon the right of succession ripening into possession or enjoyment, and that, therefore, in the case there presented, the estate was not liable to the tax.

I am of the opinion that the decision of the supreme court in the case

cited answers the question presented and that the legacy provided in the will of B. is not subject to the tax. Yours very truly,

SMITH W. BENNETT,
Special Counsel.

FOREIGN TICKET BROKERAGE—RAILROAD COMPANIES.

Railroad companies must comply with act in 99 O. L. 266, if engaged in business of selling tickets for transportation to foreign countries.

July 23rd, 1908.

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

DEAR SIR:—I am in receipt of your letter of the 15th inst., together with the inquiry presented by the general counsel of the New York Central Lines, as to whether or not house bill No. 984, passed May 1, 1908, by the 77th general assembly, does or does not apply to railroad companies.

Section 1 of the act applies to all corporations, firms and persons now engaged or hereafter engaging in the selling of steamship or railroad tickets for transportation to or from foreign countries. It also applies to such companies as are engaged in the business of receiving deposits of money for the purpose of transmitting same, or the equivalent thereof, to foreign countries. The first provision certainly includes all such railroad companies in case they are engaged in selling railroad tickets to foreign countries, which would include those which sell tickets to Canadian points. Railroad companies are not engaged in the business of receiving deposits of money for the purpose of transmitting same to foreign countries.

Section 6 of the act defines the companies which are not to be included therein as follows:

> "This act shall not apply to drafts, money orders and travelers' checks issued by trans-Atlantic steamship companies, or their duly authorized agents, or to national banks, express companies, state banks or trust companies."

It would seem that if it were not for the specially designated classes of companies not to be included within its operation, the act should be so construed as to apply only to ticket agencies or brokers who sell orders and drafts to foreigners, but the language used in sections 1 and 6 is certainly broad enough to govern such railroad companies as sell such transportation, and in my opinion the act should receive such construction by the officers of the state.

Very truly yours,

W. H. MILLER,
Assistant Attorney General

ABSTRACT OF TITLE TO TOLEDO STATE HOSPITAL PROPERTY.

August 14th, 1908.

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

DEAR SIR:—I have examined the abstract of title to the east one-half of the northwest quarter and the northeast quarter of the southwest quarter of section 17, township 3, United States reserve of 12 miles square, in Adams township, Lucas county, Ohio, as the same has been proposed to be conveyed to the state

of Ohio by the executor and the executrix of the last will and testament of Margaret Farrell, deceased.

There are several defects apparent in the early history of this title, as disclosed by the abstract, such as the failure of the record to show service and the issuance of a writ in the action abstracted at section 5; the omission from the records of Lucas county of a patent for the north half of the southwest quarter of section 17, as shown at section 9; the vagueness of the description in the deed shown at section 14, and the exact manner in which grantor in the deed, at section 15, obtained title to the northeast quarter of the southwest quarter of said township. Mortgages abstracted at sections 17 and 18 are not satisfactorily released of record, and there is a tax title outstanding, as shown by section 19.

The foregoing defects and incumbrances are of such ancient origin that I do not deem it necessary that they should be corrected and removed. It is apparent that the property has been in the open, notorious and adverse possession of Edward Farrell and Margaret Farrell for forty-four years, and in that period all causes of action would undoubtedly have been lost.

The abstract does not show the date of the death of Edward Farrell, nor that his estate has been settled and the debts thereof paid. Mr. W. D. Wilcox, steward of the Toledo state hospital, for which I understand the property is to be purchased, has, however, submitted to me the certified transcript of the proceedings of the surrogate court of Orange county, N. Y., admitting the will of the said Edward Farrell to probate; it is apparent from this instrument that claims against his estate would have been outlawed.

The will of Margaret Farrell, abstracted at section 26, a copy of which, together with the transcript of the proceedings admitting the same to probate, I have examined in full, contains ample authority for the sale of the real estate in question by her executor and executrix. The legacies are made thereby a charge upon the fund derived from the sale of the real estate, but as they are inconsiderable, and as there is land other than that proposed to be purchased by the state, belonging to the estate, I do not deem this matter of any importance.

No examination has been made in the United States courts. The taxes for the year 1909, amount undetermined, are a lien.

Subject to the foregoing qualifications, I am of the opinion that the title which would be conveyed to the state of Ohio by a deed similar to the copy transmitted herewith, being a deed signed by the executor and executrix of the last will and testament of Margaret Farrell, is perfect. The defects being unimportant, I advise that the title be accepted. Very truly yours,

W. H. MILLER,
Assistant Attorney General.

BOARD OF REVIEW—POWERS OF.

Municipal board of review may increase valuation of real property on account of subdivision thereof into lots.

September 15th, 1908.

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

DEAR SIR:—I have your letter of the 12th inst., proposing the question of whether or not the board of review of the city of Fremont has the authority to increase the valuations upon real property in cases where lands within the corporation were subdivided into lots, as provided by section 2797 R. S.

The powers of such boards organized under section (2819-1) R. S. et seq. were construed by the supreme court of Ohio in the case of Davies, Auditor, v. Investment Co., 76 O. S. 407. While this opinion is very sweeping and radically changes the practice theretofore indulged by boards of review of the different cities, it is clear that such opinion recognized that the boards may review the returns of new entries of lands and the valuation of lands newly platted, which are in the corporation. The re-valuation or equalization which is incident to the changed conditions affecting such lands, after being subdivided, lies within the power of the board, and it can increase the valuation after the same is platted over that which was fixed when it was one entire tract.

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

CRIMINAL PROCEDURE—DEPOSITION—COSTS.

Amount fixed by judge and approved by county commissioners as compensation of commissioner appointed in trial of felony case to take depositions on behalf of defendant in foreign country may be taxed as costs and paid by state.

October 27th, 1908.

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

DEAR SIR:—You have submitted to me a cost bill in the matter of the State of Ohio v. Guiseppe Vaccaro, which has been presented to you for payment under the provisions of section 7337 R. S. You inquire particularly concerning that item of the same which sets forth the expenses and compensation of a commissioner appointed by the trial court, upon the application of the defendant, to take the depositions of certain witnesses in Montreal, Canada, for use on behalf of such defendant.

Section 7293 R. S. provides:

> "When an issue of fact is joined upon an indictment and a material witness for the defendant resides out of the state * * * the defendant may apply in writing to the court * * * for a commissioner to examine such witness upon interrogatories thereto annexed; and such court or judge may grant the same * * *"

Section 7294 provides:

> "* * * the commissioners so appointed shall receive such compensation as the judge of the court of common pleas shall direct, which shall be paid out of the county treasury and be taxed as part of the costs in the case."

The certified copy of the journal entry and of indorsements on the statement of the commissioner, showing the approval of the common pleas judge and of the county commissioners, evidence full compliance with this section, as well as with the section governing the taxation and payment of costs in felony cases. I do not believe that the fact that the depositions were taken in a foreign country is material, the question being the same as if they were taken in another state of the Union. The section cited clearly contains ample authoriy for taxing these expenses and this compensation, approved in due form by the court and the county commissioners, as costs in the case, and the cost bill submitted to this department is, as to this particular item, approved.

Yours very truly, WADE H. ELLIS,
Attorney General.

APPROPRIATION—UNAUTHORIZED DEFICIENCY, ETC.

Powers and duties of special auditing committee provided for in appropriations for unauthorized deficiencies and liabilities.

November 12th, 1908.

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

DEAR SIR:—Your communication is received in which you request the opinion of this office relative to the powers and duties of the special auditing committee provided for in the second section of an act passed by the last general assembly, entitled "An act to make appropriations to pay unauthorized deficiencies and liabilities existing prior to February 15th, 1908."

Section 1 of this act is made up of specific appropriations to particular persons and corporations.

Section 2 of said act is as follows:

> "The moneys herein appropriated shall be paid upon the approval of a special auditing committee, consisting of the chairman of the senate finance committee, the chairman of the house finance committee and the auditor of state, and said auditing committee is hereby authorized and directed to make careful inquiry as to the validity of each and every claim herein made, and to pay only so much as may be found to to be correct and just, and in the event said committee finds the law relating to creating deficiencies has been violated by any official or board, it shall report the same to the governor in writing."

Under the above provision of section 2 of the act the special auditing committee, consisting of the chairman of the senate finance committee, the chairman of the house finance committee and the auditor of state, is authorized and directed to pay only so much of each of the specific appropriations as may be found to be correct and just.

It has been suggested that since each item of appropriation in section one of the act is made to a particular person or corporation, for a particular sum, the appropriation is complete in itself and that the auditing committee has no power to act by modifying or changing the appropriation. Upon a careful consideration of the law, however, I am clearly of the opinion that this view is erroneous and that the general assembly in effect appropriated the amounts designated in section 1, not to the persons named, but to the use of the special auditing committee, with powers granted to the said committee to investigate the claim in each case and pay to the individuals or corporations named, out of the appropriations, such amounts as they decide to be correct and just, and that such committee has full power to act.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

COSTS—FAILURE TO PROVIDE FOR MINOR CHILDREN.

Costs in prosecutions under juvenile act for failure to support minor children should be paid by county; costs in prosecution under section (3140-2), for abandonment of minor children, should be paid by state, when penitentiary sentence is imposed, and the same is suspended under probation act.

December 4th, 1908.

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

DEAR SIR:—Your communication of recent date is received, in which you submit the following inquiry: In prosecutions for non-support under the juvenile act in the common pleas court defendants have been convicted of felonies, peniten-

tiary sentences have been imposed and sentences suspended so long as the persons convicted contributed to the support of their families. In all of these cases the counties have certified the costs of the clerk and sheriff, in regular form, to the state for payment, claiming the same under section 11 of the juvenile act. Section 40 of the act, however, provides that all fees and costs in all cases coming within the provisions of said act shall be paid out of the county treasury of the county. *Quaere:* Do the provisions of section 40, above referred to, apply only to the costs in delinquency of children cases, or do they also apply to the costs in penitentiary cases for non-support?

In reply I beg to say section 11 of the juvenile act (99 O. L. 194) provides the method of securing a jury in the prosecution of persons charged with contributing to delinquency, dependency, or neglect of children and provides that "the compensation of jurors and the costs of the clerk and sheriff shall be taxed and paid as in other criminal cases in the common pleas court." This provision, in my judgment, applies only to the costs of the clerk and sheriff in securing juries, as provided in said section, and does not include the payment of other costs incidental to the trial of the case.

Section 40 of the act provides that:

> "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, and together with the costs of transportation of children to places to which they may be committed, shall be paid out of the county treasury of the county upon itemized vouchers and certified to by the judge of the court."

The effect of this provision is that the fees and costs in all the prosecutions provided for in said act shall be paid out of the county treasury. Aiding, abetting or contributing to the delinquency, dependency or neglect of a child is not, however, made a felony by any of the provisions of the juvenile act.

Section (3140-2) of the Revised Statutes does make the abandonment of a child under the age of sixteen years, by a parent, a felony, and provides for imprisonment in the penitentiary as a punishment. If the cases referred to in your inquiry were prosecuted under the provisions of this section, then the costs should be paid by the state, as in all other penitentiary cases. But if the prosecutions were had under the provisions of the juvenile law, then the costs should be paid as is provided in section 40 of said act.

Very truly yours,
U. G. DENMAN,
Attorney General.

LOCAL OPTION—SALE IN "DRY" TERRITORY.

Sale of intoxicating liquors may not be made in territory "dry" under county local option law under contract made prior to time when such county becomes "dry."

COLUMBUS, OHIO, November 9, 1908.

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

DEAR SIR:—Yours of the 26th ult. has received my consideration. Accompanying your letter is one from the Delphos Bottling Works of Delphos, Ohio, and you have requested an official opinion upon the question therein presented. In substance it is as follows:

May deliveries be made in dry territory of liquors which have been previously ordered and wherein the order is not solicited by the driver?

The question thus presented contemplates an exception to the act of March 5, 1908 (99 O. L. 35), otherwise known as the "Rose law." The company pre-

senting the question seems to contend that because the liquors have been ordered in certain territory prior to such territory becoming dry by vote and pursuant to such law, that therefore the law did not apply to such deliveries. The act of May 9, 1908 (99 O. L. 475, 476), should also be construed in connection with the Rose law. That law defines sales as follows:

> "All sales of intoxicating liquors to be paid for on delivery, commonly called c. o. d. shipments, shall be held to be made at the place of destination, or where the money is paid or goods delivered."

The former act, the Rose law, does not have any saving clause of vested rights, or rights arising by virtue of contracts theretofore made, contained therein. All sales, furnishing or giving away of intoxicating liquors shall by section 2 of the act in question be prohibited from and after 30 days from the date of holding an election at which a majority of the votes cast shall be in favor of prohibiting the sale of intoxicating liquors as a beverage. The language of section 2 in that regard is as follows:

> "If a majority of the votes cast at such election shall be in favor of prohibiting the sale of intoxicating liquors as a beverage, then *from and after* 30 *days* from the date of holding said election it shall be unlawful for any person, personally or by agent, within the limits of such county to sell, furnish or give away intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished for beverage purposes, and whoever from and after the 30 days aforesaid violates any of the provisions of this act or in any manner directly or indirectly *sells, furnishes* or gives away or otherwise deals in any intoxicating liquors as a beverage, or keeps or uses a place, structure or vehicle, either permanent or transient for such selling, furnishing or giving away, or in which or from which intoxicating liquors are sold, given away or furnished or otherwise dealt in as aforesaid shall be guilty of a misdemeanor and shall on conviction thereof be fined not more than two hundred dollars nor less than fifty dollars for the first offense, etc."

It has been held by the supreme court of those states wherein the license system has prevailed that whenever prohibition is declared, in accordance with the local option law, in any given locality, it has the effect to revoke and render null all existing and unexpired liquor licenses in that locality; and any person who sells liquor within the district, thereafter, violates the law, notwithstanding he sells under a license granted before the adoption of prohibition. A privilege of selling liquor is not a contract, nor a property right, nor a vested interest of any sort; it is merely a temporary permission to engage in a business which the law regards with no favor, and it may be revoked or cancelled by a change in the system of liquor legislation without an unlawful invasion of any rights of the holder or of the contracting parties.

The same principle is applicable to the state of facts presented by the question of the Delphos Bottling Works. If the deliveries were not made prior to the time mentioned in section 2 of the act, viz., within thirty days from the date of holding the election, then no such delivery can be thereafter made, although contracts had been entered into for the sale of liquor in such territory prior to the time that the territory was actually voted dry.

I therefore conclude that the deliveries of liquor in such territory, under such such circumstances, cannot lawfully be made.

Yours very truly,
U. G. DENMAN,
Attorney General.

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

DEPOSITORY—CITY—INTEREST OF MEMBER OF COUNCIL.

Bank whose cashier is member of council may become city depository and may purchase city bonds.

Deposit of city moneys and sale of city bonds are not "expenditures" within meaning of section 45 M. C.

Penalties of section 45 M. C. and section 6969 R. S. attach only to interest in public expenditures existing during tenure of office.

January 3rd, 1908.

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

GENTLEMEN:—Replying to the several inquiries contained in your letter of the 27th ult., I beg to advise you as follows:

1. "Has a bank whose cashier is a member of council the legal right to enter into competition for the use of the public funds of the city under the depository law?"

Pursuant to the provisions of section 135 municipal code (97 O. L. 270), authority is conferred upon the city treasurer to deposit the funds and public moneys of which he has charge in such bank or banks situated within the county, which may seem best for the protection of such funds. The council provides, by ordinance, the details of the procedure to be adopted by the officer, and a special provision is contained therein that all proceedings in connection therewith shall insure competitive bidding and conducted in such manner as to secure full publicity. There is no provision contained in such depository act of itself which would serve to disqualify a bank whose cashier is a member of council from competing for such public funds.

Section 45 of the municipal code (97 O. L. 44) contains the following language bearing upon the question at issue:

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

The bank is a corporation seeking to become the depository of city funds at competitive bidding. The cashier, who is a member of the council, has no interest in the expenditure of money on the part of the corporation in this instance, for the corporation expends no money in such transaction, and such prohibition does not affect a transaction of this character.

I am therefore of the opinion that, under the circumstances stated, the bank in question has the legal right to enter into competition for the use of the public funds of the city under the law in such cases.

2. "Has a bank whose cashier is a member of the council the right to loan moneys to the city on certificates of indebtedness?"

The provisions of section 45, above quoted, have never been extended to disqualify a corporation dealing with a city council, a board of county commissioners, a board of education, or other official body, from contracting with such body merely because a stockholder in such corporation is a member of the body awarding such contract. (State ex rel. v. Pinney, 47 Bulletin 820.) In such instance I am of the opinion that the bank may, pursuant to the provisions of section 95 M. C. and related sections, purchase the certificates of indebtedness of the municipality.

This may also serve as an answer to the third question, regarding the right of a bank to have its bid considered in bond sales made by the city, when the cashier of such bank is a member of council.

4. "Does the clause, 'during the term for which he was elected, or one year thereafter,' as expressed in section 6976 R. S., apply to the restrictions contained in sections 45 M. C. and 6969 R. S.?"

The language above quoted applies only to the officers and members mentioned in section 6976, and cannot, by construction, be extended to or made to apply to the limitations contained in section 45 M. C., unless such officers and such restriction are clearly included within the language of section 6976. That section is a criminal statute and must be strictly construed, and as the prohibition regarding time, as contained in the last cited section, is not contained in section 45 M. C., it is my judgment that the same cannot be made to apply to the provisions of that section.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BOARD OF HEALTH—LOCAL—DISCHARGE OF EMPLOYE.

Persons employed after adoption of municipal code by local boards of health may be dismissed without notice and hearing.

January 27th, 1908.

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

GENTLEMEN:—I have given consideration to the inquiry contained in yours of the 17th inst., which is as follows:

> "Has the board of health of cities the power to discharge sanitary policemen, inspectors, clerks, etc., at their pleasure, or can such appointees be removed only for cause assigned and after a hearing has been afforded them by the board?"

The answer to the foregoing question is dependent upon the construction accorded section 189 of the municipal code and section 2115 Revised Statutes. Prior to the adoption of the municipal code, October 22nd, 1902, the power of appointment of boards of health and the control over their appointees were materially different from that provided for by sections 187, 188 and 189 of the municipal code. In section 189 the following language is used with regard to employes of such boards:

"All employes now serving in the health department shall continue to hold their said positions and shall not be removed from office or reduced in rank or pay, except for cause assigned and after a hearing has been afforded them before the board."

In section 2115 R. S. it is provided that:

"The board of health shall also have power to appoint, with the consent of the council, as many persons for sanitary duty as in its opinion the public health and sanitary condition of the corporation may require, and such persons shall have general police powers, and be known as the sanitary police. *The board shall have exclusive control of their appointees*, and define their duties and fix their salaries, but no member of the board of health shall be appointed health officer; neither shall a member of the board of health or the health officer be appointed as one of the ward physicians. *All such appointees shall serve during the pleasure of the board.*"

Does the language above quoted from section 189 of the municipal code limit the powers of the board of health as contained in section 2115 R. S. *supra?*

The language,

"The board shall have exclusive control of their appointees * * *"

and "all such appointees shall serve during the pleasure of the board," is not compatible with the language above quoted from section 189 M. C., if the latter should be given the meaning that the employes of the health department can only be removed for cause. If that be true, the board has not the "exclusive control" of such appointees, and they are not serving "during the pleasure of the board."

It was held in the case of the State of Ohio ex rel. Attorney General v. Craig, 69 O. S. 236, 247, that the pleasure of the board of health is indicated in regard to certain employes by the appointment of other persons to serve in their places. Judge Burket says:

"Even if the word employe means and includes a health officer, then such employe as such health officer will, under section 2115 Revised Statutes, serve in said office only during the pleasure of the board of health

While in that case it was determined that a health officer was not an "employe" as used in section 189 M. C., yet the force of the opinion extended to the determination of the question herein presented, that is to say, the language of section 189 M. C. did not control the powers of the board as evidenced by the language employed in the above quotation from section 2115 R. S.

It is, therefore, my opinion that when the general assembly enacted section 189 M. C., it limited the operation of the language quoted therefrom to the "employes now serving in the health department," and thereby provided against the *then* existing boards of health and the employes then serving from being removed by reason of the change in the powers of such boards, except in the manner therein provided. Retention of section 2115 R. S. as a part of the code compels acceptance of the view that the board has exclusive control of its appointees and has the power to remove them at its pleasure.

Very truly yours,

WADE H. ELLIS,
Attorney General.

HEALTH OFFICER—INCREASE OF COMPENSATION—WARD PHYSICIAN

Compensation of health officer appointed by local board of health may be increased during term of his appointment.

Health officer may not be employed as ward physician during epidemic.

February 29th, 1908.

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

GENTLEMEN:—I beg to acknowledge the receipt of your letter of the 24th inst., relative to the compensation to be paid to the health officer appointed by the board of health of the city of Mansfield, Ohio.

In answer thereto I would say that the question of the compensation of the health officer is not affected by section 126 of the municipal code, and that such officer appointed by the board of health may have his compensation increased during the term for which he has been appointed. This is upon the authority of State ex rel. Miller v. Massillon, 24 C. C. 249. But as it appears from information received at this department that the extra allowance thus made has been for services performed by the health officer as a physician during the epidemic recently existing in your city, I call your attention to the prohibitions contained in section 2115 R. S., that neither a member of the board of health *nor the health officer* may be appointed as one of the ward physicians. The employment in this case would seem to be prohibited by such section and also by the further provision contained in section 45 of the municipal code, as follows:

> "Nor shall any member of the council, board, officer or commissioner of the corporation have any interest in the expenditure of money on the part of the corporation, other than his fixed compensation."

Therefore, I am of the opinion that the payment of such extra allowance is forbidden by the provisions of the Revised Statutes above cited, and the same should not be made.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BOARD OF EDUCATION—PURCHASE OF BOOKS.

Board of education may not purchase more than $250 worth of books for school library purposes in any one year.

March 9th, 1908.

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

GENTLEMEN:—In your recent communication as to the expenditure of money by a board of education for school library purposes, you state that the board entered into a contract for $337.50 worth of books, appropriated this amount and gave orders on the treasury for this sum at a time when the contingent fund was exhausted.

Section (3998-6) R. S. (96 O. L. 9) provides:

> "The board of education of any school district of the state, in which there is not a public library operated under public authority and free to all the residents of such district, may appropriate annually not to exceed $250.00 from its contingent fund for the purchase of books, other than school books, for the use and improvement of the teachers and pupils of such school district."

A similar question arose in the case of the Board of Education v. Andrews & Co., 51 O. S. 199, as to the construction of former section 3995 R. S. (78 O. L. 110), which provided that certain boards of education might appropriate not exceeding $75.00 in any one year for apparatus and books other than school books. The court held that a contract providing for the expenditure of a greater amount than $75.00 "exceeded the powers of the board and is void for that reason."

Since the contingent fund was exhausted at the time of making this appropriation and drawing the orders, and since not more than $250.00 out of the levy for the following year could be devoted to the purchase of such books under section 3998-6, the clerk could not legally make the certification required under section 2834*b*, without which such an appropriation could not be made.

For these reasons I am of the opinion that the action of the board is invalid and that the orders given should not be paid. Further than this, I doubt whether a board of education may enter into any contract for school library books in a sum exceeding $250.00 in any one year.

Very truly yours,

WADE H. ELLIS,
Attorney General.

VILLAGE ORDINANCES — PUBLICATION. SINKING FUND TRUSTEES — DEPOSITORY AND BOND OF.

What publication is required to be made of village ordinances.

Village trustees of sinking fund may designate village treasury as depository for their securities.

Mayor of village must approve bonds of other members of board of trustees of sinking fund; his bond, as such member, must be approved by council.

March 20th, 1908.

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

GENTLEMEN:—Replying to your inquiry of the 16th inst., requesting an opinion upon the several questions submitted by you, I submit the questions and answers, as follows:

> 1. "In how many issues are the ordinances of village councils required to be published?"

The answer to this question may be determined by a consideration of sections 124 of the municipal code and 1695 of the Revised Statutes. It is dependent upon the character of the ordinance concerning which the inquiry is

made, and also the kind of newspaper in which the same is sought to be published. If it is an ordinance of a general nature, or providing for improvements, it shall be published in some newspaper of general circulation in the corporation, if a daily, twice, and if a weekly, once before going into operation. As there is some conflict between section 124 M. C. and section 1695 R. S., it is suggested that the better practice would be to publish ordinances of a general nature, or providing for improvements, once a week for two consecutive weeks (if a weekly paper), and in the newspapers required by section 124 of the municipal code, since this would include both the requirements of section 124 M. C. and section 1695 R. S., and thereby avoid all question.

2. "May the village treasury be selected by the sinking fund trustees of a village as their depositary, and, if, so, is the treasurer required to give additional bond, subject to the approval of said trustees?"

The authority for the designation of a depository is contained in section 111 M. C. and is as follows:

"All securities or evidence of debt held by the trustees of the corporation shall be deposited with the treasurer of the corporation or with a safety deposit company or companies within the corporation, or, if none exist, then in a place of safety to be indicated or furnished by the council."

It seems to be a statutory requirement that the sinking fund trustees shall deposit all their securities with the treasurer of the corporation. There is a choice implied in such section, that a safety deposit company within the corporation may be accepted as such depository, but the treasurer is to be preferred under the statute. His bond should be sufficient to cover all such additional securities or evidence of debt so deposited with him.

3. "What authority approves the bond of the trustees of the sinking fund of villages?"

In villages the trustees of the sinking fund shall be the mayor, clerk and chairman of the finance committee of the council (Sec. 102 M. C.) The village council shall fix the bond of the trustees of the sinking fund. Such bonds are included within the provisions of section 1738 R. S. and are subject to the approval of the mayor. The mayor being one of the trustees, his bond should be approved by the council.

Very truly yours,

WADE H. ELLIS,
Attorney General.

MUNICIPAL POLICE—CIVIL SERVICE.

Under regulations providing for examination of applicant to appointment on municipal police force, station-house keeper, appointed to that position without examination, may not be transferred to position of patrolman.

April 23rd, 1908.

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

GENTLEMEN:—You have transmitted to this department the letter of the city solicitor at Newark, presenting a question as to the authority of the chief of police to order the transfer of a station house keeper to the position of patrolman upon which you request an official opinion of this department. The letter of the solicitor informs me that the appointment of the station house keeper was made without an examination of any kind and, under the rules adopted by the board of public safety of that city, a wide distinction in the qualifications for each of these positions has been made. It is evident that the merit system governing such department, as provided in the municipal code, would be defeated if appointments could be made to the position of station house keeper without any examination and such person transferred by order of the chief from such position to that of patrolman. For the latter position it is imperative that examinations be required, as such position is within the classified service, and all applicants shall be subjected to examination.

I am, therefore, of the opinion that, under the circumstances, the order made by the chief of police, transferring the station house keeper to the beat of a patrolman, is without authority unless it was merely for temporary and emergency purposes.

Very truly yours,

WADE H. ELLIS,
Attorney General.

HEALTH OFFICER—COMPENSATION.

Compensation of health officer may be increased by board of health during epidemic.

July 29th, 1908.

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

GENTLEMEN:—I have your inquiry of the 25th inst., accompanying the letter of Mr. R. C. Skiles, requesting an opinion upon the right of the board of health of the city of Mansfield to pay the bill of one Dr. Burns, for services performed by him during an epidemic of smallpox in that city some time during the fall and winter of 1907 and 1908. It appears from the statement of facts, filed with the request for an opinion, that the board of health passed a resolution increasing the salary of Dr. Burns $10 per day, such increase to continue during the epidemic. This increase of salary was continued until January 15, 1908, and the city council appropriated $1,000 for the expense attendant upon the epidemic and to take care of Dr. Burns' additional salary. Mr. R. C. Skiles

is attorney for Dr. Burns and desires to know whether the compensation of the doctor can be increased during his term, and whether or not section 45 of the municipal code forbids the payment of this increased compensation during his term.

It was held by the circuit court for the 5th circuit of Ohio, at the February term, 1903, in the case of State ex rel. Miller v. Massillon (24 C. C. Rep. 249), that

> "a health officer, appointed by a board of health, as provided by section 2115 Revised Statutes, is not an officer or appointee, in contemplation of section 1717 Revised Statutes, and the board of health may increase or diminish his salary while he is in office."

Section 1717 R. S. was repealed by the repealing act contained in the new municipal code, passed October 22d, 1902, but the substance thereof is contained in section 126 of the municipal code, to-wit:

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

That court, in further passing upon the question here presented, determined that a health officer does not serve a "term" as used in section 1717 R. S., for the reason that his service is at the pleasure of the board of health which gives him his position. It is not a term for the reason that there is no limit to it. It may be likened to a tenancy at will because in a term it has no limitation, so that this authority is directly in point as authorizing the board of health to increase the compensation of a health officer while he is in office.

As to whether a valid contract could be made with Dr. Burns for services during the smallpox epidemic, I beg to advise that it was represented to this department on or about February 29, 1908, that he was appointed one of the ward physicians while acting as health officer. This department then advised your department, under opinion of that date, that the health officer could not lawfully be appointed as one of the ward physicians, this being forbidden by section 2115 R. S.

There has been presented with the present inquiry, under date of the 16th inst., a statement from the members of the board of health of the city of Mansfield, that Dr. Burns was not appointed a ward physician, but that his compensation as health officer was merely increased during the period of the epidemic. The communication from the members of the board of health further states that "our action in this matter was prompted because of the extra time and work that the health officer had to devote to his usual duties as health officer, in establishing quarantine, fumigating private homes and public places, vaccinating indigent poor, inspecting school children and enforcing vaccination." Upon these facts as thus given it would appear that section 2115 R. S. was not violated because the doctor was not appointed one of the ward physicians. The right to increase his compensation during the time he is serving as health officer is not prohibited by section 126 M. C. As the right exists to increase his compensation, the payment of the same to him would not be a violation of section 45 M. C.

Therefore I conclude, upon the facts as contained in the statement made

to this department, that it is perfectly legal to pay the bill of Dr. Burns as per his agreement with the board of health, both for the supplies furnished as well as for the labor performed.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

POLICE COURT LAW LIBRARY—ALLOWANCE FOR.

Allowance for law library of police court should be paid out of fund arising from collection of fines, after compensation allowed by county commissioners to officers of court has been taken out of such fund; amount of such allowance may not exceed balance of such fund; costs collected do not constitute a part of such fund.

August 13th, 1908.

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

GENTLEMEN:—In your letter of August 11th you give the following provisions of section (1536-937) R. S.:

> "All fines and penalties which are assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court, in state cases, which shall be retained by the clerk, shall be paid by the clerk quarterly to the trustees of such law library association mentioned in the next two preceding sections, except those in cities of the first and second grades of the first class, but the sums so paid shall not be less than five hundred dollars per annum, if there be such an amount,"

and ask (1) Whether this section makes the five hundred dollars allowance to the law library the first lien upon the collection of fines and penalties in a police court in a city not of the first or second grade of the first class.

(2) Whether the costs assessed and collected in said police court in such state cases are to be considered a part of the fines and penalties in case no fees are to be paid from such costs.

I am of the opinion that the five hundred dollars allowance is not the first lien upon the fines and penalties above mentioned, but that "the compensation allowed by the county commissioners to the judges, clerk and prosecuting attorney of such court, in state cases," should be excepted and paid before the five hundred dollar allowance is made for the library. This section, as contained in 69 O. L. 165 originally provided "that the sum as paid shall not exceed five hundred dollars per annum." From a reading of the provision just quoted, of the provision of section 2680*a*, that "the sum so paid shall not exceed four hundred dollars per annum," and of the provision of section 2680*b* that "the sum so paid shall not exceed five hundred dollars per annum," I take it that the provision of the present section 2680 R. S. that "the sums so paid shall not be less than five hundred dollars per annum, if there be such an

amount," means that five hundred dollars shall be paid if there be such an amount left out of the fines and penalties assessed and collected after the excepted portion above mentioned has been paid, and that a less amount shall be paid for library purposes in case the balance left does not amount to five hundred dollars.

The costs in such state cases, I believe, are not a part of the fines or penalties as set forth in section 2680. Section 1807, referred to in section 2680, uses the terms "fines, penalties, fees and costs," and other provisions of the statutes as well as law dictionaries and encyclopedias use the terms "fines and penalties" in a manner distinct from the terms "fees and costs."

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

VILLAGE WATERWORKS—POWER OF BOARD OF TRUSTEES OF PUBLIC AFFAIRS TO CONTRACT CONCERNING.

Board of trustees of public affairs has the power to enter into all contracts respecting improvements in village waterworks, but contracts involving expenditure of more than $500 *must be approved by council.*

September 1st, 1906.

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

GENTLEMEN:—I am in receipt of your communication enclosing the letter of the board of trustees of public affairs of Madisonville, Ohio, in which request is made of your department that an official opinion be secured upon the facts as therein recited.

It appears from the communication of the trustees of public affairs that Madisonville, a village, has waterworks and electric light plants, and the same are operated and controlled by the trustees of public affairs, as provided for by section 205 of the municipal code. The question presented involves the power of the trustees of public affairs to make and enter into contracts exceeding in amount $500, without the authority of council. It is contended that such power is vested in the board.

In an opinion of this department addressed to your department under date of April 2nd, 1907 (Report of Attorney General, 1907, p. 155), it was observed that the powers conferred upon waterworks boards, now vested in the trustees of public affairs, are the same as those heretofore incorporated in the original act providing for trustees of waterworks, which is Chap. XXV of the municipal code, May 7th, 1869 (66 O. L. 205 to 209 inclusive). In section 342 thereof, powers conferred upon trustees of waterworks are, in part, as follows:

> "The said trustees shall be authorized to make contracts for the building of machinery, waterworks buildings, reservoirs, and the enlargement and repair thereof, and the manufacture and laying down of pipe and for all other necessary purposes to the full and efficient management and construction of waterworks."

This section is now embraced in section 2415 R. S. (Ellis' Municipal Code, 3rd Ed. 462), and evidences the most full and ample authority conferred upon such board, and is a measure of the authority of the board created pursuant to section 205 municipal code. It was further observed therein that power is conferred upon the council of a village by section 334 of the original act, now section 2407 R. S., to enter upon and take possession of any land obtained for the construction or extension of waterworks, reservoirs, etc. Thus, certain powers must be exercised by the council and certain powers are still preserved in the board of trustees of public affairs.

Since the enactment of the new municipal code, and the limitations contained in section 143 thereof, it has been held, as the opinion of this department, that the limitations therein imposed upon the directors of public service are likewise limitations operating upon the trustees of public affairs.

The limitation to be considered is the power of such board to make any contract or purchase supplies or materials involving more than $500. While it is evident, as was said in State of Ohio ex rel. v. Griffin, 4 C. C. 156, that the intention of the general assembly "was and is to give them (the board of trustees) the control and disbursement of the moneys raised to pay for the work done under the contracts which the trustees are empowered to make," yet the subsequent enactment of the new municipal code, with the limitations therein imposed, applicable, in our opinion, to both cities and villages, the trustees are authorized to make contracts as provided in section 2415 R. S., but subject to the limitations contained in section 143.

This conclusion seems to be strengthened from a consideration of the chapter providing for the organization of villages in their various branches and departments, and leaves no room for doubt that section 143 should be made to apply to the trustees of public affairs, the same as to the directors of public service.

I return to you the letter of the trustees of public affairs of Madisonville herewith.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

MUNICIPAL CORPORATIONS—CITIES—LEGAL COUNSEL

City council may not by ordinance employ attorney at law.

September 11th, 1908.

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

GENTLEMEN:—Your communication of the 9th inst., accompanying the inquiry of the city auditor of Defiance, Ohio, has received my consideration. You request an opinion of this department upon the facts presented in the letter of the auditor. In substance, the inquiry is whether the city council can, by resolution, employ attorneys to attend to certain legal matters comprised in the duties of the city solicitor, and by resolution fix the compensation of such attorneys.

The legal matters in which such employment was attempted to be made by the council of the city of Defiance was that of appearing in the case of City of Defiance v. The Defiance City Bank, pending in one of the local courts of

that county, said action being one to determine the liability of a surety company on the bonds given by such bank as city depository. The communication further advises me that the employment of such counsel was not made upon the request of the city solicitor, nor was such counsel employed as an assistant to the solicitor, pursuant to the provisions of section 137 M. C.

The provisions of section 137 M. C., regarding the duties of the city solicitor, are as follows:

> "The powers and duties of the solicitor shall be such as are provided in sections 1776, 1777, 1778, 1779 and 1780 of the Revised Statutes of Ohio; such as are provided in this act and all other acts or parts of acts having uniform operation throughout the state and not inconsistent with this act, and he shall prepare all contracts, bonds and other instruments in writing in which the city is concerned; and shall serve the several directors and officers mentioned in this act as legal counsel and attorney. * * * The solicitor shall also be prosecuting attorney of the police court, and shall receive for his service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow; provided, that where council allows an assistant or assistants to the solicitor, such solicitor may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police court. The duties of the solicitor as prosecuting attorney of the police court shall be such as are provided in section 1813 of the Revised Statutes; such as are provided in this act, and in all other acts or parts of acts applying to all cities of the state and not inconsistent herewith. In case of the inability or absence of the solicitor or any of his assistants to act as prosecuting attorney of the police court, provisions of section 1815 of the Revised Statutes shall apply."

Examining the related section, it is evident therefrom that no specific authority is conferred upon the city council to employ counsel for the city other than that designated in the foregoing sections. The city solicitor is, by section 128 M. C., made a part of the executive power and authority of the city. He is, by such section, classed with the mayor, auditor and other executive officers of the city. Certain specific duties are assigned to his department to be performed by him or by his assistants. The enactment of the new municipal code continued many of the existing provisions relative to the duties of the solicitor theretofore contained in the Revised Statutes, but nowhere has it added the authority to council as here attempted to be exercised. The language of section 137 M. C. is that the city solicitor "shall serve the several directors and officers mentioned in this act as legal counsel and attorney." Among the other officers therein mentioned was that of the city council. The city solicitor was thereby made the legal representative of the city. The city is his client, as well as the several directors and officers thereof. He is denominated as their legal counsel and attorney.

Can the duties thus imposed upon him by statute be transferred, by resolution of the city council, to another or others not bearing an official relation to the city?

The case of Yaple v. Morgan et al., 2 O. C. C. 406, would seem to be opposed to such contention. In that case the reasoning of the court supports our view inferentially. The board of police commissioners of the city of Cincinnati, appointed by the governor of the state, was held to be an arm of the state for police purposes, and as such to be independent of control by the

city, and that the city solicitor of Cincinnati was not made, by law, its attorney. Therefore, it was held that such board might employ, and pay out of its fund, such counsel as it selected. It is plainly deducible therefrom that if the board could have been classed as a board of officers of the city of Cincinnati the decision of the court would have been otherwise.

The language employed in section 137 M. C. compels the conclusion that the city law department should have charge of and conduct all the law business of the co-ordinate departments, directors and officers created by the municipal code. As pointed out, the solicitor is designated as the "legal counsel and attorney" for such officers. For such services he receives an annual salary, and this is in lieu of all the charges against the city for the same. By section 126 M. C. the council is required to fix the salaries of all officers, clerks and employes in the city government, and such salary, when fixed, shall not be increased nor decreased during the term for which such officer may have been elected. By section 43 M. C. the council is required to make appropriations at the beginning of each fiscal half year for the law department, as well as the other departments of the city. By sections 35 and 37 M. C. it is made the duty of the head of each department to report an estimate, in itemized form, to the mayor and auditor, stating the amount of money needed for their respective wants for the incoming year, and for each month thereof. This is required of the law department as of the other municipal departments. The council is forbidden, by section 43 M. C., to transfer any funds from one fund to another, except in compliance with the provisions of that section.

A consideration of these provisions is necessary as bearing upon the legality of the appropriation made for this purpose, as well as for the determination of the legality of the employment thus attempted to be made. It is thus apparent that the selection of the legal counsel and attorney for the city, its directors and officers, is by popular election, and while the employment of assistants to the solicitor is authorized, their appointment can only be made pursuant to the provisions of the section designated in the statutes above cited. The municipal code does not contemplate that extra counsel shall be employed to perform legal services for the corporation, its directors and officers, and no power has been lodged in the municipal authorities to provide funds for their compensation, even if employed.

The scheme of the act of October 22nd, 1902 (the municipal code), was to guard the city from loose, reckless and indefinite expenditure and limit the power of its authorities to create debts by the most careful and stringent provisions. If an employment of this character can be made, carrying with it the compensation for the services of those thus employed, it would furnish sufficient reason for saying that the duties imposed upon the boards of public safety and public service could, by resolution of the city council, be transferred to some individual or corporation not connected with the city government, and thus delegate to others the duties and responsibilities which alone should be borne by the officers elected or appointed.

Again, it is not in accordance with settled rules of construction to ascribe to the general assembly an intention to provide for a law department for each city and to leave the employment of legal counsel, whenever desired, to the city council. Under such construction conflicting and hostile systems relating to the same subject might be created, and such result, if legalized in one particular, would become a precedent for all departments and officers and thus subject the municipal code to the reproach of uncertainty and unintelligibility.

In the case of Clough & Wheat v. Hart, 8 Kans. 487, the supreme court of that state said:

"Where a written contract between a city of the first class and an individual shows upon its face that it was made by the city for the professional services of the individual as an attorney and counselor at law, which services are such as the law requires to be performed by the city attorney, such contract is *prima facie* void."

In a similar case the supreme court of Minnesota (Horn v. City of St. Paul, 80 Minn. 369), said:

"It is a great hardship to have rendered valuable legal services to a city for a number of years and not be permitted to collect reasonable compensation. But the statute is plain, and respondent was charged with notice of its provisions. It is useless to pursue the subject further. The law has been adopted, and, as we now interpret it, the defendant city is absolutely powerless to compensate for legal services performed by any one except the regular members of the legal department."

This view is further sustained by a consideration of the provisions of sections 1813 to 1815, providing for the employment of assistants during a temporary inability or absence of the prosecuting attorney of the police court, he being an assistant city solicitor. It is further sustained by the provisions contained in sections 845, (1001-1) and 7196 R. S., wherein it was necessary to specially authorize county commissioners to employ and courts to appoint special counsel and assistants to prosecuting attorneys in their respective counties.

The case of Lyddy v. Long Island City, 104 N. Y. 218, is also a controlling authority.

In coming to the conclusion that the city council of Defiance had no authority to make the employment recited in the foregoing statement, and to make the appropriation for the compensation of the attorneys so employed, this department but follows the opinion expressed by it to your department under date of January 11th, 1907 (Report of Attorney General, 1907, 142), relating to the power to substitute another method for the maintenance and operation of an electric police and fire alarm system than that vested in the board of public safety in each city. In that opinion it was said:

"The method the general assembly has thus provided is exclusive. Affirmative words are often in their operation negative of other objects than those affirmed, and, in this case, a negative or exclusive sense must be given to the language employed, or it will have no operation at all. (Marbury v. Madison, 1 Cranch 137)."

The words used by the general assembly in providing for a law department for the cities of the state, in conferring upon council the necessity to make appropriations for such department, in providing how assistants to the city solicitor shall be appointed, all suggest their plain import to be that the system thus set forth is exclusive, and if the duties of that department can thus, by contract, be transferred to another, it can be absolutely destroyed.

I therefore return to you the papers transmitted to this department, advising that you inform the city auditor of Defiance of the opinion thus expressed.

Very truly yours,

SMITH W. BENNETT,
Special Counsel.

MUNICIPAL CORPORATIONS—AMENDMENT OF APPROPRIATION ORDINANCE—EMPLOYMENT OF CLERK BY BOARD OF PUBLIC SERVICE—SPECIAL ASSESSMENT BOND.

Council may amend semi-annual appropriation ordinance against veto by mayor only by passing the ordinance over such veto.

Board of public service may not hire clerk when no appropriation has been made for his compensation.

Special assessment bonds are within the "Longworth" act.

September 11th, 1908.

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

GENTLEMEN:—I am in receipt of yours of the 3rd inst., enclosing a communication from the city solicitor of Newark, in which the following questions are presented:

1. The city of Newark passed a semi-annual appropriation ordinance. The mayor vetoed certain items of this ordinance. Will a subsequent ordinance amending the semi-annual appropriation ordinance, including therein the items vetoed by the mayor, if passed by council, be legal?

2. Council, in passing the semi-annual appropriation ordinance, did not make an appropriation for a waterworks clerk. The board of public service hired such a clerk and fixed his compensation. Has the clerk a right of action against the city for the salary so fixed by the board?

3. Do special assessment bonds come within the Longworth bond act, i. e., bonds for paving, sewering and sidewalks? May the city of Newark issue such bonds in excess of one per cent. in one year?

Replying to question 1, above presented, it is apparent that the ordinance seeking to amend the semi-annual appropriation ordinance was not acted upon by the council in conformity to section 43 M. C. The requirement therein contained is that:

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

The mayor has the right to exercise his veto. If the necessary votes could be secured in council the members thereof could pass the same over the mayor's veto, pursuant to the provisions of section 125 M. C. This provision is as follows:

> "When the mayor disapproves an ordinance or resolution, or any part thereof, and returns it to council with his objections, council may, after ten days, reconsider the same, and if such ordinance, resolution or item upon such reconsideration is approved by the votes of two-thirds of all the members elected to council, it shall then take effect as if signed by the mayor."

The procedure resorted to by the council was not in conformity to such provision and its action thereon was, in my opinion, illegal.

Replying to the second question, I beg to advise that the board of public service has no authority to hire a clerk if there has been no appropriation made for such purpose. While the board of public service has the right, ordinarily, to hire a clerk and fix his compensation, such right can only be asserted when an appropriation has been made to pay the compensation of the clerk so hired.

Replying to the third question, the answer thereto may be found in the decision of Phillips, J., in the case of the City of Cleveland v. Cleveland et al., decided March 13th, 1907, 18 Ohio Dec. 619. The syllabus thereof is as follows:

> "Paving, sewer construction and abolishing grade crossings within a municipality are improvements within the provisions of Revised Statutes 2835, limiting the authority of the council to issue bonds, and where the cost of proposed paving and sewer construction and abolishing grade crossings will bring the net indebtedness of the city past the 4 per cent. limit, the council has no authority to issue bonds therefor without the approval of the electorate."

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

CITY SOLICITOR—COMPENSATION OF.

Compensation of city solicitor may not be increased by council on account of imposition of duty to act as prosecutor of mayor's court, during term for which he has been elected.

December 16th, 1908.

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

GENTLEMEN:—I am in receipt of your inquiry of the 9th inst., presenting, through your department, the question submitted thereto by the city solicitor of Delaware, Ohio. In substance the communication of the city solicitor presents the question of the power of the city council to increase the salary of the city solicitor during his term of office because of the added duties imposed on him by the act of the general assembly passed May 9th, 1908 (99 O. L. 458, 459), amending section 137 of the municipal code. The amendment to section 137 imposes upon the solicitor the duty not only of being the prosecuting attorney of the police court, but that of the mayor's court, as distinguished therefrom. This department had formerly held that the use of the terms "police court" did not include mayor's court, and that therefore the solicitor was not compelled to appear as the prosecuting attorney in the mayor's court.

The amendment referred to is simply by the addition to the existing statute the words "or mayor's court." It is thus made evident that the intention of the general assembly was to add to the duties of the city solicitor, but it did not thereby provide that the salary of the city solicitor could be increased on account of such added duties.

Section 126 of the municipal code, in so far as it is necessary to quote the same, provides:

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

There did not seem to be any intention on the part of the general assembly to amend the provisions of section 126 M. C. in that regard. It has been frequently held that the duties of an officer may be increased by provision of law, or by ordinance, and that where no provision is made for increased compensation the added services so performed must be regarded as performed under the salary theretofore established. This is announced by the supreme court of Ohio in the case of Jones, Auditor, v. Commissioners, 57 O. S. 189; Strawn v. Commissioners, 47 O. S. 404, and many other citations unnecessary to give.

It follows, therefore, that the compensation of the city solicitor on account of such added service, or otherwise, cannot be increased during the term for which he has been elected.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Treasurer of State)

SAFE DEPOSIT AND TRUST COMPANY—DEPOSIT OF SECURITIES WITH TREASURER OF STATE.

Decision of supreme court in Schumacher v. McCallip, 69 O. S. 500, did not relieve safe deposit and trust companies accepting trusts, under section 3821c, from making deposits required by section 3821d.

March 24th, 1908.

HON. W. S. MCKINNON, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Replying to your request for an opinion as to the amount of the deposit required to be made with you as treasurer of state by trust companies engaging in business in this state, I beg to say that, pursuant to the provisions of section 3821*d* R. S., before a safe deposit and trust company, doing business in a city of 33,000 or more, accepts any trust which may be vested in, transferred or committed to it by any individual or court of record, as provided in section 3821*c* R. S., such trust company must have a capital stock of $200,000, fully paid up, and shall have deposited with you, as treasurer of state, $100,000 in cash or in securities mentioned in such section. But when such trust company, doing business in a city of less than 33,000, desires to accept any trust which may be vested in, transferred or committed to it by any individual or by any court of record, as provided in section 3821*c* R. S., it must first have a capital stock of $50,000, fully paid up, and shall have deposited with you as treasurer of state $25,000 in cash or in the securities mentioned in such section. I am not unmindful of the opinion of the supreme court of this state in Schumacher v. McCallip, 69 O. S. 500, holding sections 3821*c* and 3821*f* R. S., to be unconstitutional; such opinion does not affect the question suggested by you.

Very truly yours,

WADE H. ELLIS,
Attorney General.

TREASURER OF STATE—COLLECTION OF SECURITIES DEPOSITED WITH.

Treasurer of state may not assign securities deposited with him by insolvent safe deposit and trust company to assignee of such company for collection, but must collect them himself; procedure of such collection.

June 3rd, 1908.

HON. W. S. MCKINNON, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—In the absence of the attorney general, I beg to answer your request for an opinion contained in your recent letter, in which you state the following facts:

> "This department holds in trust securities in the way of mortgage notes in the sum of $101,650.00 for the account of the Euclid Avenue Trust Company of Cleveland, Ohio, which company made an as-

signment to the Cleveland Trust Company on the 8th inst. * * * Kindly advise this department in writing as to the proper procedure thereunder. The securities are held by this department under section 3821*d*."

Accompanying such letter is a communication from the Cleveland Trust Company, assignee of the Euclid Avenue Trust Company, in which the proposition was made by such assignee tendering its services to collect the securities referred to. With such proposition is enclosed a form of deposit agreement for you to execute and you are to turn over to it the items constituting such deposit.

The questions arising involve your power to comply with such proposition. These deposits were made with your department by the Euclid Avenue Trust Company pursuant to the provisions of section 3821*d* R. S. The portion of that section relating to such subject is as follows:

> "The treasurer of state shall hold such fund or securities deposited with him as security for the faithful performance of all the trusts assumed by said company, but so long as any such company shall continue solvent, said treasurer shall permit it to collect the interest of or dividends on its securities so deposited, and from time to time to withdraw such securities or cash, or any part thereof, on depositing with him cash, or other securities of the kind heretofore named, so as to maintain the value of said deposit as hereinbefore provided."

This duty thus imposed upon the treasurer of state cannot be legally abdicated or surrendered to any other person or corporation. It is one of the duties attaching to the office to be performed by the officer elected by the people. The purpose of the deposit so made is similar to that which is made by bond and investment companies pursuant to the provisions of section 3821*r* R. S.

The supreme court of the state of Ohio, in construing the duties of the treasurer of state under such latter section, in the case of the State of Ohio ex rel. Attorney General v. The Interstate Savings Investment Company, 64 O. S. 283, 323, said:

> "It should be added as the opinion of the whole court that it is the duty of the state treasurer to hold and distribute the fund deposited with him, in trust for the holders of the debentures in this state, according to the amount that may be found due to each one."

This authority thus settles the question that there is no power in the treasurer of state to acquiesce in the proposition made by the Cleveland Trust Company, and that the duty thus imposed upon you must be performed by you, viz: "To hold such funds or securities deposited * * as security for the faithful performance of all the trusts assumed by said company."

The form of procedure was not defined by statute at the time of the rendition of the opinion by the supreme court hereinbefore referred to, but on the 10th day of May, 1903 (95 O. L. 480), the general assembly provided the method of procedure applicable in such cases, the same being found in section (281-1-2-3) of the Revised Statutes.

It will be observed that the language of such section is broad and includes such instances as are here presented. Among other provisions, observe that

if the company making the deposit has ceased to do business within the state, leaving unpaid any liability, or has become insolvent, the attorney general, on behalf of such officer, shall, upon the application of any party entitled to participate in such deposit, or the proceeds arising therefrom, commence a civil action in the court of common pleas of Franklin county, to determine the rights of all parties claiming any interest in such deposit, to subject such deposit to the payment or satisfaction of all liability or liabilities and to distribute the fund among the persons entitled thereto. In such action the company making the deposit should be made a party defendant.

It further provides the character of notice that shall be given to every person claiming to have any interest in the fund and the length of time for the publication of such notice, and that all such persons having any interest therein may intervene and set forth such interest by answer.

I am of the opinion that the assignee of the Euclid Avenue Trust Company would be one of such parties in interest and could make the request upon the attorney general to begin such action.

As the jurisdiction of the courts of Cuyahoga county has been invoked by the assignee in the settlement of the affairs of the Euclid Avenue Trust Company, I deem it proper to suggest that in my opinion the attorney general would not be limited in the commencement of any such action to the court of common pleas of Franklin county, but might, at his option, file such petition in the court of common pleas of Cuyahoga county.

I therefore return to you the correspondence and form of agreement which you have submitted as having been presented by the Cleveland Trust Company, advising that you have no authority to comply with the proposition therein contained.

Yours very truly,

SMITH W. BENNETT,
Special Counsel.

BANKS—SECURITIES WHICH MAY BE DEPOSITED WITH TREASURER OF STATE UNDER BANK INSPECTION LAW.

June 24th, 1908.

HON. W. S. MCKINNON, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—Replying to yours of the 22nd inst., suggesting an inquiry as to the character of securities which may be deposited with you as treasurer of state by banks and trust companies, pursuant to the provisions of section 69 of an act of the general assembly entitled "An act relating to the organization of banks and the inspection thereof," passed by the 77th general assembly, second regular session, I beg to say:

By section 69, aforesaid, the treasurer of state may accept as such deposit "bonds of the United States or of the state of Ohio or Ohio municipal bonds." He is further authorized to receive such deposit "in cash or in securities in which said corporation is allowed to invest its capital."

Examining those paragraphs designating the securities in which trust companies, commercial banks and others are authorized to invest their capital, there is found mentioned "promissory notes of individuals, firms or corporations, when secured by sufficient pledge of collateral, approved by a quorum of the executive committee or directors, subject to the provisions of section 47 of

this act." "Stocks which have paid dividends for five consecutive years next prior to the investment, and bonds of corporations when the same are authorized by the affirmative vote of the board of directors or of the committee of said trust company."

It would therefore appear that as trust companies, commercial banks, etc., are authorized to invest in the first mortgage bonds of waterworks companies, that such bonds may be accepted by you for the purpose of the deposit required by section 69 of the act in question.

Yours very truly,

WADE H. ELLIS,
Attorney General.

DEPOSITORY—STATE—LIABILITY OF SURETY FOR.

Surety on bond of state depository is not liable to pay more than the penal sum thereof although the bond expressly covers interest, and principal and interest together exceed such penal sum.

September 14th, 1908.

HON. W. S. MCKINNON, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—I have given consideration to your request of the 12th ult., for an opinion as to the liability of the United States Fidelity and Guaranty Company of Baltimore as surety upon the bond of the Euclid Avenue Trust Company of Cleveland, Ohio.

The Euclid Avenue Trust Company was created a depository of state funds and a bond was exacted of such company as required by the act of May 3, 1904 (97 O. L. 535). The Euclid Avenue Trust Company has made an assignment to the Cleveland Trust Company and its affairs are being wound up, and it has become insolvent. The question of the liability of the United States Fidelity and Guaranty Company is to be determined according to the language of the bond and the language of the law pursuant to which such bond was executed by such surety company. It appears from the correspondence transmitted to this department that the United States Fidelity and Guaranty Company executed a bond for $5,000; the Federal Union Surety Company for $20,000; and the Empire State Surety Company for $30,000. These were all executed to secure the state of Ohio, and run concurrently. The amount of the United States Fidelity and Guaranty Company bond is $5,000.

While the language of the statute reads: "And 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 of not less than two per centum per annum, payable quarterly on the first Monday in February, May, August and November of each year, or at any time when the account may be closed,"—yet this language, which is also incorporated in the bond, cannot extend the liability beyond the principal amount therein named, to-wit, $5,000.

The United States Fidelity and Guaranty Company has paid the amount of $5,000, as per its letter of May 22nd, 1908, but you have apportioned against said bond an additional liability of $35.59 as its portion of the interest on the total deposit of $55,000. In my opinion the amount of such interest cannot be col-

lected upon said bond. It has been repeatedly held in this state that the liability of a surety is never to be extended beyond the strict letter of its obligation. That is, in this particular instance, the liability of the United States Fidelity and Guaranty Company cannot be extended beyond $5,000, the penal amount of said bond. It is therefore evident that the combined amount of the three bonds thus executed at $55,000 is not sufficient to cover the deposit of state funds held at the time of the assignment by the Euclid Avenue Trust Company for the principal of such deposit was at the time $55,000. The principal of the bonds should, therefore, be required to be sufficiently large to cover both principal and interest, otherwise the interest cannot be added to the penal sum and be exacted from the surety company in addition to such penal sum mentioned in the bond.

I return herewith the bond executed by the United States Fidelity and Guaranty Company, the certificate of the amount of deposit of $5,000 executed by the Euclid Avenue Trust Company to yourself as treasurer, also the correspondence passing between your department and the office of the United States Fidelity and Guaranty Company of Baltimore.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

(To the State Commissioner of Common Schools)

SCHOOL LANDS—UNSOLD—DISPOSITION AND CONTROL OF PROCEEDS OF LEASES.

Levy for school purposes as fixed by board of education of township district applies to fractional part of such township in which there are unsold school lands.

Township board of education, not trustees of school lands, has authority to direct manner of expenditure of funds arising from leases of such school lands.

Respective functions of township boards of education and trustees of school lands.

February 3rd, 1908.

HON. E. A. JONES, *Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—In your recent communication as to a fractional part of Liberty township, Ross county, you state that the trustees of such fractional township now have accumulated $6,000 from the rental of school lands which are still unsold, that they have been paying the salaries of the teachers within such fractional territory and that they desire an explanation of their rights and duties as related to school lands and the board of education of such township. You ask:

1. Whether or not the board of education of Liberty township can lawfully levy and collect tax for school purposes on the fractional part of Liberty township entitled to the proceeds of the rental of these school lands.
2. Whether the board of education of the township or the trustees of the school lands have the authority to control the school, employ teachers and fix and to pay salaries within such fractional township.
3. What are the rights of the board of education and of the trustees as related to such school lands.

First. In the case of Zanesville v. Auditor, 5 O. S. 590, the court holds that section 2, article 12,

"requires a uniform rate per cent. to be levied upon all property according to its true value in money, within the limits of the local subdivision for which the revenue is collected."

Section 3960 R. S., referring to the two preceding sections, provides that

"the amount of the levy fixed by the boards of education * * * shall be certified to the county auditor in writing * * * who shall assess the *entire amount upon all the taxable property of the district.*"

The rate of taxation fixed by the board of education must therefore apply to such fractional part, as well as to the rest of the township. The title to the school lands still unsold is in the state and such school lands are not taxable

before sale, although the lessee's leasehold interest in school lands is taxable when the lease is for a term exceeding fourteen years and not subject to revaluation. See 54 O. S. 269, and section 2733 R. S.

Second. The board of education has full control over all the public schools of its district, including such fractional part. While such control is clearly implied in the various statutes relating to the powers and duties of the boards of education, the policy of the law is specifically expressed in the following language of section 3975 R. S.:

> "For the purpose of enabling such boards to carry out the conditions and limitations upon which the bequest, gift or endowment is made, they are authorized to make all rules and regulations that may be required to fully carry into effect the provisions of such bequest, gift, or endowment, but no such bequest, gift or endowment shall be accepted by any board of education when the conditions of the same shall remove any portion of the public schools from under the control of said board."

The trustees of school lands, like the trustees of townships, "are a corporation for special limited purposes, with special and definite powers only, and cannot, in general, do any act foreign to the purpose of their creation." 5 Ohio 185. "They are not authorized by law to direct the manner of expenditure of school funds after payment of the same to the board of education."

Third. I take it that the school land in this fractional part of Liberty township was granted by act of congress dated May 20th, 1826, to be "held by the same tenure, and upon the same terms, * * * as section 16 is or may be held," "for the use of schools in each entire township or fractional township for which no land has been heretofore appropriated or granted for that purpose."

By act of congress, approved March 3rd, 1803, section 16 and the other lands appropriated for the use of schools in the state of Ohio were vested in the legislature of the state in trust for the use of the schools and for no other use, intent or purpose whatever. This act of congress, together with the act of March 14, 1831, 29 O. L. 490, incorporating original surveyed townships and placing section 16, school lands, in the care of three trustees and a treasurer, and also the subsequent act relating to the trustees of original townships and to section 16 are held to apply to all school lands of the grant of May 20th, 1826, 17 O. 267, 16 O. S. 11, 31 O. S. 301. Sections 1366 to 1375 and 1403 to 1440, relating to original townships, should be read in the light of these decisions.

Section 1411 R. S., as to the annual division of rents of school lands, is better understood after reading the provisions of the act of March 14th, 1831, most of the provisions of which have since been repealed or amended. This act provided that three trustees were to manage in a corporate capacity the school lands within their township or fractional township, to "apply the rents and profits arising from section 16 to the special purpose for which it was intended," and "where there is any money arising from rents of school lands, belonging to such township, to meet at least once in the year and to make a dividend of all such money among the several school districts or part of districts, in proportion to the number of youth in each district or part of district, above the age of four or under twenty-one years; each dividend shall, by the treasurer of such original surveyed township, on demand, be paid over to the treasurers of the several school districts or parts of districts."

The board of education should expend the money received from "the state common school fund" provided for in section 3951 R. S., and the money

received from the levy provided for in section 3960 R. S., equitably throughout the district. The "common school fund" defined in section 3953 R. S., and the rents of school lands turned over to the board of education by the trustees of such school lands are trust funds which I believe the board of education should use for the benefit of the schools of the original township, or fractional township, to which the school lands were originally assigned. See article 6, section 1, of the constitution, and section 3956 and 3975 R. S.

It is to be regretted that the law is so incomplete and indefinite as to many phases of this subject.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BOARD OF EDUCATION—MEMBER—EXPENSE.

Expense of member of board of education incurred on trip of inspection may not be paid out of public funds.

February 20th, 1908.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—In your recent communication you ask whether a board of education may expend money for the expenses of its members on a trip of inspection of high school buildings, or for the expenses of the superintendent of schools on a trip to a convention.

This office has held that there is no warrant in law for such expenditure, and that in the absence of specific legal authority the board has no power to pay such expenses to any of its members or the superintendent of schools.

Very truly yours,

WADE H. ELLIS,
Attorney General.

VILLAGE SCHOOL DISTRICT—ORGANIZATION AND DISSOLUTION OF.

Under section 3888, *as amended,* 98 *O. L.* 217, *village incorporated prior to adoption of said amendment remains a school district if total tax valuation therein is* $100,000 *or more; if total tax valuation therein is less than* $100,000 *such village school district may be dissolved by vote of electors.*

Under said section village school district may not be created except in villages wherein the total tax valuation exceeds $100,000, *and upon vote of electors; but if such valuation falls from above to below said amount, such district may not be dissolved except by vote of electors.*

June 8th, 1908.

HON. E. A. JONES, *Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—In your letter of May 22nd, you ask for a construction of section 3888 of the Revised Statutes, in relation to the following inquiries which you present:

Village A has a tax valuation of more than $100,000.

Village B has a tax valuation of less than $100,000.

First. What action is necessary to constitute village A a village school district?

Second. What action is necessary to constitute village B a village school district?

Third. Do both the words "dissolve" and "organize," in section 3888, apply to each of these classes of villages?

Fourth. In what way may the proposition to dissolve or organize a village school district be submitted to the electors of said district?

Section 3888, as contained in the act of April 25, 1904, 97 O. L. 334, was as follows:

"Each incorporated village, now existing or hereafter created, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, shall constitute a village school district."

The present section 3888, as enacted April 16, 1906, 98 O. L. 217, provides as follows:

"Each incorporated village now existing or hereafter created, 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 one hundred thousand dollars, shall constitute a village school district, provided that each incorporated village now existing or hereafter created, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, with a tax valuation of less than one hundred thousand dollars, shall not constitute a village school district; provided, at any general election the proposition to dissolve or organize such village school district be submitted by the board of education to the electors of such village and be so determined by a majority vote of such electors."

It is to be noted that prior to April 16, 1906, every village was a village school district. The object of the amendment of April 16, 1906, seems to have been to form two classes of villages as to school districts and at the same time to prevent any change in the boundaries of an existing school district unless a majority vote of the electors of the new district to be organized, or the old district to be dissolved, should be in favor of such change. I arrive at this interpretation by reading the present section in connection with the former section and, also, because such an interpretation can be consistently applied to all the provisions of this section and will, in my opinion, promote the best interests of the schools.

Considering section 3888 from this viewpoint, I am of the opinion that:

1. An incorporated village existing April 16, 1906, which, together with the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, had, in the district thus formed at that time, a total tax valuation of not less than $100,000, continued to be a village school district. No election was required in this case and no election upon this proposition was permitted.

2. Such a village existing April 16, 1906, having a tax valuation of less than $100,000, remained a village school district until such time as the proposition to dissolve such village school district should be submitted by the board of education of such village to the electors and a majority vote of such electors should be cast in favor of dissolving the school district.

3. An incorporated village created since April 16, 1906, having within its corporate limits a total tax valuation of not less than $100,000 continues to be a part of the school district of the township from which the village is formed until the proposition of organizing a village school district is submitted by the township board of education to the electors of such village and a majority of votes is cast in favor of organizing a village school district.

4. An incorporated village created since April 16, 1906, having within its corporate limits a total tax valuation of less than $100,000 continues to be a part of the township school district from which the village is formed, and cannot become a village school district. No election to vote upon the proposition of organizing a village school district is permitted in this case.

5. Should the tax valuation of any village rise to $100,000 or more, or should the tax valuation of any village school district fall below $100,000, a new village school district may not be organized, and an existing village school district may not be dissolved, except upon a majority vote of the electors of such village or of such village school district in favor of the proposition to organize or to dissolve.

6. The word "organize" applies only to newly created villages having at the time of their creation a tax valuation of $100,000 or more, and to villages which are a part of the township school district when their tax valuation rises to $100,000 or more. The word "dissolve" applies only to village school districts the tax valuation of which falls below $100,000.

7. The proposition to organize a village school district is to be submitted by the board of education of the township out of which the village school district is to be formed. The proposition to dissolve a village school district is to be submitted by the board of education of the village school district.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

BOARD OF EDUCATION—TEACHER—BOND.

September 5th, 1908.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—Replying to your letter of August 27th, where a board of education has elected a teacher and has also provided by resolution that the contract shall not be completed until such teacher has signed the same, and also a bond in the sum of $50.00, for the faithful performance of the contract, I am of the opinion that a teacher who has, under such circumstances, signed the contract and refused to sign the bond, cannot hold the board to such contract.

As the answer to your question depends largely upon the facts in the case, I should prefer a more complete statement from you in case this opinion does not answer the particular situation now before you.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BOARD OF EDUCATION—TOWNSHIP—COMPENSATION OF MEMBERS.

Member of township board of education may receive compensation under act in 99 O. L. 105 during term of office existing at date of enactment of said act.

October 20th, 1908.

HON. EDMUND A. JONES, *State Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—In your letter of October 15th you ask whether present members of township boards of education are entitled to the compensation provided in section 3920 R. S., as amended by the act approved April 15th, 1908 (99 O. L. 105).

Article II, section 20 of the constitution 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."

In the case of Thompson v. Phillips, 12 O. S. 617, the court say:

> "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. Where the compensation, as in this case, is to be ascertained by a percentage on the amount of money received and disbursed, we think it is not a salary within the meaning of the section of the constitution."

In the case of Gobrecht v. Cincinnati, it was held that

> "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, article II, of the constitution,"

and that the pay of a member of the board of legislation of the city of Cincinnati might be increased during his term without conflicting with the constitution.

I am, therefore, of the opinion that present members of township boards of education are entitled to receive two dollars for each meeting actually attended since the passage of the act approved April 15th, 1908.

Very truly yours,

JOHN A. ALBURN,
Assistant Attorney General.

SCHOOL TEACHERS' PENSION FUND—DETERMINATION OF AMOUNT.

November 14th, 1908.

HON. EDMUND A. JONES, *Commissioner of Common Schools, Columbus, Ohio.*

DEAR SIR:—I beg leave to reply to your letter enclosing a communication from Hon. N. H. Chaney, superintendent of schools at Youngstown, inquiring as to the teachers' pension fund of his city.

Section 3897*l* R. S. provides that:

> "The board of education in any school district which has created, or shall hereafter create, a teachers' pension fund, shall pay, semi-annually, from the contingent fund of such school district into said teachers' pension fund, not less than one per cent. nor more than two per cent. of the gross receipts of said board of education raised by taxation, which shall be applied to the payment of teachers' pensions, as herein and hereinbefore provided."

I am of the opinion that the words, "not less than one per cent. nor more than two per cent. of the gross receipts," mean not less than one per cent. nor more than two per cent. of the gross receipts since the last semi-annual payment of the board to the teachers' pension fund, and that such per cent. is to be computed semi-annually upon the receipts of the previous half year.

Although I am unable to find any judicial determination of the matter, I am of the opinion that the words, "gross receipts raised by taxation," include only funds raised by local taxation and do not apply to funds received from the state. The rules for statutory construction seem to bear out this conclusion. Further than this the amounts paid from the state, although in the main raised by state levies, are nevertheless paid in pursuance of specific appropriations made by law as provided by Art. 2, Sec. 22 of the Ohio Constitution and for the specific purposes set out in section 3967 R. S.

The word "premiums" as found in present section 3897*e* R. S. should be read as "pensions." Since this section would have no rational meaning otherwise, and since original section 3897*e*, as contained in the act of April 14, 1896, uses the word "pensions," then the evident mistake in the present section should not be permitted to interfere with the carrying out of the plain intention of the general assembly in this matter. The bureau of inspection and supervision of public offices informs me that they have no forms provided for the handling of pension rolls, but suggest that such forms may be procured from the board of education of Cincinnati.

Very truly yours,

U. G. DENMAN,
Attorney General.

(To the Dairy and Food Commissioner)

PURE FOOD LAWS—LABEL—MAPLE SYRUP.

July 20th, 1908.

HON. R. W. DUNLAP, *Dairy and Food Commissioner, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter of July 16th, in which you request the opinion of this office as to whether or not a compound sold as "Old Manse Pure Cane and Canadian Maple Syrup," composed of about 50% cane syrup and 50% Canadian maple syrup, may lawfully be sold in Ohio. With this request you enclose copy of an opinion rendered by the circuit court of Delta county, Michigan, together with a brief, which attempts to sustain the proposition that syrup labeled as indicated would not be in violation of our law.

In reply to your letter, I desire to say that in my opinion such a compound cannot lawfully be sold when labeled as indicated. There is a great distinction between the Michigan law and the Ohio law as to the proposition which you submit. The last Ohio law, found in the 97 O. L. 47, makes it an offense to sell "as and for" maple syrup a substance which is not (section 3); it is still a different offense to sell "as and for" maple syrup an article which does not bear the name and address upon the label as provided by section 4. But there is still a distinct offense and one that is not considered in the brief and opinion submitted by you, and one which is not in the Michigan law, and that offense is the fraudulent use of the word "maple" in labeling the article.

The offense is solely in using the word "maple" as a part of the name of the syrup when it is not pure maple syrup. If the Ohio law applied only to adulterated maple syrup "when sold as maple syrup," then the substance could be labeled as submitted by you, but since section 5 was intended to apply, and does only apply to the fraudulent use of the word "maple," then no adulteration of maple syrup can be sold at all in any package having the word "maple" as a part of the name of the syrup. The label, therefore, does not comply with section 5 of the Ohio law. If the label should be changed to read "Old Manse Syrup," then it can be sold in compliance with the Ohio law.

Trusting this will answer your inquiry, I am,

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

(To the State Board of Public Works)

TAXATION—SALE OF LANDS LEASED FROM STATE FOR DELINQUENT TAXES.

Land leased for term of 15 years from state is subject to taxation as to such leasehold interest only; such interest may be sold for delinquent taxes, but fee may not be sold.

January 18th, 1908.

To the Board of Public Works, Columbus, Ohio.

GENTLEMEN:—In your letter of January 5th you state that the auditor of Fairfield county has advertised the leaseholds of certain embankment lots at Buckeye Lake for sale for taxes. You ask whether leases for state land are taxable.

The question probably arises because of the following provision of section 2733 R. S.:

> "All lands held under lease for any term exceeding 14 years, and not subject to revaluation, belonging to the state * * * shall be considered for all purposes of taxation as the property of the person or persons holding the same, and shall be assessed in their name."

And also because leases of state land are made to run for 15 years under section (218-225, 226) of the Revised Statutes.

In construing this section the supreme court of Ohio, in the case of Zumstein, Treasurer, v. The Consolidated Coal and Mining Co. et al., 54 O. S. 264, say at page 272:

> "We are of the opinion that the purpose of section 2733 is to impose a tax upon the lessee's interest in lands, in the cases specified, and not a tax upon the fee."

The court further say:

> "The term 'lands,' when not restricted in meaning by related provisions, includes all interests therein. There are, however, considerations which indicate that the term is used in a restricted sense in section 2733. By the terms of the section, it does not apply to lands held under leases for terms shorter than fourteen years, nor to those held for longer terms, if by the stipulation of the lease the lands are, as between the lessor and lessee, subject to revaluation. The conditions to the application of the section can have no meaning if the object of the legislature was to impose a tax upon the fee. The value of the fee could not be at all affected by the duration of the lease, nor by stipulations for revaluation. These conditions are, however, important in providing for the taxation of the lessee's interest in such lands. They indicate that in the opinion of the legislature in leases for a shorter term, the rent reserved would be the substantial equivalent of the rent value, and that in the cases of leases for a longer term, but

stipulating for revaluation, the rent reserved and the rental value would be made substantially equal by such revaluation. The result in either case would be that the lessee's interest would not be of substantial value.

"By the terms of section 2735, leased lands belonging to a municipal corporation, and those belonging to the state, are subject to the same rule.

"The third subdivision of section 2732 very clearly exempts 'all property, whether real or personal, belonging exclusively to the state.' It cannot be supposed that, notwithstanding this exemption, the legislature contemplated a tax upon the fee, to be assessed against the lessee and enforced against the property of the state or the municipality."

That the title to such lands cannot be sold for taxes is proved by the above quotation and also by the following provision of section 2732 which is part of an act passed subsequent to section 2733:

"The following property shall be exempt from taxation: Third. (state and federal property.) All property, whether real or personal, belonging exclusively to the state or United States."

In the case of State v. Griftner, 61 O. S. 201, where a 15-year lease of state lands was involved, as in the case under discussion, the court said at page 214:

"The title of these lands being in the state, the auditor of Warren county had no authority to put the lands upon the duplicate for taxation, and the tax sale and the deed of the auditor were void and conferred no right upon the purchaser to hold the lands."

That the general assembly intended the land to be free from taxation is proved by implication by the fact that it distinguishes buildings and structures erected upon state lands by lessees from the land itself, and say (section (218-226)) as to such 15 year leases:

"Provided always, however, that each and every building or other valuable structure erected thereon by any person, or persons, or corporation, may be taxed as other property of individuals and corporations in the same locality."

A 15-year lease is not such a permanent or perpetual lease as is provided for in section 2897, and yet this section confines a sale for taxes to a sale of "the right of lessee on the premises and the improvements thereon, if the same shall be sufficient to meet the tax, interest and penalty, so assessed and due." To say that a sale as to state lands could go beyond the sale of the leasehold and the improvements of the lessee would be to deny the exemption of state property from taxation.

Section 2731 provides that

"all property, whether real or personal, in this state * * * shall be subject to taxation, except only such as may be expressly exempted therefrom."

It is held in Taylor v. Debus, 31 O. S., at page 472, that:

> "Our legislature, in respect to leasehold estates, has not modified the rules of the common law,"

and that

> "by the common law, leasehold estates are regarded as chattels— chattels real, to be sure, but, nevertheless, subject to the rules relating to chattel property."

From a consideration of these and other authorities, I am of the opinion that the lessee's interest in these lands, which are leased for 15 years, and also buildings and structures of lessee's upon such lands, may be taxed, but that the lands themselves are exempt from taxation and may not be sold because of delinquency of lessees as to taxes.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CANALS—MAD RIVER FEEDER WITHIN THE CITY OF DAYTON.

City of Dayton must keeep open and in repair Mad River feeder of Miami and Erie Canal, between Wayne street and Atlantic and Great Western Railway, within said city.

March 24th, 1908.

To the State Board of Public Works, Columbus, Ohio.

GENTLEMEN:—You inquire as to whose duty it is to keep clear for the passage of water that portion of the Mad river feeder of the Miami and Erie canal, across which the city of Dayton was authorized to build stationary bridges by the act of April 26th, 1877, 74 O. L. 473. Section 1 of this act provides:

> "That the city of Dayton shall be and is hereby authorized to build and maintain stationary bridges, at any height above high water level, across the Mad river feeder of the Miami and Erie canal, at any point thereon between the western line of Wayne street and the bridge of the Atlantic and Great Western railway, across said feeder."

Section 2 of the same act provides:

> "Said portion of said feeder shall be kept open and in repair, and the flow of water therein shall not, in any manner, be diminished, obstructed or impeded, and said city shall forever maintain the banks of said part of said feeder in good condition, and shall remove the sediment which may be deposited in the same."

If the city of Dayton assumes the rights and privileges granted by this act it agrees to be bound by all the conditions prescribed in the act. Since

every provision of section 2 above applies solely to the city of Dayton and sets out explicitly its obligations, I am of the opinion that it is the duty of the city of Dayton to keep open and to maintain that part of the Mad river feeder "between the western line of Wayne street and the bridge of the Atlantic and Great Western railway across said feeder."

Very truly yours,

WADE H. ELLIS,
Attorney General.

REMOVAL OF SUNKEN CANAL-BOAT HULLS FROM CANALS.

March 28th, 1908.

Board of Public Works, Columbus, Ohio.

GENTLEMEN:—Replying to your letter of March 26th, as to the removal of sunken or partly sunken hulls of canal boats in the canals, this question is answered at some length by the following provisions of the Revised Statutes:

> Section (218-119). It shall be the duty of every engineer, collector, superintendent or agent, employed on either of the canals, to seize all boats, rafts, logs and every floating or sunken thing, which may be found in either of said canals, and all articles found on the towing path thereof, not under the charge of any person, and to sell the same at public vendue, after giving ten days' previous notice thereof, in writing, posted up in two public places near the place where such boat or other articles or things may be found."
>
> Section (218-120). "If the owner of any article so seized shall appear and claim the same before the time of sale, and pay the cost of seizure and expense of removal, such sale shall not take place."
>
> Section (218-121). "If the officer making such sale shall not be a collector, the avails of such sale shall be accounted for by him, within thirty days, to the nearest collector, who shall account for the same as for tolls collected; and if the same be made by a collector, he shall account for the avails thereof in the same manner."
>
> Section (218-122). "After any such sale shall have been made, and the proceeds thereof shall be in the hands of the collector or officer making such sale, such collector or other officer may, on the application of the owner, and due proof of ownership, pay over such proceeds to such owner, after deducting all penalties, forfeitures, costs and reasonable expenses chargeable thereon."

You may, therefore, remove such hulls and also sell the same.

The forfeit provided for sinking boats in the canals is found in section (218-72), which provides for a forfeit of $25.00 over and above the expense of removing such obstructions, and in section (218-117) R. S., which provides for a forfeit of $20.00.

Very truly yours,

WADE H. ELLIS,
Attorney General.

UNUSED CANAL FEEDER MAY NOT BE ABATED AS NUISANCE BY LOCAL BOARD OF HEALTH.

June 8th, 1908.

The State Board of Public Works, Columbus, Ohio.

GENTLEMEN:—Your inquiry as to abating a nuisance from stagnated water in the canal feeder within the city of Columbus, together with a notice from the Columbus board of health and a letter from the state board of health, is received.

While the Columbus board of health is without the authority it assumes in its notice to your board to abate such nuisance, the board of public works has the implied power to maintain this feeder in a healthful condition, provided that the means used by the board will not materially injure, render useless or destroy such feeder for canal purposes. The suggestion that the city be permitted to fill up the bed of this feeder for park or other purposes is, of course, untenable, in the absence of specific legislative authority. Although the feeder is not now in use, yet, under existing law, its legal status is the same as it would be if the feeder were in active use and operation for canal purposes.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

BOARD OF PUBLIC WORKS MAY MAKE EXTRA ALLOWANCES TO CONTRACTOR.

June 10th, 1908.

HON. CHARLES E. PERKINS, *Chief Engineer of Public Works, Columbus, Ohio.*

DEAR SIR:—In your letter of June 9th you call attention to the following paragraph of a contract for the construction of certain canal locks in the city of Akron:

> "The state repair gang will draw the water from the several canal levels and divert the canal water by bulkheads across channel, except water in chamber of lock below top of miter sills, which will be drained by contractor at his own expense, as also any surface water from adjacent premises."

You ask what the liability, if any, is on the part of the board for the pumping done by the contractor of water which was not diverted by proper bulkheads.

Under this paragraph of the contract it was the duty of the state, first, to draw the water from the several canal levels, and, second, to divert the canal water as well as could reasonably be done by bulkheads constructed in as reasonable a manner as was permitted by the physical conditions of the canal. If the state failed to construct the necessary bulkheads contemplated by this paragraph, or failed to use proper care in the construction or maintenance of such bulkheads, so that it was necessary for the contractor to pump out water which should have been drained by bulkheads, then the contractor may, under section (218-42) and section (218-43) of the Revised Statutes, file his petition for an extra allowance

> "for extra expenses and labor in constructing the work contracted for, occasioned, either by new directions given by an acting commissioner or engineer after making the contract, or where, in consequence of the work proving to be of an entirely different character or description from what it was understood and contemplated to be by the acting commissioner or engineer at the time of making the contract."

The board of public works may then make such "extra allowances as they may judge reasonable," and payment of the same may be made upon the board's approval of estimates furnished by the chief engineer as provided in section (218-4*a*) of the statutes.

Under the above paragraph of the contract it was the duty of the contractor to drain all water "in chamber of lock below top of miter sills," and also surface water from the premises adjacent to that part of the canal covered by the contract.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

CANALS—RESERVOIR—EXTENSION OF DAM.

June 23rd, 1908.

HON. CHARLES E. PERKINS, *Chief Engineer of Public Works, Columbus, Ohio.*

DEAR SIR:—In your letter of June 18th you state that the board of public works contemplates increasing the width of the dam at Lewiston reservoir about one hundred feet for the purpose of better protecting the reservoir banks at flood time. You ask whether the board has a legal right to make such change and whether liability will result therefrom.

That the board of public works has the power to change the dimensions of the existing structures in the public works of the state is shown by the following language of section (218-20) R. S.

> "The board of public works shall have charge of the public works of the state, and shall have power to perfect, render useful, maintain, keep in repair and protect the same; and to that end shall have power to remove obstructions therein or thereto, and to make such alterations or amendments thereof (whether now or hereafter constructed), and to make such feeders, dykes, reservoirs, locks, dams and other works, devices and improvements as they may think proper for the respective purposes aforesaid."

Matters of detail as to the construction and maintenance of the public works are left to the discretion of the board and the chief engineer of public works.

Since you state that the effect of the proposed change will be to lessen the increased pressure on the levees of the reservoir at flood time, caused by recent improvements in the drainage of the watershed, and since a wider dam will cause the overflow from the reservoir to approximate more nearly a natural flow of water, I believe that no legal liability to property owners below the reservoir will result from such a reasonable use of its property by the state.

Since a wider dam would send down the water no faster than it is received into the reservoir, any damage occasioned to the riparian owners below would hardly be "real, material and substantial, arising from an unreasonable or improper use, appropriation, obstruction or diversion of the water from its natural course, or flow." McElroy v. Goble, 60 O. S. 188.

The policy of our canal laws has been to allow no damages for interruption or loss of water on streams, except in the case of interferences with mills or other hydraulic machinery.

Respectfully submitted,

WADE H. ELLIS,
Attorney General.

CANALS AND RESERVOIRS—ENFORCEMENT OF ACTS RELATING TO NIGHT LIGHTS AND LIFE PRESERVERS.

August 13th, 1908.

The Board of Public Works and the Chief Engineer of Public Works, Columbus, Ohio.

GENTLEMEN:—In your communication of August 13th you ask for an opinion as to the best method of enforcing the rules of your joint board requiring that all boats carry lights at night and that all passenger boats carry life preservers.

Section (218-206) R. S. provides that:

> "Every boat passing through either of the canals of this state or on any feeders of either of them, is required at all times during the night to carry conspicuous lights on the bow of the boat."

Section (218-207) R. S. provides that:

> "The master or owner of any boat or float, who shall violate any of the provisions of the two preceding sections shall forfeit and pay, for every such violation, the sum of ten dollars."

Since the act of which these two sections are a part (76 O. L. 185), is entitled "An act supplementary to 'An act to provide for the protection of the canals of the state of Ohio, and the regulation of the navigation thereof,' passed March 28, 1840 (S. & C. 202)," the provisions of this act of 1840 contained in section (218-199) (38 O. L. 87), to the enforcement of the act of 1840, are applicable to prosecutions brought under sections (218-206) and (218-207) R. S.

Rule 11 of your board, relative to the control and management of the public parks of the state, provides that:

> "Pasenger boats must carry a life preserver for each passenger carried on any trip."

This rule has been duly made by your board in pursuance of the following provisions of section 2 of the act of April 28, 1902 ((218-316) R. S., 95 O. L. 277):

> "The said board of public works, the chief engineer of the public works and the Ohio canal commission, in the discharge of their duties relating to the management and control of said public parks and pleas-

ure resorts, shall have power to describe and enforce such rules and police regulations, subject to statutory provisions, as may by them be deemed necessary for the proper protection and safety of the public."

Section 9 of the same act ((218-232) R. S.) provides that:

"The joint board, provided for in the first section of this act, may cause to be inspected, as often as they may deem necessary, all boats and water craft maintained and operated in or upon (any of) the waters of any state reservoir or lakes, dedicated or set apart for the use of the public for park or pleasure resort purposes, and shall have power to condemn any such boats or water craft deemed by them unsafe for the carrying of passengers, and the owner of any such boat or water craft so condemned, who offers the same for hire after such condemnation, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than one hundred dollars ($100.00) nor less than ten dollars ($10.00), and stand committed till such fine and costs are paid, and the permit issued to such person shall be revoked and annulled."

In this latter section your board may condemn any boat or water craft as unsafe for the carrying of passengers on the ground that it does not carry the life preservers prescribed by your rule. Any person using such boat or water craft after such condemnation may be arrested by the park policeman or other officer for such offense.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

CANAL LANDS—REMOVAL OF TELEGRAPH POLES.

August 14th, 1908.

The Board of Public Works, Columbus, Ohio.

GENTLEMEN:—Replying to a letter from your department dated July 31st, as to whether or not the canal superintendent may remove telephone and telegraph poles from canal embankments, this question has been discussed very fully in opinions of this office to your department dated October 6th, 1906, and August 8th, 1907, as found on page 132 of the annual report of the attorney general for 1906, and page 186 of the annual report for 1907, to which we respectfully call your attention.

While this department believes that such poles may be removed without legal action, we have advised that, owing to doubtful questions as to boundary lines, etc., a safer way, in many cases, for canal superintendents and other officers of the board of public works would be to bring legal proceedings to enforce the penalties and forfeitures for such illegal occupation, or to compel the removal of such poles or other property from the lands of the state.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

(To the Superintendent of Insurance)

INSURANCE COMPANY—SUPPLEMENTAL CONTRACT.

Non-mutual life insurance company may write supplemental contracts providing for guaranteed income, when supported by sufficient premiums.

In re the Cleveland Life Insurance Company.

January 17th, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have given consideration to the question presented through your department by the Cleveland Life Insurance Company relative to the power of the company to write contracts of insurance in this state with a "rider" attached thereto of the character of that presented to you by the representative of the company, and by you submitted to this department.

The "rider," or supplemental contract, is in form as follows:

"GUARANTEED INCOME."

I.

"The Cleveland Life Insurance Company agrees to apportion and pay to John Doe, the insured hereunder, during the continuance of this policy, the premiums on the same having been paid in full each year as they become due, a guaranteed income consisting of ten shares of the proceeds of one dollar ($1.00) per one thousand dollars ($1,000.00) of all insurance, except reinsurance, written by said company in the United States from the date of its incorporation to the first day of January, 1918, on which premiums, computed on the annual basis, have been received in cash, and also for so long thereafter as premiums are received on such insurance; said guaranteed income to be determined as follows:

II.

"The total sum of said one dollar ($1.00) per one thousand dollars ($1,000.00) of insurance shall be ascertained at the end of each calendar year and such sum divided by the number of thousands of insurance represented by policies containing this provision. The quotient obtained shall be the apportionment to each such share, and the total sum of ten such shares shall be the guaranteed income payable hereunder upon the succeeding anniversary of this policy, subject to the payment of the premium hereon.

III.

"The total amount of insurance issued in policies containing this provision shall not exceed fifteen million dollars ($15,000,000.00). Each one thousand dollars ($1,000.00) of insurance shall represent one share. No lapsed share shall be reissued to a new policy holder.. Shares surrendered by lapse or death shall decrease the number of shares and inure to the benefit of the survivors."

I have examined the same with relation to the common law governing contracts of insurance, as well as with relation to the statutes of this state placing limitations upon such contracts and upon the powers conferred upon life insurance companies to write particular forms or characters of such contracts.

It should be borne in mind that this "rider," or supplemental contract, does not of itself constitute the entire contract, but is to be attached to a form of policy which has already been passed upon by your department and approved in the original authorization of this company to carry on the business of life insurance in this state. Hence, the scope of the examination of this question has been limited to the supplemental clause above set forth.

The essentials of a contract of insurance, which may be described as the fundamentals of a valid contract, must be a subject matter to which the policy or agreement is to attach; a risk or contingency insured against; two parties, the insurer and the insured; the amount of the indemnity and the duration of the risk; and the premium or consideration. Anything less than this would be insufficient and unenforcible.

The method of carrying out the contracts and of the classification of the risks, when properly made, and other incidentals of the insurance contract, are largely left by the statutes of the state to the discretion and judgment of the company, except wherein limitations have been imposed, and when these are respected the wisdom or unwisdom of specific forms of policies is left entirely to the company engaging in such business. The statutes, as interpreted by the courts, become the definition of the powers thus assumed, and they should not be construed as restrictive of the power to make contracts of this character if the same is not violative of such statutes so interpreted and the public policy of the state.

It is said by Kerr on insurance that:

> "The parties can insert in the policy such terms and conditions and stipulations as they may agree upon, provided, always, that these must not be contrary to public policy or violative of the substantive law. Many states have undertaken to regulate the form and contents of the policy by statute. In case of the conflict between the provisions of the policy and those of the statute, the former must give way to the latter."

Examining the foregoing supplemental contract or "rider" with reference to certain specific limitations contained in the statutes, and bearing in mind the statements made by the officers of the company in your hearing, that they did not write any participating policies, we see that the class interested in such form of contract is only those who purchase such contracts. The question, then, is not complicated with the interests of those policyholders who did not accept this form of contract, and I see no objection that could be urged in behalf of other policyholders, that this form of contract would in any way work a violation of any right, statutory or otherwise, acquired by such policyholders. The company does not do a mutual business. Freed from a consideration of the rights of other policyholders the question becomes, is the contract forbidden?

The proposition made at the time of the argument centered about the consideration of section (3631-4) Revised Statutes, which is as follows:

> "No life insurance company doing business in Ohio shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums, or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the con-

tract it makes; nor shall any such company, or any agent thereof, make any contract of insurance, or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance."

The prohibitions contained therein are against:

(1) Any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount of payment of premiums.

(2) The rates charged for policies of life or endowment insurance.

(3) Or in the dividends or other benefits payable thereon.

(4) Or in any other of the terms or conditions of the contracts it makes.

(5) Forbids making any contract or agreement other than is plainly expressed in the policy.

(6) Forbids paying or allowing, or offering to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance.

Does this form of contract constitute a distinction or discrimination as above defined? In the opinion of this department heretofore rendered it was stated that the law recognized the right of insurance companies to make classifications of insurants if the classification adopted did not operate as a distinction or discrimination as defined in section (3631-4) R. S. It is proposed to write this class of policies for a certain definite time and that the total amount of the insurance of this character should not exceed fifteen million dollars. The holders of such policies are not, *inter se*, subject to any distinction or discrimination. They are in the same class. They receive certain added benefits in which others not in this class do not participate, but as the business written is all non-participating, those who are not in this class cannot object thereto. The premium paid in this class entitles one to a "guaranteed income," as defined in the "rider" hereinbefore quoted, which others do not receive, but a "discrimination" is not thereby created any more than a policy providing for an annuity is a discrimination against those who have purchased a different form of policy.

I am, therefore, of the opinion that section (3631-4) R. S. is not violated by such classification.

The evidence of the actuary seemed to demonstrate that the rates to be charged on such contract would be adequate, and therefore it would not jeopardize the solvency of the company, nor would it add additional charges or expenses to those policyholders whose policies did not contain the foregoing provisions.

As it is assumed that the "rider" in question is to be attached to the policy, it complies with that portion of section (3631-4) R. S., requiring the entire agreement to be "plainly expressed in the policy."

I am further of the opinion that it does not violate the provision against in-

ducements, rebates, special favors or advantages in dividends or otherwise, as defined by that section. Considering the supplemental contract as an entirety, I find no reason for disapproving it.

I return herewith the papers transmitted with your inquiry.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

INSURANCE—AGENCY COMPANY—LICENSE.

Corporation proposing to act as agent of foreign insurance company and to discharge all ordinary obligations of such company in the nature of running expenses may not be licensed by superintendent of insurance.

In re American Assurance Company and American Registry Company.

January 23rd, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter submitting to this department the question of the legality of a certain contract sought to be entered into by the American Assurance Co. of Philadelphia, with the American Registry Company, a corporation organized under the laws of the state of Delaware. The contract in question is as follows:

> WHEREAS, The American Assurance Company, a corporation under the laws of the state of Pennsylvania, is duly authorized to transact the business of industrial life, personal accident and health insurance, and duly licensed to transact said business in the state of Ohio, and issues only non-participating policies; and,
>
> WHEREAS, Said American Assurance Company is desirous of extending its operations by the further development of the said state of Ohio; and,
>
> WHEREAS, The proper development of new territory for the business in which said American Assurance Company is engaged requires the expenditure of large sums of money more than the immediate returns in premium income, and such territory does not become self-supporting for a period of two or three years; and,
>
> WHEREAS, The said expenditures if made by said American Assurance Company would materially reduce its assets and probably consume its surplus; and,
>
> WHEREAS, The American Registry Company, a corporation under the laws of the state of Delaware, is duly authorized, *inter alia*, to promote the interests of other corporations, now,
>
> THEREFORE, This agreement made by and between the said American Assurance Company and the said American Registry Company, having reference only to the business and agents of the said American Assurance Company in and for the state of Ohio, WITNESSETH:

1. The said American Registry Company agrees to pay all salaries, advances and other cash payments to the agents of said American Assurance Company, to pay all rents for offices, all advertising (except such advertising as may be required by law), all traveling expenses incurred in and about the agency work, to pay for all furniture, fixtures, safes, etc., used or to be used by the agents of the said American Assurance Company, and to pay all incidental expenses of such agencies.

2. The said American Assurance Company agrees, in consideration of the payments hereinbefore provided for, and agreed to be made by the said American Registry Company, to pay to the said American Registry Company one-half the net profit which may accrue to the said American Assurance Company from its business transacted in the said state of Ohio, which said profit shall be determined by deducting from the gross premium income, received by it from the business within said state, the following items, the remainder to be considered net profit for the purposes of this agreement: All commissions paid to agents for writing business and collecting premiums; all claims paid; all taxes, licenses and medical fees; all advertising required by law; 12 per cent. of the gross premium income for home office expenses; and the legal reserve and unearned premiums, as ascertained according to law.

3. It is agreed that the said American Assurance Company shall not be liable in any manner or to any extent to return any portion or part of the amount which the said American Registry Company may pay under this contract, and the whole obligation and liability of the said American Assurance Company to the said American Registry Company shall be for one-half of the net profits as hereinbefore provided, and for nothing other or further whatsoever.

4. The books and records of the said American Assurance Company shall be conclusive and binding upon the parties hereto as to all matters contained therein. Immediately after the ascertainment of the reserve and unearned premiums each year said American Assurance Company shall submit to the said American Registry Company a statement as of the last day of December next preceding, showing the transactions of the said American Assurance Company in said state and the amount of profit accruing therefrom for the twelve months next preceding. Accompanying the said statement the said American Assurance Company shall pay to the said American Registry Company the latter's share of the profit, if any, as shown thereby.

5. It is agreed that the American Registry Company acquires no interest in or control over the business or agents of the said American Assurance Company by virtue of this agreement, and this agreement shall be in no wise construed as creating a partnership between the said American Assurance Company and the said American Registry Company.

6. It is further agreed that this contract shall continue for the term of three years from the first day of January, 1908; provided, that if, at the termination of said period, said American Registry Company shall not have received from its share of the profits as herein provided a sum equal to the amount which it shall have paid hereunder, together with interest thereon at the rate of 6 per cent. per annum, then this contract shall continue for a further period of one year, and so on from year to year thereafter, until the amount received by the said American Registry Company shall equal the amount paid by it hereunder, together with interest thereon at the rate of 6 per cent. per annum.

IN WITNESS WHEREOF, These presents have been duly executed in duplicate this ..... day of ..... A. D., 1907.

AMERICAN ASSURANCE COMPANY.

President.

Secretary.

AMERICAN REGISTRY COMPANY.

President.

Secretary.

The question presented by your department involves the issuing of a license to such corporation to act in the capacity of agent for the American Assurance Company.

The insurance company has been heretofore authorized to do business in Ohio, and this contract seeks to adopt a new method of meeting the expenditures incident to the development of the business of the insurance company by providing that the agency company shall defray the same as set forth in the contract. In consideration of the payment of such expenses as are therein enumerated the insurance company agrees to pay the agency company "one-half of the net profits which may accrue to the insurance company from its business transacted in the state of Ohio."

Section 283 R. S. provides:

> "It shall be unlawful for any person, company or corporation in this state either to procure, receive, or forward applications for insurance in any company or companies not organized under the laws of this state, or in any manner to aid in the transaction of the business of insurance with any such company, unless duly authorized by such company and unless duly licensed by the superintendent of insurance."

It would require, before the business contemplated by such contract could be entered into by any such insurance company doing business, that such company should first make application to your department for a license to act as the agent of the insurance company, because the business contemplated in such contract would come within the purview of that set forth in section 283, above quoted.

The immediate question to be determined is, can you lawfully issue to the agency company a license to do the business contemplated in this contract with the insurance company.

The agency company provides for the discharge of certain financial obligations of the insurance company, and its avowed purpose is to make a profit for itself out of the manipulation of the amounts which, by the contract, it is to receive from the insurance company. It is to pay all salaries, advances and other cash payments to the agents of the insurance company, to pay all rents for offices, all advertising except such as may be required by law, all traveling expenses incurred in or about the agency work, all furniture, fixtures, safes, etc., used or to be used by the agents of the said insurance company, and to pay all incidental expenses of such agencies. In return for this it is to receive one-half of the net profit which may accrue to the insurance company from its

business transacted in Ohio, and the contract provides the method of computing the net profit contemplated therein. This is aiding in the transaction of the business of insurance.

The company which purposes to assume this character of business is represented as a corporation of the state of Delaware, authorized "to promote the interests of other corporations." I have observed no authority in the brief of counsel for the company under which it may be claimed that such agency company has been authorized to engage in this particular character of business and to assume the obligations of an insurance company. But waiving the question as to whether or not such agency company may have been so authorized, the insurance company should not be permitted, directly or indirectly, to transfer to an agency company the duty it has assumed as an insurance company, under the laws of this state, to pay and discharge all obligations of this character arising in the management of its own business. It is an obligation which a life insurance company, while a going concern, assumes to discharge, and cannot be surrendered or abdicated without, to that extent, avoiding the duty which it has assumed. I have, therefore, arrived at the conclusion, after careful consideration of this form of contract, that your department should not sanction the same.

I refer you further to the opinion of June 8th, 1903 (Report of the Attorney General, 1903, page 91), for the views of this department on a contract similar to this, and with which this opinion is in accord.

I return to you the forms of contract and correspondence heretofore submitted to this department.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CASUALTY INSURANCE COMPANY—TAXATION OF.

Casualty insurance company may not deduct estimated cost of inspection of boilers, etc., from premiums in making annual statement to superintendent of insurance.

January 28th, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—You have submitted to me the report of an examination made by one of your examiners of the books and office records of the Maryland Casualty Company of Baltimore, Maryland, and have requested of this department an opinion upon that portion of the report which is in the words following:

> "In reporting for taxation premiums received in Ohio on steam boiler and elevator policies, this company makes an arbitrary deduction of 30% of same, based upon the experience of the company as to the cost of inspection of boilers and elevators, and has termed this 30% inspection fees. These inspections are made by employes of the company and the fees are paid by the company. The steam boiler and elevator policy contracts issued by the company do not stipulate that any part of the premium paid is for purposes of inspection, but do stipulate that the premium is paid as a consideration for the insurance of the boiler or elevator. There is a stipulation in the policy, however, that the boiler or elevator shall be inspected.

"In reporting premiums received on such policies under income in its annual financial statements, the company reports 70% of the considerations named in the policies as premiums, the balance being entered under income as inspection fees.

"Whether such deduction should be made in reporting premiums for taxation purposes, is a question submitted to the department."

The foregoing presents the question of the right of the casualty company to deduct the cost of inspections of boilers and elevators from the amount of the premiums when reporting the amount of the same for purposes of taxation.

From a form of policy adopted by this company, which you have submitted with the report aforesaid, I find that the consideration for the policy, otherwise known as the premium, is not divided between the premium account and expense account, but it is all treated as "premium" to be paid to the insured. The policy further provides that the inspector is a representative of the company and has the right at all reasonable times to inspect the risks. His service in that regard is paid for by the company and the inspection inures to the safety of the risk and lessens the liability from defects or dangers which may be reported by him to the company. It is the common practice indulged in by such companies to employ such inspectors and their services, as such, are similar to those employed by fire insurance companies.

In view of the foregoing facts, what is the duty of the company in making its annual statement to your department?

That part of section 2745 of the Revised Statutes bearing upon this subject is as follows:

"Every insurance company, incorporated by the authority of any other state or government, shall, in its annual statement to the superintendent of insurance, set forth the *gross* amount of premiums received by it in the state during the preceding calendar year, without deductions for commissions, return premiums or considerations paid for reinsurance, or any deduction whatever; and shall, also, therein set forth, in separate items, return premiums paid for cancellations and, also, considerations received from other companies for reinsurance in this state during such year.

"The superintendent of insurance shall examine such report of every such company, and if he finds the same correct, shall, prior to the month of November in each and every year, compute an amount of two and one-half per centum on the balance of such gross amount after deducting such return premiums and considerations received for reinsurances as shown by the next preceding annual statement, and charge the same to such company as a tax upon the business done by it within said state for the period as shown by said annual statement; and shall, at said time, mail to the last known address of the head office of such company, a statement of the amount so charged against said company, which amount such company shall, in the month of November next succeeding, pay to the superintendent of insurance at his office."

It will be observed from the foregoing section that the computation of the tax must be made upon the balance of the gross amount of premiums after deducting return premiums and considerations received for reinsurance. It is, therefore, clear that the company has made a deduction of 30% from the gross amount of premiums, which should not be allowed, but upon which it should

be required, in pursuance of the report made by your examiner, to pay the taxes for the past years, computed at the given rate per centum, which it has thus far omitted to report.

I return to you the report and other papers submitted to this department.

Yours very truly,

WADE H. ELLIS,
Attorney General.

INSURANCE—SANATORIUM COMPANY.

Sanatorium company, regardless of the nature of the business which it transacts, is not subject to insurance laws of state.

In re Cosmopolitan Sanatorium Company.

March 28th, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your communication of the 27th inst. The questions presented involve the legality of the organization of the Cosmopolitan Sanatorium Company, engaged in business in Cleveland, Ohio. With your inquiry you have submitted a letter of the company, together with forms of contracts and other literature which evidence the scheme of operation adopted by the corporation. It has become incorporated under the laws of this state. Your question is whether such corporation is engaged in the business of insurance or enters into contracts substantially amounting to insurance.

The provisions of section 3235 R. S., examined with regard to the legality of this business, expressly forbid incorporating companies for carrying on professional business; but in the same section in connection with such prohibition the following language is used:

> "But nothing in this section shall prevent the formation of corporations for the purpose of erecting, owning and conducting sanatoriums for the receiving of and caring for patients, and for the medical, surgical and hygienic treatment of the diseases of such patients, and for instruction of nurses in the treatment of diseases and hygiene."

The latter language was incorporated in section 3235 R. S. by the act of March 22nd, 1900 (94 O. L. 65), and, in my opinion, operates as an enlargement of the purposes for which corporations may be formed under title 2, Chap. 1, part 2, of the Revised Statutes, and the prohibition against incorporating companies for carrying on professional business cannot be construed to forbid the organization of a company such as is described in the charter under consideration.

Section 289 of the Revised Statutes, being a part of Chap. VIII, title 3, Div. 2, part 2, thereof, and governing your department, provides that:

> "It is unlawful for any company, corporation, or association, whether organized in this state or elsewhere, either directly or indirectly, to engage in the business of insurance, or to enter into any contracts substantially amounting to insurance, or in any manner to aid therein, in this state, or to engage in the business of guaranteeing against liability, loss

or damage, unless the same is expressly authorized by the statutes of this state, and such statutes and all laws regulating the same and applicable thereto have been complied with; provided that nothing in this chapter, or in any other statute of the state of Ohio pertaining to insurance, shall so operate or be construed as to apply to the establishment and maintenance by individuals, associations or corporations, of sanatoriums or hospitals for the reception and care of patients for the medical, surgical or hygienic treatment of any and all diseases, or for the instruction of nurses in the care and treatment of diseases and in hygiene, or for any and all said purposes, nor to the furnishing of any or all of said services, care or instruction in or in connection with any such institution, under or by virtue of any contract made for such purposes, with residents of the county in which such sanatorium or hospital is located."

The language employed in the foregoing regarding the establishment and maintenance of sanatoriums is similar to that which is incorporated in section 3235 R. S. above quoted, and operates to exempt such corporations from the supervision and control of the department of insurance and from all laws pertaining to insurance.

It is, therefore, evident to me that neither of the above cited sections in any way qualify the power to engage in the business or to enter into the contracts contemplated by the charter of this company and set forth in the literature accompanying your letter.

There is but one provision of the Revised Statutes which should be considered in connection with your question, and that is the recent act of the present session of the general assembly of Ohio, which places all burial associations under the control of your department. There is a provision contained in the by-laws of this company by which, in the case of the decease of any stockholder thereof, the sum of $125.00 is allowed as a burial expense. I cannot now give you an opinion as to whether such corporation would be included within the provisions of such act, as I have not been able to secure a copy thereof.

With this feature of the question reserved for further consideration I submit that, in my opinion, no provision of the law is violated by this company.

I herewith return to you the papers kindly submitted to this department.

Very truly yours,

WADE H. ELLIS,
Attorney General.

FUNERAL BENEFIT ASSOCIATION—EFFECT OF THE REPEAL OF THE LAW AUTHORIZING ORGANIZATION OF.

Repeal of sections 3631a, et seq., authorizing organization of funeral benefit associations, does not impair abligation of prior contracts of such associations, which may continue to exist for the purpose of discharging such contracts only.

April 20th, 1908.

HON. C. C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department a copy of senate bill No. 307, entitled "A bill to amend section 289 of the Revised Statutes of Ohio,

making it unlawful to engage in the insurance business in Ohio unless the same is expressly authorized by the laws of this state," which has been enacted into law by the 77th general assembly, second regular session.

You present with such bill the inquiry as to the effect and operation thereof upon existing contracts made by burial associations organized under section 3631*a* R. S., and the status of such corporations since the amendment to section 289 R. S.

I have given to the questions presented by you such consideration as their importance demands, and submit my views herewith:

By section 3631*a* R. S., as amended by the act of the general assembly contained in Vol. 97 O. L. p. 61 (Bates Annotated Ohio Statutes, 6th Ed.), provision was made for the organization of burial associations in the following language:

> "The provisions of section 3630*a* to 3631, inclusive, shall not apply * * * to any association formed for the exclusive purpose of providing for the payment of the funeral expenses of the members of such association by assessments upon such members, when the amount of such payment on account of any one member does not exceed the sum of one hundred dollars, and when the membership of such association is limited to the county in which such association is organized."

Such section further provided that all such burial associations shall not be subject to the provision of any other law or laws relating to insurance companies. The constitutionality of such section has been challenged and has been sustained by the courts of Ohio.

State ex rel. Wachenheimer v. Burial Association, 28 C. C. 397.

Pursuant thereto many associations have been organized in various parts of the state and innumerable contracts have been written, as provided by the constitution and by-laws of such associations, by which assessments have been collected from the members thereof for the purpose of paying the funeral expenses of such persons, and these funds are being held by the associations conformably to the requirements of the provisions of such constitutions and by-laws as authorized by the section above quoted.

The amendment to section 289 provides in substance that it shall be unlawful

> "for any company, corporation or association engaged in the business of providing for the payment of the funeral, burial or other expenses of deceased members or certificate holders therein, or engaged in the business of providing any other kind of insurance, to contract to pay or to pay the same, or its benefits or any part thereof, either to any official undertaker or to any designated undertaker or undertaking concern, or to any other particular tradesman or business man, so as to deprive the representative or family of the deceased from, or in any way to control them in procuring and purchasing said supplies and services in the open market with the advantage of competition, unless the same is expressly authorized by the statutes of this state. * * *."

The powers which are negatived by the matter above quoted from section 289 R. S., as amended, are among the powers which seem to have been authorized by section 3631*a* R. S., and sustained by the courts of the state as valid by-laws of such associations created under favor of such section.

But by legislation enacted at the present session of the general assembly the provisions of section 3631*a* R. S., whereby the organization of such associa-

tions was authorized, and they were exempted from the operation of the insurance laws of the state, was repealed. The repeal left the status of such associations or corporations as before the enactment in 97 O. L. 61. The question as to their legal standing was at various times before this department, and the opinions then expressed are now in point. (Report of Attorney General, 1904, page 66; 1905, page 43, and 1906, page 56.)

The amendment to sections 289 and 3631*a* R. S., having been the only legislative authority for the creation of such organization, by the repeals referred to, the right to organize the same falls and leaves no existing law on the subject.

But what shall be said regarding the existing contracts which have been entered into between such associations and their many members? The corporations are extinguished by the repeal of the legislation which favored their organization, but can such legislation affect their private rights acquired, or contracts entered into, prior to such repeals?

The constitutional right to alter or repeal the laws under which corporations have been formed is conferred upon the general assembly by section 2 of article XIII of the constitution of this state in the following language:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

Independent of such constitutional provision, it was a familiar doctrine that the corporate charter was a contract between the corporation and the state, which could not be altered or repealed without the consent of the corporation.

Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 to 715.

While the right exists to repeal such laws by which corporate powers are conferred, such repeal must be subject to section 28 of article II of the constitution of Ohio and, further, to section 1 of article XIV of the constitution of the United States.

When the life of a corporation, as such, is at an end, it cannot proceed as before in the transaction of the business for which it had been empowered, for its life and its powers alike have departed. Property which it has acquired is not confiscated by reason of the repeal of the law constituting its charter any more than is that of an individual upon his decease. Nor will the lawful right of third persons, by way of contract, as against this defunct entity of the law, be destroyed any more than will those of other persons upon the death of an individual.

Justice Miller, in Greenwood v. Freight Co., 105 U. S., 19, observed:

> "Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in any other thing depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such repeal, and there must remain in the courts the power to protect those rights."

In People v. O'Brien, 111 N. Y. 57, it was held as follows:

> "Legislation seeking to affect existing corporations by virtue of a reserved right to alter, amend or repeal, must meet several require-

ments; first, where the purpose of the legislature is to deprive, either by modification or repeal, it must not seek to take anything except that which the state has granted; property which the corporation may have acquired under the powers and franchises so granted may not be taken; second, where the purpose of the legislation is alteration rather than deprivation, the substitution of powers and privileges may not be carried on to the point where a new corporation is practically substituted; and, third, it must, as must all laws, be within the general scope of the legislative power and contravene no constitutional prohibitions."

To the same effect is Navigation Co. v. United States, 148 U. S. 344.

In the following cases the doctrine has been emphasized that the state may take or may modify only that which it has granted. That is all. Property acquired during the exercise of this power it may not divest; contracts already executed it may not annul; acts lawful when committed, it may not afterwards punish; taxes remitted it may not afterwards exact; the legislation thus attempted must be prospective and not retrospective in its operation.

Sinking Fund Cases, 99 U. S. 721.
Railroad Tax Cases, 13 Fed. Reporter, 755.
Miller v. State, 15 Wallace 494.
Pearsall v. Great Northern R'y Co., 161 U. S. 660.
Bridge Co. v. United States, 105 U. S. 470.
Greenwood v. Freight Co., 105 U. S. 20.
Lake Shore R'y Co. v. Smith, 173 U. S. 684.
Hill v. Glassgow Co., 41 Fed. Rep. 610.
Shields v. Ohio, 95 U. S. 319-324.

From a review of the foregoing authorities, and many others unnecessary to cite, it is evident that the general assembly may change or modify the privileges and franchises which the state has granted to such corporations; but dealing with what it has bestowed, either by way of withdrawal or of alteration, the state may not go further and so legislate as to disturb, affect or impair the rights either of the corporation or of its contract-holders, previously acquired, while the corporate functions were being lawfully executed. All rights thus tional sanctions and guarantees higher than and superior to, the legislative tional sanctions and guarantees higher than and superior to, the legislative power of amendment or repeal.

It follows, therefore, that such legislation should only be given a prospective operation and so as not to affect existing contracts. Corporations heretofore organized may continue in existence for the purpose of carrying out the contracts heretofore written, but not for the purpose of doing any further business, or they may, pursuant to the provisions of the Revised Statutes, proceed to wind up their business and dissolve, protecting the rights of the contract-holders and the interests which such persons may have in the assets of such corporation.

Yours very truly,

WADE H. ELLIS,
Attorney General.

INSURANCE—AGENCY COMPANY.

Insurance company may not, by contract with agency company, impose upon such agency company any of the duties required by law to be discharged by such insurance company.

In re contract between the Cleveland Life Insurance Company and the American Agency Company.

June 22nd, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of the 5th inst., submitting to this department the question of the power of the Cleveland Life Insurance Company, organized under the laws of Ohio for the purpose of doing a life insurance business, to make and enter into a certain contract with the American Agency Company, a corporation created by the laws of the state of Arizona, a copy of which contract you have submitted with your inquiry.

By this contract the Cleveland Life Insurance Company employs the American Agency Company as a representative for the purpose of procuring, writing and selling insurance policies, annuities, and such other forms of contract which the company has or may have authority by law to write or sell. Said agency company is given power and authority to employ sub-agents in the prosecution of such business, provided that no such sub-agent shall be employed or permitted to solicit business for the insurance company until it or he has been approved by the insurance company. Under this contract all agents soliciting business have been appointed by and report to said agency company, which company submits monthly reports to the insurance company. All the cost of obtaining such business shall be borne by the agency company.

The insurance company, for the services thus to be performed by the agency company, agrees to pay it 80 per cent. of the first year's premium on all policies written on the preliminary term plan wherein the first annual premium is based on the whole life premium table, together with a series of commissions on renewal premiums received by the insurance company on business written by the agency company, which table of commissions it is unnecessary to here state entire. There is a provision in such contract that the commission on renewal premiums shall be paid while and as long as the agency company is acting as general agent for the insurance company under this agreement, and for and during an additional period of ..... consecutive years from and after the date when the term is terminated for any cause whatever.

On the part of the agency company it further agrees to assume and pay all expenses in connection with the selling of such insurance and it relieves the insurance company of any and all expenses in connection therewith, except payment by the insurance company of any and all departmental fees, which fees are to be paid by the insurance company. The agents' licenses are to be paid by the agency company.

Provision is made that the first year's premiums on contracts sold shall be collected by the agency company and accounted for by it to the insurance company by regular monthly statements, or oftener if demanded by the insurance company; and the balance, after deducting commissions herein agreed to be paid, shall be paid by the agency company to the insurance company. As soon as said statements furnished by the agency company are approved and confirmed by the insurance company all renewal premiums shall be collected by the insurance company direct, and regular monthly statements thereof shall be furnished

to the agency company. The commissions due on such renewal premiums from the insurance company to the agency company shall be advanced by the insurance company, less the expense of collecting, to the agency company, as soon as such monthly statements are approved and confirmed, but final settlement on all renewal commissions shall be made annually. Provision is inserted therein forbidding the agency company to offer, or permit agents to offer, any rebates of any kind to any person buying insurance or other contracts with the insurance company.

Further provision is made against the agency company allowing any of its agents or employes in any manner to solicit, sell or in any way dispose of *its* capital stock at the time of, or in conjunction with, soliciting or selling insurance.

The agency company further agrees that every person, firm or corporation who may be employed or authorized to solicit or sell, or in any manner dispose of any of the agency company's capital stock, shall be prohibited from soliciting or selling any of said capital stock at the same time and in conjunction with any one else who is soliciting insurance for the insurance company.

Provision is made that the agency company must sell $3,000,000 worth of business, accepted and paid for, on or about the first day of January, 1909, and that at that time there must be on the books of the insurance company said amount of business in force; and for each and every year thereafter said agency company must sell not less than $3,000,000 worth of business, accepted and paid for, and, in addition thereto, must show an increase in business done for each and every year during the life of this contract. The agreement fixing the minimum amount of business that must be sold by the agency company is made a condition precedent to the right of the agency company to receive the commissions and must be compensated upon the rates hereinbefore stipulated, and all payments made by the insurance company to the agency company on account of commissions or compensation shall be considered as advancements on account of the current year's business until such time as it shall be definitely determined that the condition precedent herein fixed shall have been satisfied, and, in the event that the agency company fails to sell said minimum amount of business, then settlement shall be made by the insurance company with the agency company on some just and honorable basis, to be agreed upon or determined as therein provided.

The contract is to continue and be operative for a term of twenty-five years from August 18th, 1906, unless otherwise terminated.

Your letter is further supplemented by a report of an examination of the Cleveland Life Insurance Company, made by the duly authorized examiners, and accompanying the same is a series of representations made by the agency company when soliciting business for the insurance company, which, for the purpose of this inquiry, it will be unnecessary to set forth herein.

You further submit in your letter the additional inquiry as to whether the life insurance company can escape responsibility for the misrepresentation of the agency company under H. B. 970, passed by the recent session of the general assembly and approved by the governor April 22nd, 1908.

The major proposition herein presents the question of the legality of such contract, and it may not be necessary, in view of the determination of such proposition, to consider the secondary one involved therein.

Is this contract such as the life insurance company can lawfully enter into? It purports to give to such agency company, a foreign corporation, the exclusive agency within the state of Ohio for such insurance company, giving to it power and authority to employ sub-agents in the prosecution of the business of selling

insurance. It denominates it its general agent, authorizing it to establish agencies in the state of Ohio for such company, and requires it to devote its entire time, energy, skill and resources to procuring, writing and selling insurance contracts and annuities of every kind, or other contracts in the nature of insurance or annuities, that said insurance company may lawfully undertake. Such contractual relation forbids the agency company engaging in any other business or enterprise than that of acting as agent for said insurance company. It attempts to vest in the agency company the fullest and most plenary authority in such regard and then qualifies such authority in the following language:

> "10. It is further agreed that the agency company shall not have power, and by this contract is not given power, to bind the insurance company in any manner by any promises, contracts or obligations, unless such authority is duly granted by the proper officers of the insurance company in writing."

This is a denial of the results arising from such relation therein created and is an attempted withholding of the power which is the supposed foundation of the agreement. The agency company having been denominated by the contract the general agent of the insurance company, the paragraph last quoted would be unlawful because a person soliciting risks for the insurance company, with authority to obtain applications on which policies are issued, is the agent of the company, and authority as such agent is attendant thereon to bind the company by his promises, contracts or obligations. Such paragraph is an emasculation of that which precedes, and destroys the agency, if one is thereby created.

But, considering the scheme as here outlined in toto, I am of the opinion that your department should not sanction the same because such contract is *pro tanto* an abandonment or surrender of the duties which the law imposes upon an insurance company to a corporation which is not authorized to do or engage in the business of insurance within the state of Ohio.

An insurance company may not, without distinct legislative authority, make any alienation or contract assigning to another corporation any part of its duties, either of the general franchise to be a corporation or of the subordinate franchise to manage and carry on the corporate business. This contract certainly contemplates the functions classified under the lesser franchise, and it is a serious question whether it does not embrace the greater office or function contained in its general franchise. The insurance company cannot thus devolve upon the agency company the duties, privileges and powers which were conferred upon it by the laws of the state, and all contracts by which this is attempted are *ultra vires* and void.

The corporate charter of an insurance company not only grants rights; it also imposes duties; an acceptance of those rights is an assumption of the duties and is no authority for the transfer of the same to any other corporation.

This conclusion is arrived at independent of the attempted authorization, by the state of Arizona, of the agency company to engage in such or similar business. It cannot be ousted of the right to be a corporation, nor of any of the franchises conferred on it by the laws of Arizona; but as to such franchises and privileges sought to be exercised within the state of Ohio, it is as much amenable to the courts of this state as an Ohio corporation. The question rests rather upon the lack of authority of the insurance company, an Ohio corporation, to enter into such contract, and this, in my opinion, should be resolved against the company.

This is not a contract affecting the stockholders alone; if so, it might be waived; but it is a question of the powers of such insurance company, presented by your department, having supervision and control over all such companies and, therefore, is freed from all question of waiver or estoppel.

Very truly yours,

WADE H. ELLIS,
Attorney General.

OFFICER—SALARY FIXED BY LAW MAY NOT BE AUGMENTED BY APPROPRIATION.

In re salary of actuary in department of superintendent of insurance.

July 9th, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

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

The last general assembly, in its general appropriation bill for your department, made the following appropriation: "Salary of actuary, $600." You inquire whether or not the actuary of your department has a legal right to receive this $600 as salary in addition to the annual salary of $2,400, as provided in section 1284*b* R. S.

In reply I beg to say that section 1284*b* of the Revised Statutes fixes the annual salary of the actuary of your department at $2,400, and the partial appropriation bill passed by the last general assembly carries an appropriation for its payment. The provision fixing the salary of the actuary in section 1284*b* of the Revised Statute was neither expressly amended nor repealed and, in my judgment, the mere inclusion of the $600 in the general appropriation bill does not impliedly amend or repeal said section. Of course, if there was no statutory salary fixed for the actuary he would be entitled to such sum as the general assembly deemed proper to appropriate, but inasmuch as his salary is fixed by statute and no action was taken by the legislature to increase the same by amending or repealing the statute, I am forced to conclude that the $600 appropriation, as carried in the general appropriation bill, can only be regarded as a legislative error and is not available as an increase in salary to the actuary of your department.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

INSURANCE—AGENCY COMPANY.

Modified contract between Cleveland Life Insurance Company and American Agency Company approved.

July 21st, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your inquiry of even date herewith, relating to the agreement entered into on the 14th day of July, 1908,

by and between the Cleveland Life Insurance Company and the American Agency Company, a copy of which agreement you have transmitted with your inquiry. I have given the same my consideration.

It has been represented to me that the American Agency Company has qualified under sections 148*c* and 148*d* of the Revised Statutes and is thus authorized to carry out its business purpose within this state, it being a corporation organized under the laws of the territory of Arizona. The agreement under consideration is a modification of the agreement which was disapproved by this department in its departmental opinion of date of June 22nd, 1908, and the modified contract has avoided the criticisms therein contained.

The American Agency Company is thereby employed as an agent of the insurance company for the purpose of soliciting and writing applications for insurance policies, annuities and such other forms of insurance contracts as the insurance company has or may have authority by law to write or sell within the state of Ohio. The relation thus established is, in my opinion, clearly authorized and no provision contained therein is prohibited by law.

I therefore return the same to you with the approval of this department.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

INSURANCE—SUPERINTENDENT OF—EXCESSIVE DEPOSIT WITH, MAY BE RECLAIMED BY COMPANY.

July 24th, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of the 21st inst., in re the deposit made by the Western and Southern Life Insurance Company with your department, as required by section 3593 of the Revised Statutes. The correspondence transmitted therewith shows the circumstances under which the deposit in excess of $100,000 was made by the company. The question now presented turns upon the right of the company to take down the excess of the deposit, leaving with your department full and adequate security for $100,000.

The latter part of section 3954 R. S. certainly gives the company the right to claim the excess, because the statute recites that such excess "is not held in trust for the benefit of the policy-holders, but shall be held in trust for the company * * * and shall be returned to the company making the deposit on its demand."

The purpose of the deposit being made at the exact sum of $100,000 is not conditioned upon the amount of business which the company is doing, but it is a condition precedent to its right to commence business. It has no authority under the statute to begin business until it has made a deposit of at least $100,000 in the character of securities mentioned in section 3953 R. S. If for any reason it has deposited an amount in excess thereof it has the right to reclaim the same upon demand, and in so doing I assume that those securities which are taken in place of those which it demands are of full value and are equal to at least $100,000 in actual value.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BURIAL ASSOCIATIONS—LEGALITY OF CONTRACTS OF.

Funeral benefit associations are prohibited by act in 99 *O. L.* 131 *only from writing contracts, the effect of which is to deprive the representatives of deceased persons of choice in selection of undertakers, etc.*

In re Cosmopolitan Sanitorium Company.

September 21st, 1908

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of yours of the 15th inst., regarding the contracts written by the Cosmopolitan Sanatorium Company of Cleveland, Ohio, and in which you invite further consideration thereof in view of the statement made in the opinion of this department under date of March 28th, 1908, relative thereto. In the opinion then expressed it was said:

> "There is but one provision of the Revised Statutes which should be considered in connection with your question, and that is the recent act of the present session of the general assembly of Ohio, which places all burial associations under the control of your department. There is a provision contained in the by-laws of this company by which, in the case of the decease of any stockholder thereof, the sum of $125.00 is allowed as a burial expense. I cannot now give you an opinion as to whether such corporation would be included within the provisions of such act, as I have not been able to secure a copy thereof.
>
> "With this feature of the question reserved for further consideration, I submit that, in my opinion, no provision of the law is violated by this company."

Having examined the act of the general assembly, passed April 9th, 1908, entitled "An act to amend section 289 of the Revised Statutes of Ohio, making it unlawful to engage in the insurance business in Ohio unless the same is expressly authorized by the laws of this state" (99 O. L. 131, 132), I beg to advise that such amended act expressly forbids companies, corporations or associations, whether incorporated or not, to engage in the "business of providing for the payment of the funeral, burial or other expenses of deceased members or certificate holders therein, or engage in the business of providing any other kind of insurance, to contract to pay or to pay the same or its benefits, or any part of either, to any official undertaker, or to any designated undertaker or undertaking concern, or to any particular tradesman or business man, so as to deprive the representative or family of the deceased from, or in any way to control them, in procuring and purchasing said supplies and services in the open market with the advantage of competition, unless the same is expressly authorized by the statutes of this state."

This act, as amended, should not be so construed as to forbid the organization of societies or associations with powers to provide for the payment of the funeral, burial or other expenses of deceased members thereof or certificate holders therein. The prohibitions contained in the act are against certain forms of certificates or contracts issued by such associations. It forbids entering into contracts whereby the individual or association is required to pay the amount of the benefits, etc., "to any official undertaker, or to any designated undertaker or undertaking concern, or to any particular tradesman or business man, so as to deprive the representative or family of the deceased from procuring and purchasing said supplies and services in the open market with the advantage of competition."

It is thus apparent that the abuse or mischief aimed at by this act was to forbid contracts of that character. The language immediately following the above quoted portion, to-wit, "unless the same is expressly authorized by the statutes of this state," should not be construed that express statutory authority must exist for the organization of a burial association, but should be so construed as to forbid or prohibit forms of contract being made unless the same (to-wit, that form of contract) is expressly authorized by the statutes of this state. Such forms of contract are now unlawful and unauthorized by the statutes of Ohio.

I have not before me the form of contract of the Cosmopolitan Sanatorium Company, whereby to determine whether it is obnoxious to the provisions of the statute quoted, but if the contract written by such company violates such provisions it should be denied the assumed right so to do, but such company is not thereby denied the provisions of section 3235 R. S. relating to conducting its sanatorium or further to provide for the burial of its deceased members or certificate holders by lawful contracts made for that purpose.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

FRATERNAL BENEFICIARY ASSOCIATIONS—CONSOLIDATION—DISSOLUTION.

Superintendent of insurance may not intervene to prevent transfer of membership and liabilities by one fraternal beneficiary association to another such organization in the absence of fraud, if two-thirds of governing bodies of both organizations concur.

Superintendent of insurance and attorney general have discretion as to instituting proceedings in quo warranto in case examination by superintendent discloses insolvency of fraternal association.

In re contract between the Pathfinder and the American Insurance Union.

October 3rd, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—Having been requested by you to sit in the hearing of certain complaints made by parties in interest connected with the fraternal organization known as the Pathfinder, arising out of a contract of merger made between the American Insurance Union and the Pathfinder, and having been further requested by you to formulate an opinion based upon the evidence and the argument of counsel made at such hearing, I beg to advise as follows:

The facts disclose that the American Insurance Union is a fraternal association organized and doing business pursuant to the act of the general assembly governing fraternal beneficiary associations within the state of Ohio; that the Pathfinder is a similar fraternal organization operating under the same laws; that prior to the 12th day of September, A. D. 1908, the Pathfinder had its principal place of business in the city of Cleveland Ohio; that it had about 9,600 members; that for some time prior thereto the membership had been decreasing in numbers and, at the time mentioned, it had accrued liabilities upon its death benefit certificates amounting to about $18,000; that between the 12th day of September and the hearing had before you three more certificate holders

had died, leaving a liability arising from death losses of $51,000. The facts further disclosed that it had on hand, in round numbers, $10,000; that its membership had decreased, from December 31st, 1906, when it amounted to 15,414, to December 31st, 1907, when it amounted to 9,366, and it was apparent that the decrease in membership was continuing and the necessity of increasing its rate of assessments existed.

Under these circumstances a proposition of merger between the two organizations mentioned was made, and for some time discussed, and at last agreed upon. A copy of this contract has been submitted to you and it need not here be reviewed in detail. Suffice it to say that it involved paying over to the board of officers of the Pathfinder, by the American Insurance Union, the sum of $35,000, with which to settle, compromise and adjust the claims then in existence owing by the Pathfinder.

It further involved the taking over of the entire membership of the Pathfinder, merging it into the American Insurance Union, and scaling the certificates held by the membership so merged, for the first year after such merger, in an amount of one-third of the face value thereof; and after said first year the certificates so issued by the Pathfinder to its former membership were to be paid in full upon the death of any member, and no disparity was thereafter to be permitted between the former membership of the Pathfinder, so merged, and the membership of the American Insurance Union. Other details of such merger have been made the subject of more or less acrimonious discussion, but the major objections urged by certain representatives of the Pathfinder, being officers thereof, centralized about the portions of the contract above stated.

Such proposed merger was to be made pursuant to the provisions of section 14 of the act regulating fraternal beneficiary associations, which is as follows:

> "No domestic association shall transfer its membership or funds to any association not authorized by the superintendent of insurance to transact business in this state; nor shall any such association transfer its membership or funds to any licensed association, unless the said contract of transfer has been approved by a two-thirds vote of the members of the supreme body of the association whose membership is proposed to be transferred; and by a two-thirds vote of the trustees or board having charge of the association proposing to take such membership."

No question has been raised by the dissenting members and officers of the Pathfinder that the contract or transfer had not been approved by a two-thirds vote and more of the members of the supreme body of the Pathfinder, and by a two-thirds vote and more of the trustees or board having charge of the American Insurance Union. The preliminaries seem to have been strictly observed.

The power of a domestic association of this character to thus transfer its membership to another association, also organized under the laws of Ohio, cannot be seriously questioned in view of the authority conferred upon such associations by the section of the act in question. Certain facts were developed at said hearing which show that another association had made a proposition to the officers of the Pathfinder for a transfer of its membership to such other organization. In some respects the proposition made by such other organization, not necessary here to name, was claimed to be more advantageous for the membership of the Pathfinder than that of the American Insurance Union. This was freely discussed, but the relative merits and advantages of the

two propositions could not be considered by your department, nor by you as the superintendent thereof, except in so far as it might bear upon the proposition of the good faith of the Pathfinder in entering into the contract of merger with the American Insurance Union.

It will be borne in mind that the complainants before you expressly withheld any charge of fraud in all of the transactions. The advantages or disadvantages of each of these propositions were matters to be fully, if not exclusively, determined by the contracting parties. In my opinion, it was only a question of powers vested in your department, which, in view of the circumstances concerning the transaction, should become the subject of inquiry, viz: Had your department, or you, as the superintendent of insurance, the authority to require the Pathfinder to reject the proposition made to it by the American Insurance Union, and to accept the proposition made by the other fraternal beneficiary association? This question must be resolved against the power. The contracting parties, by the proper vote, having determined upon a plan of merger, your department, and you, as superintendent of insurance, in my opinion, cannot compel a transfer of the membership or funds of the Pathfinder to any other organization than that whose proposition has been approved and adopted by the requisite vote of the supreme body of the Pathfinder.

No inference is to be made from this statement that, under circumstances amounting to fraud, such contract might not be set aside and everything accomplished thereunder undone, but the facts present in this matter, by specific admission of the parties, present no such issue.

But it was urged upon you with much force that the examination made by your department of the Pathfinder, and the admissions made by the officers thereof, disclosed that that association was not able to carry out its contracts and the data presented was of such character as to make the Pathfinder amenable to charges embraced within section 25 of the fraternal beneficiary association act. It was further urged that such facts having been disclosed, you, as superintendent of insurance, should present the same to the attorney general and that he should commence an action in *quo warranto* in a court of competent jurisdiction and have a receiver appointed to proceed at once to close the affairs of the association and to distribute its funds to those entitled thereto.

So the contending parties presented at such hearing but the one alternative, that of immediately closing the affairs of the association and enjoining it from further carrying out its business purposes. This contention assumed no discretion on the part of the superintendent of insurance and no discretion on the part of the attorney general in beginning such proceedings when the facts would so warrant. If this assumption be made it is not borne out by the proper construction of the section under review. The act provides that the "superintendent of insurance *may* present the facts relating thereto to the attorney general, who shall, *if he deem the circumstances warrant*, commence an action in *quo warranto*, etc."

Discretion is thus conferred in such matters upon each of such officers. Observing such discretion and acting thereunder, it brings you, as such officer, to a comparison of the two alternatives: the one presented by the American Insurance Union to take over the membership and funds of the Pathfinder, as above set forth; the other to immediately authorize the commencement of an action to close such organization and enjoin it from further doing business. If the latter be resorted to, the membership of over 9,000 is not protected in any degree. Their insurance is terminated; the contracts under their death benefit certificates are all destroyed. Many therein represented have probably passed into such condition of health that it would no longer be possible for them

to pass another medical examination. Some of them, we may assume, have attained the age when no other organization would accept them as members. By the contract under consideration no benefit of selection has been resorted to by the American Insurance Union, but it has taken the weak with the strong, the aged with the young, all without disparagement, under its protection.

It has been held by the supreme court of Iowa, in Cathcart et al. v. The Equitable Mutual Life Association of Waterloo, 111 Ia. Rep. 471, that:

> "Where a mutual insurance association transferred its membership to another association under an agreement that the latter will carry out the insurance contracts of the former, such an arrangement was not an agreement to insure, within the provisions of the insurance code, prohibiting such association from insuring a person over sixty-five years of age, and hence the fact that a member of the association whose membership was so transferred was over sixty-five years of age at the date of the agreement, did not release the latter association from liability on his certificate."

Without further reviewing the advantages to be gained to the membership and to the beneficiaries under the accrued certificates, it seems that the alternatives are not comparable, and an action in *quo warranto*, with an incidental receivership, should not be resorted to.

I do not here pass upon the question as to whether such contract should be approved by you, but the entire matter ought to be determined upon the higher equity by which your department will be guided in matters of this character, taking into consideration the probability of saving to this membership the protection heretofore given under its former organization.

Without establishing a precedent for the approval of such contracts, it is sufficient to determine the matters at issue before you by recommending that no proceeding in *quo warranto* be instituted against the Pathfinder.

As this matter was heard by us jointly, I respectfully submit my conclusions herein for your approval or disapproval.

SMITH W. BENNETT,
Special Counsel.

ACCIDENT INSURANCE COMPANY—BOND.

Superintendent of insurance may require renewal of bond filed with him by accident insurance company under section 3630i R. S.

Treasurer of accident insurance company must file bond with superintendent of insurance under section 3631 R. S., in addition to bond filed by company under section 3630i.

October 7th, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your favor of the 5th inst. In it you propose a question upon which you request an opinion of this department, viz:

> Companies doing business in Ohio, organized under section 3630*i* R. S., are engaged in health and accident business; they have each given the one hundred thousand dollar bond required by that section. Three

of such companies gave personal bonds which are several years old, and which have never been renewed. Has the superintendent of insurance power to require a renewal of these bonds?

Also, are the treasurers of such companies, in addition to the hundred thousand dollar bond, above mentioned, required to give a bond designated by section 3631 R. S.?

The first question presented is one of general power of the superintendent of insurance rather than of any specific statutory direction. You, as superintendent of insurance, are required to see to the execution and enforcement of all laws relating to insurance (section 268 R. S.). Undertakings required from certain classes of insurance companies are to be construed as security for policy or certificate holders in such companies, and are of the nature of deposits of securities made with your department and with the treasurer of state by certain other classes of insurance companies. These undertakings and bonds, as well as deposits and securities, are subject to examination, from time to time, in the performance of the duties imposed upon you in the execution and enforcement of all laws relating to insurance. Such bonds are, in certain cases, rerequired to be examined as to their sufficiency and to be renewed whenever the superintendent of insurance shall require (section 3631 R. S.). I am of the opinion that it is your duty, in the absence of information as to the ability of sureties to respond in case of default, to examine the persons connected therewith and, in case you find such securities insufficient, that you require a renewal of such bonds and undertakings.

The further question relating to the duty of treasurers of such companies in connection with the execution of the bonds required therefrom can be determined by a consideration of section 3630*i* and section 3631 R. S. The first numbered section provides as follows:

> "Companies organized under the provisions of this section shall, before engaging in business, as provided in this section, execute a bond in the sum of one hundred thousand dollars to the state of Ohio, with security to the acceptance and approval of the superintendent of insurance, for the use and benefit of all persons holding policies or certificates of said company, conditioned that such company shall credit upon the books of said company, all moneys received by it under the provisions of this section, keep the funds separate and not use or interchange them for purposes other than those for which they were respectively collected, and that they will apply and pay out said funds to and for the purposes provided for in this section, which bond, when so executed and approved, shall be deposited with and held by the superintendent of insurance."

With regard to the execution of a bond by the treasurer of any such corporation the provisions of section 3631 R. S. are as follows:

> "* * the treasurer thereof, who shall, before assuming the duties of his office, give bond in the sum of not less than ten thousand nor more than fifty thousand dollars, as the said superintendent may determine, with not less than three sureties to be approved by the superintendent of insurance, and conditioned for the faithful accounting for, and proper payment and disbursement to the legitimate purposes of the company or association of all the money thereof, which comes into his hands."

The bond required by section 3630*i* R. S. is to be executed by the *companies* organized under the provisions of that section. The bond required by section 3631 R. S. is to be executed by the *treasurer* of such corporation. The conditions of each of said bonds are not similar and are clearly distinguished. The execution of the bond by the *company* is not a compliance with the condition that the *treasurer* shall execute a bond. It will be observed that the bond of the treasurer, when approved by the superintendent of insurance, shall be filed with the secretary of state and the bond of the company shall be deposited with and held by the superintendent of insurance.

The distinction being obvious, in my opinion, it is necessary that both classes of bonds shall be executed as above set forth.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

FRATERNAL BENEFICIARY ASSOCIATION—UNINCORPORATED—APPLICATION OF LAWS OF OHIO.

Unincorporated fraternal beneficiary association licensed under laws of Ohio and moving its offices into another state ceases thereby to be amenable to Ohio laws, and proceedings against it for violation thereof may not be had.

December 16th, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—I have given consideration to your communication regarding the Fraternal Censer, heretofore located at Cincinnati, Ohio.

From your communication, and the exhibits accompanying the same, I am advised that this association was unincorporated and that upon the enactment of the first fraternal beneficiary law of this state, being the act of April 27th, 1906, it was licensed thereunder, and continued to be so licensed until the repeal of said act by the present fraternal beneficiary law, and since its enactment has been and now is operating and licensed under said present law.

After the examination made by your department of this association, the result of which was certified by your examiner under date of July 10th, 1908, a disclosure of certain facts was made sufficient to have warranted the adoption of the procedure set forth in section 25 of the fraternal beneficiary act, for the purpose of winding up the affairs of such association.

Thereafter the association changed its place of business beyond the limits of the state, and located at Covington, Ky., removing whatever of assets such association had to that state. After accomplishing such removal it entered into an agreement with the Western Life Indemnity Company of Chicago, Ill., whereby the membership and property of the association was transferred, or attempted to be transferred, to the Western Life Indemnity Company. Such company is an assessment life insurance company, incorporated under the laws of the state of Illinois, and is not a fraternal beneficiary association, and is not licensed to transact business in the state of Ohio.

The question thus presented involves the power of your department to proceed against such association for violation of the fraternal beneficiary law of the state of Ohio, for transferring its membership and property to a company not authorized by your department to transact business in this state.

Section 14 of said act is as follows:

"No domestic association shall transfer its membership or funds, to any association not authorized by the superintendent of insurance to transact business in this state; nor shall any such association transfer its membership or funds to any licensed association, unless the said contract of transfer has been approved by a two-thirds vote of the members of the supreme body of the association whose membership is proposed to be transferred; and by a two-thirds vote of the trustees or board having charge of the association proposing to take such membership."

The question presented turns upon the construction of such section. In order to answer such inquiry a statement of the facts made by the supreme president of the Fraternal Censer is material to consider. His statement coincides with that disclosed by the circular matter which accompanied your communication. The association was never incorporated under the laws of Ohio. It was a voluntary association. The construction given to the word "association" by section 31 of the act in question is as follows:

"The word 'association' as used in this act shall be taken and construed as meaning a fraternal beneficiary corporation, society, order, or a voluntary association as defined in section 1. The words 'domestic association' shall be taken and construed as an association organized or incorporated under the laws of this state. The words 'foreign association' shall be taken and construed as meaning an association organized or incorporated under the laws of another territory, district, state, province or country. All provisions of each section of this act shall be taken and construed as applying to both domestic and foreign associations."

Referring to the facts as recited by your communication, this association was not in any way limited or restricted by the fraternal act of Ohio from removing from this state. The action taken by it in that regard was clearly within its rights. The removal of a voluntary body or association from one state to another, under a proper resolution or action of those constituting such body, as completely removes it from one jurisdiction to the other as the removal of a natural person to another state with the intention to permanently reside there changes such person from a citizen of one state to a citizen of another.

The mere fact that the Fraternal Censer, as a voluntary unincorporated organization, was licensed under the fraternal act from time to time, by your department, did not change it from an unincorporated voluntary association to that of an incorporation pursuant to the provisions of section 12 of the act in question. By such license it continued to exercise the rights, powers and privileges of a fraternal association in Ohio, but it did not thereby become an incorporation. Section 13 provides that "no association or organization shall be required to re-incorporate hereunder." It did not incorporate nor re-incorporate. If it had it would have become a domestic corporation and would have remained in fact a citizen of Ohio until such corporate charter had been surrendered. It could not have changed the place where its principal business was transacted until it had proceeded according to the provisions of section 3236 R. S. It surrenders its citizenship as a voluntary association by simple removal from the state.

This having been accomplished in the method stated in your communication, whatever it did after surrendering such citizenship in Ohio it did by virtue

of the laws of Kentucky. As section 14 of the fraternal beneficiary act would not have any extra-territorial effect beyond the jurisdiction of the state wherein such provision was enacted, it would not extend to the state of Kentucky, where the membership of this association was transferred to the Western Life Indemnity Company, unless such state had the same or similar law. It seems to have no law forbidding the action taken by this association.

I therefore conclude that at the time such action was taken by the Fraternal Censer it was not an association amenable to the laws of the state of Ohio, and especially was not subject to the provisions of the fraternal beneficiary act of this state, and the re-insurance of its members in the Western Life Indemnity Company of Chicago, Ill., was not in violation of section 14 of the act of April 27th, 1896.

I herewith return the papers accompanying your communication.

Very truly yours,

U. G. DENMAN,
Attorney General.

BANKERS' ASSOCIATION—OFFICER OF MAY BE AGENT OF INSURANCE COMPANY.

December 22nd, 1908.

HON. CHARLES C. LEMERT, *Superintendent of Insurance, Columbus, Ohio.*

DEAR SIR:—You have submitted an inquiry under date of the 17th inst., upon which you request an official opinion of this department, which inquiry is, in substance, as follows:

The agent of the Ocean Accident and Guarantee Corporation, Limited, is the secretary of the Bankers' Association. The association, through a committee, made a contract with the above-named corporation whereby the secretary should act as state agent for bank burglary insurance in Ohio and solicit such insurance from the banks of the state for that company. At the end of each year the commissions of the secretary derived from the business are turned over to the treasurer of the Ohio Bankers' Association. Query, as to the legality of such procedure.

Under the laws of Ohio it is clear that a bankers' association cannot act as an agent for an insurance company, but it becomes a matter of indifference whether Mr. R., who acts as the agent of the Ocean Accident and Guarantee Corporation, is also acting as the secretary of the Ohio Bankers' Association. There is nothing in the two positions that forbids R. from representing both. The question properly presented would be whether R. is really the agent of the company, or is the Ohio Bankers' Association such agent? From the statement and correspondence accompanying the same the agent is R., and not the association. R., acting as such agent, can give his commissions to any organization or association, and he violates no law in so doing. I am, therefore, of the opinion that under the arrangement as detailed to me, no law is being violated in the premises.

Yours very truly,

U. G. DENMAN,
Attorney General.

(To Various Appointive State Officers)

"SQUIRREL HUNTERS"—ADDITIONS TO RECORDS OF ADJUTANT GENERAL.

June 30th, 1908.

HON. A. B. CRITCHFIELD, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—In your letter as to J. R. No. 76, passed May 9th, 1908, you state that some organizations of "Squirrel Hunters," which were in service in September, 1862, under the call of Governor Tod, have never had their company rolls filed with your department. You ask whether such records can be received at this time, and whether there is any way by which the names of members of such organizations can be recorded, so as to bring them within the following provision of such joint resolution:

> "An amount equal to one month's pay of militia at the time of their service, being the sum of $13.00, be set apart and apportioned to each surviving member who responded to this call, and whose names are so recorded in the files of the adjutant general's office of the state."

Strictly speaking, the resolution applies only to those whose names were recorded at the time the resolution was passed. Since there is no law authorizing or providing for the recording of the names of "Squirrel Hunters," I believe that the resolution did not contemplate that the rolls of other organizations of "Squirrel Hunters" should be recorded for the purpose of coming within its terms. However, from a reading of the entire resolution, and especially of that part of it which refers to the certificate of service and discharge given to individual "Squirrel Hunters" by Governor David Tod under the resolution of the general assembly of March 4th, 1863, I am convinced that J. R. No. 76 was intended to include all persons who have received such certificates of service and discharge from Governor Tod. I believe that such persons are entitled, upon the presentation of such certificates, to have their names recorded in the office of the adjutant general and to receive the $13.00 under the resolution. I do not believe that the names of any other persons who claim to be "Squirrel Hunters" can be added to the records under this resolution.

Very truly yours,

WADE H. ELLIS,
Attorney General.

NATIONAL GUARD—TRANSPORTATION—DAMAGES.

Contract between state and railroad company for transportation of companies of national guard must be made in manner prescribed by regulations.

State is not liable for damages to private property caused by unauthorized acts of individual members of national guard while in camp.

November 20th, 1908.

COL. WORTHINGTON KAUTZMAN, *Assistant Adjutant General, Columbus, Ohio.*

DEAR SIR:—You have presented to this office for consideration a bill from the Pennsylvania Company for transportation furnished this year in pursuance

of request number 2703 of your department for military transportation for "61 men" of Troop A from Cleveland to Ripley; a bill from the Ohio River and Columbus Railway Company for transportation furnished in pursuance of request number 7946, for military transportation for "51 persons" of Troop B from Ripley to Columbus, and a bill from the Norfolk & Western Railway Company in pursuance of requests numbers 4318, 4320 and 4321, for military transportation for "55 persons" of Troop B from Columbus to Portsmouth, Vera to Sardinia, and Sardinia to Ripley, respectively.

While the Pennsylvania Company ask only the regular fare of two cents per mile for the number of men carried, the other companies in each case ask for payment upon the basis of 100 men transported, on the ground that a special train was furnished in each case.

As to request number 2703, the action of the Pennsylvania Company, the contracting party, in charging on the basis of regular service, gives an interpretation of the contract in this case, which, it seems to me, should be binding upon the connecting railroad companies. The Ohio River and Columbus Railway Company, too, is not in a position to ask additional payment for special train service, since it had not, at that time, filed a tariff rate for special train service as provided for in section (244-45) R. S.

There are, however, other considerations applicable to each of the cases presented. Each "request for military transportation" above mentioned, states specifically the number of men to be transported and makes no request for special service of any kind. Each "request for military transportation" contains, also, the certificate of the officer to whom transportation is issued, and in each of the above cases the officer certifies on honor that the railroad furnished transportation for the number of persons for whom the requests were made, and makes no mention of any special train service. The presumption, therefore, is that regular service only was required, and the fact that a railroad may have furnished more accommodations than the state requested is no reason for imposing an additional burden upon the state.

In the absence of evidence that a proper legal request was made through the regular military channels, for special train service, I am of the opinion that payment should be made only for the number of men carried and at the regular passenger rate. In this connection it appears to me, also, that terms of the regular written "request for military transportation" should prevail over verbal or other communications between the railroad company and members of the Ohio National Guard. I am informed, too, that for a number of years the general orders of the adjutant general's department have forbidden the ordering of transportation except by means of the regular "request for military transportation" blank which was used in these cases.

You present, also, three claims for damages for property said to have been taken or destroyed by members of the Ohio National Guard while in camp in Indiana last summer. Admitting the statements of the claimants to be true, such property was taken or destroyed by the men as individuals, without authority and in a manner entirely outside any of their duties as members of the Ohio National Guard. The individuals, therefore, and not the state, are legally liable. The laws of Ohio and the regulations for the Ohio National Guard make no provision for payment by the state in such cases and I know of no legal remedy except appeal to the next general assembly for an allowance of these claims.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

BANKS—ORGANIZATION OF.

Superintendent of banks must approve and authorize organization of all banks organized under act in 99 O. L. 269.

July 23rd, 1908.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Replying to your inquiry of the 20th inst., I beg to say your question as to a bank having a right to transact any business until it has complied with the provisions of section 10 of the act of the 77th general assembly, passed and approved May 5th, 1908, entitled "An act relating to the organization of banks and the inspection thereof," should be determined against such power.

Section 10 of the act in question provides:

> "No such corporation (banking corporation) shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the superintendent of banks."

This provision applies to any bank organized under the act in question and until it has been duly authorized by you as such superintendent it is positively forbidden to transact any business except such as is incidental and preliminary to its organization.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

SAFE DEPOSIT AND TRUST COMPANY—COMPLIANCE WITH BANKING LAW OF 1908.

Safe deposit and trust company must conform its capital stock to provisions of act in 99 O. L. 269, on or before April 1, 1910.

July 23rd, 1908.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of the inquiry contained in yours of the 22nd inst., which may be summarized as follows:

The Ohio Safe Deposit and Trust Company of Zanesville was incorporated on the 21st day of September, 1889, to engage in the business defined in sections 3821*a* and 3821*b* of the Revised Statutes, otherwise known as the safe deposit and trust company statute. Its original stock was $10,000, which was fully paid up. Such stock was subsequently increased to $50,000, but only $7,000 of the increased stock was subscribed and paid for, making the present capital stock paid up $17,000. Based upon these facts that bank presents the question to you whether it must comply with the requirements of the act of the general assembly passed and approved May 5th, 1908, and entitled "An act relating to the organization of banks and the inspection thereof," in the respect of having its capital stock increased to the amount provided for in section 2 of such act, and, if so, by what time is it required to so increase its capital stock.

Section 2 thereof provides that the capital stock of a trust company and a safe deposit company shall not be less than $100,000. This bank is now organized as a safe deposit and trust company, with a capital of $50,000. It is said in the letter of the cashier that it does not receive trusts, but limits itself to receiving deposits and allowing interest thereon, loaning money secured on real estate or collateral and renting space and boxes in its safe deposit vault.

The controlling question is not, what does the bank actually do, but what is it authorized to do and what will it be authorized to do under such form of charter after compliance with the new banking act above referred to? Its statute, as fixed by the old law from which it receives its powers, also establishes its status under the new law as a trust company and safe deposit company, and if the new act is to control it in the amount of its capital stock, it is essential to determine when the same becomes so operative, and in the same connection to determine when and to what extent such capital stock shall be paid in.

Section 36 of such act contains the provision by which all character of banks, *heretofore incorporated*, may avail themselves of the provisions of the act in question. That section provides how such banks may signify their intention to accept the privileges and powers conferred by such act. A provision is further contained therein as follows:

> "Provided that, after April 1st, 1910, every such corporation or association shall in all respects conform their business and transactions to the provisions of this act."

Such section relates alone to the banks which have been incorporated in this state prior to the enactment of the law in question, and it applies to such banks the provisions of the act after April 1st, 1910. It makes it elective with such banks to avail themselves of the privileges and powers conferred by the act at any time before that date. Before April 1st, 1910, it is elective with the banks incorporated before the passage of the act to assume such powers, and after that date it is mandatory. In such connection should be read section 91 thereof, which provides, with regard to banks "now existing and chartered or incorporated, or which may hereafter become incorporated." It provides with regard to them

> "that no such corporation or association having a less capital stock than the minimum amount provided in section 2 hereof shall be required to increase its capital stock in order to conform to the provisions of this section, but no such association or corporation may avail itself of any of the privileges or powers conferred by this act until it has complied with the provisions of section 36 of this act, *and no corporation or association shall be required to comply with the provisions of sections* 1 *to* 77 *inclusive of this act before April* 1*st*, 1910, *etc.*"

Construing section 91 in connection with section 36 and section 2 of the act in question, the conclusion is compelled to be reached that the above quoted provision only relieves existing banks from the provision as to their increase of capital stock until April 1st, 1910. On or before that date the capital stock must be increased so as to comply with the act. The period intervening is allowed by the statute as preparatory to the change. Section 11 thereof provides that "the entire capital stock of such corporation shall be subscribed and at least 50 per cent. thereof paid in before it shall be authorized to commence business,

and the remainder of the capital stock of such corporation shall be paid in in monthly installments of at lease ten per centum on the whole amount of the capital payable at the end of each succeeding month from the time it shall be authorized by the superintendent of banks to commence business, etc."

This provision will govern after April 1st, 1910, as to banks incorporated before the passage of the act in question as to the percentage of the capital that must be paid in.

I therefore conclude that the Ohio Safe Deposit and Trust Company and other banks similarly situated must, by April 1st, 1910, increase their capital stock from $50,000 to $100,000, and that at least 50 per cent. thereof must be paid in before they can lawfully continue to do business after said date.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BANKS—SUPERINTENDENT OF—RECEIVER.

August 10th, 1908.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Replying to your inquiry of the 6th inst., I beg to advise that the right of inspection and examination of the old corporations which have not availed themselves of the powers and privileges of the new banking act is not suspended or held in abeyance until said act is in full operation, but such act as to the power of inspection and examination was and is in full force since the date of its passage and approval.

The right to apply for a receiver for any banking corporation which was incorporated under the laws of this state and transacting business at the time of the passage of the recent banking act, cannot be asserted for failure to comply with the provisions of such act regarding transactions made prior to its passage, nor on account of renewals or settlements and adjustments of such transactions where the examinations show to your satisfaction that the interest of its depositors, creditors and stockholders will not be endangered by permitting it to continue to transact its regular business.

The limitation thus placed upon the right of your department to invoke the appointment of a receiver does not qualify or limit your right to proceed with the inspection and examination of banks, provided for by other sections of such act.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

BANKS—CAPITAL STOCK.

Fifty per cent. of each subscription to the capital stock of bank organized under act in 99 O. L. 269 must be paid in before bank may commence business.

September 11th, 1908.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your request for an opinion as to the construction of sections 5 and 11 of the act of the general assembly, passed May 5th, 1908, entitled "An act relating to the organization of banks and the inspection thereof."

The question involves whether the requirement that 50 per cent. of the capital stock be paid in before the corporation shall be authorized to commence business applies to each share of stock or whether it applies to the sum total of all the stock independent of the individual subscriptions.

Observing the language employed in section 5 thereof, it will be seen that "an installment of 10 per cent. on each share of stock shall be payable at the time of making the subscription, and an installment of 40 per cent. on each share of stock shall be payable as soon thereafter as may be required by the board of directors, etc."

Section 11 says "the entire capital stock of such corporation shall be subscribed and at least 50 per cent. thereof paid in before it shall be authorized to commence business, etc."

The latter language should be given the same construction as that employed in section 5, which relates to "each share of stock." In view thereof I beg to advise that the provision that 50 per cent. of the capital stock be paid in before the corporation should be authorized to commence business requires the payment of 50 per cent. on each share of stock by each subscriber thereto.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BANKS—ACCEPTANCE OF PROVISIONS OF ACT IN 99 O. L. 269—WAIVER OF NOTICE OF STOCKHOLDERS' MEETING.

September 14th, 1908.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I have your inquiry of the 10th inst., proposing the question whether or not the notice provided for by section 36 of the act of the general assembly governing your department, passed May 1st, 1908, can or cannot be waived by the stockholders executing such waiver in writing.

In my opinion it would be legal to avoid publication if each and all of the stockholders sign a waiver of such notice of such meeting; but you will understand the meeting is required to be held and the necessary vote of at least two-thirds of the capital stock must be taken at such meeting.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BANKS AND BANKING—COMMERCIAL BANKS—LOANS.

Commercial banks organized under act in 99 O. L. 269 may loan more than 20 per cent. of the paid-in capital and surplus of such bank to any one person, firm or corporation, provided such loan is made upon securities mentioned in said act.

October 1st, 1908.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your inquiry, upon which you request the official opinion of this department. Such inquiry is as follows:

Are commercial banks permitted to loan more than 20 per cent. of their capital and surplus to any one person, firm or corporation?

The act of the general assembly of this state, passed and approved May 5th, 1908, 99 O. L. 269, provided in section 47 thereof as follows:

> "Any bank doing business as a commercial bank shall not lend, including overdrafts, to any one person, firm or corporation, more than twenty per cent. of its paid in capital and surplus, unless such loan be secured by first mortgage upon improved farm property in a sum not to exceed sixty per cent. of the value of such property. The total liabilities including overdrafts, of any person, company, corporation or firm to any bank, either as principal debtor or as security or indorser for others, for money borrowed, shall at no time exceed twenty per cent. of the paid in capital stock and surplus of such bank. But the discount of bills of exchange drawn against actually existing values, and the discount of commercial or business paper actually owned by the person, company, corporation or firm negoitating the same, shall not be considered as money borrowed."

And it further provides, in section 64 thereof, as follows:

> "Not more than twenty per cent. of the capital and surplus of any corporation doing business under this act shall be invested in any one stock, security or loan, unless it be in bonds or other interest-bearing obligations enumerated in paragraphs b, c and d of section 50 of this act, or in a building and vaults."

It plainly appears that these sections are not consistent with the view that it was the intention of the general assembly to deny to commercial banks the power to loan to any one person, firm or corporation more than 20 per cent. of its paid-in capital and surplus. Such is the declaration in the first sentence of section 41. Then follows an exception to this provision providing that "unless such loan be secured by first mortgage upon improved farm property," etc. This is immediately followed by language expressing the contrary of such construction, as follows:

> "The total liabilities, including overdrafts, of any person, company, corporation or firm, to any bank, either as principal debtor or as security or indorser for others, for money borrowed shall at no time exceed twenty per cent. of the paid-in capital stock and surplus of such bank."

The language in section 64 should also be read as stating an exception to the rule that not more than twenty per cent. of the capital and surplus of any corporation doing business under such act shall be invested in any one stock security or loan. The exception is "unless it be in bonds or other interest-bearing obligations enumerated in paragraphs b, c and d of section 50 of this act, or in a building or vaults."

Turning to section 50, which discusses the character of interest-bearing obligations in which commercial banks have power to invest their capital, surplus *and deposits*, they are given as bonds or other interest-bearing obligations of the United States, bonds or other interest-bearing obligations of any foreign government, bonds or other interest-bearing obligations of this or any other

state of the United States, the legally issued bonds or interest-bearing obligations of any city, village, hamlet, county, township, school district or other district or political sub-division of this or any other state or territory of the United States and of Canada.

These exceptions must be accepted as qualifications of the rule that a commercial bank shall not loan more than twenty per cent. of its *capital and surplus* to any one person, firm or corporation. There is, therefore, no limitation imposed upon the power of such banks as to the amount they may loan to any one person, firm or corporation, of their capital and surplus, provided the security given is of the character mentioned in section 47 and in section 50.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BANKS AND BANKING—BANK ORGANIZED UNDER FREE BANKING ACT MAY NOT ASSUME TRUST POWERS.

October 6th, 1908.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Replying to your inquiry of the 30th ult., requesting an opinion upon the question as to whether the North Side Bank of Cincinnati, Ohio, can become a trustee and hold a deed of trust to secure bonds issued by a private corporation in Ohio, I beg to advise that from information contained in your letter, such bank seems to have been organized under the free banking act of 1851, and as such it cannot assume the powers of a safe deposit and trust company as defined by section 3821*a* and related sections of the Revised Statutes. The power contended for is a power which can only be performed by a safe deposit and trust company if organized under the old act, and can be assumed only in the manner provided by the act relating to the organization of banks and the inspection thereof, passed by the general assembly of the state of Ohio May 5th, 1908. As such bank has never assumed such powers, the question must be resolved against it exercising the same.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

SAFE DEPOSIT AND TRUST COMPANY—PENALTY FOR VIOLATION OF SECTION 3281*a* REVISED STATUTES.

October 6th, 1908.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—Replying to your inquiry of the 1st inst., requesting an opinion as to whether there is a criminal penalty for violation of section 3821*a* of the Revised Statutes of Ohio, I beg to advise that as said act was enacted after the savings and loan association act, the penalties prescribed in connection therewith do not seem to be applicable to the safe deposit and trust companies. They are not made specially applicable by that act.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BANK MAY NOT ACT AS AGENT FOR INSURANCE COMPANY.

November 6th, 1908.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—I am in receipt of yours of the 30th ult., presenting the following question for this department to answer:

> "Can a banking and trust company, organized under the laws of Ohio, either under the old or the present law, act as agent for insurance companies?"

The new banking law, entitled "An act relating to the organization of banks and inspection thereof" (99 O. L. 269), does not specifically authorize any form of banking company to act as agent for insurance companies. Such power is not included in section 3821*a* R. S., which contains the power of trust companies, and is plainly negatived by sections 3596 and 3656 of the Revised Statutes. I am therefore of the opinion that such corporations do not possess the power of acting as agents for insurance companies.

Very truly yours,

U. G. DENMAN,
Attorney General.

BANKS AND BANKING—STOCKHOLDERS—CUMULATIVE VOTING.

Stockholders of bank organized under law of 1908 *may vote cumulatively.*

November 18th, 1908.

HON. B. B. SEYMOUR, *Superintendent of Banks, Columbus, Ohio.*

DEAR SIR:—You have requested of this department an opinion as to whether a law applying to corporations generally, towit: section 3245 R. S., providing for cumulative voting, may be permitted in banking corporations organized under the Thomas act That section provides that:

> "Every 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 said shares and give one candidate as many votes as the number of directors, multiplied by the number of his shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit."

This section of the Revised Statutes, before the amendment thereto of 1898, did not confer upon stockholders the right of cumulative voting, but, under the present law, it is made applicable to all domestic corporations for profit, where the same is not especially denied by any of the provisions of the chapters governing specific forms of corporations.

Section 3269 R. S. reads as follows:

> "The provisions of this chapter (meaning chapter 1 of title II, Corporations) do not apply when special provision is made in the subsequent chapters of this title, but the special provision shall govern, unless it

clearly appear that the provisions are cumulative; but no corporation shall, by anything in this title, be relieved from any liability in actions now pending or causes of action heretofore accrued."

Section 3245 R. S. is contained in the chapter referred to, and therefore the provisions thereof apply to incorporated banks, unless some special provision is made in the so-called Thomas act nullifying such other provision. As no such special provision is incorporated therein it is permissive to use the provisions of section 3245 R. S. with reference to cumulative voting, in connection with banking corporations.

Very truly yours,

U. G. DENMAN,
Attorney General.

ROADS AND HIGHWAYS — STATE AID FOR REPAIR — TRANSFER TO COUNTY PIKE REPAIR FUND EQUIVALENT TO LEVY FOR SUCH FUND.

May 19th, 1908.

HON. JAMES C. WONDERS, *Commissioner State Highway Department, Columbus, Ohio.*

DEAR SIR:—Your communication of May 15th is received, in which you submit the following inquiry:

Paulding county, in its application for state aid for pike repair, certified a levy of $3,000. Recently $2,000 additional has been transferred to the pike repair fund from other funds. Does this come within the meaning of section 31 of the Boehmar bill, and should this department send Paulding county its voucher for $5,000?

In reply I beg to say that section 31 of the Boehmar bill requires that a county shall levy an amount for pike repairs equal to the county's pro rata share of the state appropriation. In my judgment the transfer of the additional $2,000 to the pike repair fund takes the place of an additional levy. By such transfer Paulding county has $5,000 provided for pike repair funds and is entitled to the full appropriation of $5,000.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

STATE HIGHWAY COMMISSIONER MAY CONTRACT FOR PART OF IMPROVEMENT PETITIONED FOR.

June 5th, 1908.

HON. JAMES C. WONDERS, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your communication of June 2nd is received, in which you submit the following inquiry:

Where the estimated cost of a road petitioned to be improved by state aid exceeds the amount of money available for that purpose, can

a part of the road coming within the amount available be contracted for, or could all the grading be contracted and such amount of surfacing contracted for as the remaining money would cover?

In reply I beg to say there is no provision in the statutes governing your department that prevents you from making the contract suggested.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OILS—STATE INSPECTOR OF—DISPOSITION OF INSPECTION FEE EARNED UNDER ONE INCUMBENT AND PAYABLE DURING HIS SUCCESSOR'S TERM.

June 4th, 1908.

HON. W. H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—There is submitted in your communication of the 4th inst., a question as to the authority of your predecessor in office to collect the fees for inspection of oils made during the month of May, 1908.

I am informed by your letter that you received your commission and were sworn in and filed your bond as inspector of oils on the 16th day of May, 1908. Since that time you have been, under the provisions of the act of April 30th, 1908 (house bill No. 1275), the only legally qualified state inspector of oils, and since that time have been the only one acting in such capacity authorized to demand and receive unpaid fees for inspection, whether made under that act or under the law as contained in old sections 394, 395 and 396 of the Revised Statutes.

Section 7 of the act in question contains this provision:

> "All fees for inspection under this act shall be due and payable on formal demand of the state inspector of oils, and in no case shall payment be deferred beyond the tenth day of the next calendar month after such inspections are made."

The duties of the deputy inspectors are contained in part in section 8 of that act, as follows:

> "Each deputy inspector shall make, on the first day of each calendar month, a true and accurate return to the state inspector of oils, of such inspections for the preceding month, giving the quantity inspected, the date of the inspection, the name of the person for whom it was inspected, and shall file a duplicate copy of such return at the same time with the auditor of state."

It follows from the foregoing that the company for whom inspections have been made, whether made by you or your predecessor, has, since the enactment of the law in question, to the tenth day of the next calendar month to pay such fees, and that would be to the 10th day of June, 1908. From and after the 16th day of May your predecessor was not entitled to receive such fees and you have been since that time entitled to demand and receive the same.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OIL—INSPECTION OF.

Authority of state inspector of oils to employ office attaches out of inspection fees.

Necessity for inspection of oil depends upon changes in its condition of refinement, and not upon changes in ownership.

All oils must be inspected. Oil not intended for illuminating purposes must be inspected.

July 16th, 1908.

HON. WILLIAM H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—Your several communications of recent date are received, in which you submit the following inquiries:

First: May the oil inspector employ other persons to assist in the proper conduct of his office than those designated in sections 3 and 5 of the act entitled "An act to provide for the inspection of oils, gasoline and naphtha," passed by the last general assembly, and pay said employes out of the moneys derived from the inspection fees, as provided in said act?

Second: The Solar Refining Company sells its entire production of oil to the Standard Oil Company, and the Standard Oil Company pays the inspection fees. The Standard Oil Company afterwards sells said oil to independent or jobbing concerns. Said independent or jobbing concerns re-sell said oil to consumers.

Query: Should there be but one inspection of said oil or should there be an inspection in the hands of each owner?

Third: The Standard Oil Company sells a great amount of oil to the Factory Oil Company of Akron and pays the inspection fees on the same. The Factory Oil Company then proceeds to make alterations in said oil and sells it as its own refined product.

Query: Should said oil be subject to an additional inspection after having been further refined or changed by said Factory Oil Company?

Fourth: Shall refined oil used in the manufacture of paint, soap, etc., and having a lower fire test than is required for illuminating purposes, be exempt from inspection?

Fifth: Should the inspection of oils, as provided for in the oil inspection laws, be made at the refineries before shipment, or at destination?

In reply thereto I beg to say:

1st. Section 9 of the act regulating the inspection of oils provides as follows:

> "The state inspector of oils shall pay into the state treasury quarterly, all moneys received by him under this act after first paying therefrom all money due him or said deputy inspectors and *all expenses incident to the proper conduct of his office under the provisions of this act to that date.*"

In my opinion, the state oil inspector may, under the above provision, employ such persons in addition to the appointment of a stenographer and deputy inspectors, as provided in sections 3 and 5 of the act, as are necessary in the discharge of his official duties and the proper conduct of his office, and pay such employes out of the funds derived from inspection fees. The state inspec-

tor, however, is not authorized, in my judgment, to appoint an assistant state inspector and delegate to him the authority to perform any of the official acts enjoined by law upon the state inspector of oils.

2nd. Section 12 of the act provides:

> "Any oil intended for sale for illuminating purposes within this state, as defined herein, shall be inspected within the state, and, when consigned to a distributing station in tank cars, shall be inspected, as provided herein, at the refinery where manufactured, when such refinery is located within this state or at the distributing station to which it is consigned, at the discretion and direction of the state inspector."

It is evident from this provision that but one inspection of oil is required when said oil is refined and ready for sale, and the law leaves it to the discretion and direction of the state inspector of oils whether said oils shall be inspected at the refinery or the distributing station to which it is consigned. It is not, in my judgment, material as to whether or not oil is sold directly to the consumer from the refinery or passes through the hands of jobbers and retail dealers, so far as the inspection is concerned. With a due regard to the protection of the consumers, as contemplated by the inspection laws, the state inspector will determine the time and place of the inspection of all oil in its transmission through the hands of jobbers and dealers from the refinery to the consumer.

3rd. In my judgment, all inspected oils which undergo a further process of refining or alteration are subject to another inspection before being sold or offered for sale, otherwise the intent of the law would not be carried out. The purpose of the law is that the oil, when it reaches the consumer, shall be in like condition and quality as when tested by the inspector.

4th. Section 13 of the act is as follows:

> "All gasoline, petroleum ether, or similar or like substance having a lower flash test than provided herein for illuminating oils, *under whatever name called*, whether manufactured within this state or not, *shall be inspected by the state inspector of oils or his deputies, etc.*"

Under this provision it is immaterial whether the oil is to be used for illumination or in the manufacture of paint, soap or any other purpose; if offered for sale or sold within this state, it must be inspected as herein provided.

5th. As stated above, it is in the discretion of the state oil inspector as to whether inspections shall be made at the refineries before shipment or at destination.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OILS—INSPECTION OF.

Deputy inspector of oils may not exact inspection fees for inspections not actually made.

July 17th, 1908.

HON. WILLIAM H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—Your communication of July 11th is received, in which you submit the following inquiry:

A dealer, in ignorance of the law, has been selling oil without having said oil first inspected. Query: Has the deputy inspector a right to demand inspection fees of such dealer on oil previously sold, which had not been inspected?

In reply thereto, I beg to say section 6 of the inspection law passed by the last legislature contains the following provision:

> "Each deputy inspector shall receive for such inspection as he may be called upon to make under the provisions of this act, a fee of three cents for each and every barrel of oil of fifty gallons which he shall so inspect, payable out of the fees collected as provided in section 7 hereof, and not otherwise."

And section 7 also provides:

> "Each and every owner of oil which is inspected shall pay the state inspector or deputy inspector *who inspected the same*, fees thereon as follows: The sum of 50 cents for a single barrel, package or cask when the lot inspected does not exceed 10 barrels of 50 gallons each in the aggregate; the sum of 20 cents each when the lot inspected does not exceed 50 barrels of 50 gallons each in the aggregate, and the sum of 7 cents each for all lots exceeding 50 barrels of 50 gallons each in the aggregate, and all fees accruing shall be a lien on the oils so inspected."

Under the above provisions contained in sections 6 and 7, I am clearly of the opinion that no inspection fees can be charged or collected until after inspection is actually made. The dealer in this instance may be liable under the penal section of the inspection laws for his failure to have said oil inspected before sale, but no obligation exists for the payment of inspection fees when no inspection was made. The inspection law is not a revenue measure, but a police regulation, and it is only incidental to such regulation that revenue is derived for the benefit of the state.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OILS—INSPECTION OF—JURISDICTION.

Deputy state inspectors of oils may not make inspections outside of state.

July 17th, 1908.

HON. WILLIAM H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—Your communication is received, in which you request an opinion as to the application of the inspection laws to the following statement of facts:

At various points along the Ohio river, in West Virginia and Pennsylvania, shipments of oil, gasoline, etc., are made into Ohio in barrels. The practice heretofore has been to have the Ohio deputy inspector go to the barreling station without the state and inspect the refined product there and report it as being

inspected in Ohio. Query: Is said practice in compliance with the provision of the act for the inspection of oils, gasoline and naphtha, as passed by the last legislature?

In reply I beg to say section 12 of said act provides as follows:

> "Any oil intended for sale for illuminating purposes within this state, as defined herein, *shall be inspected within this state*, and, when consigned to a distributing station in tank cars, shall be inspected as provided herein, etc."

The above provision expressly requires that all oils intended for sale within this state shall be inspected within the state. Certainly it is not intended that Ohio inspectors of oil shall have authority to make inspections without the state. The jurisdiction of the Ohio oil inspector and his deputies is confined within the limits of the state. All oils, gasoline and other products of petroleum inspected at points within the states of West Virginia and Pennsylvania will be inspected under the inspection laws of said states, and if shipped to Ohio for the purpose of being sold or offered for sale, it then becomes the duty of the Ohio oil inspector to inspect such oils, gasoline, etc., in accordance with the provisions of the inspection laws of this state.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OILS—INSPECTION OF.

Naphtha used in manufacturing must be inspected.

July 17th, 1908.

HON. WILLIAM H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—Your communication of July 13th is received, in which you enclose the correspondence between your department and Messrs. Allen, Waters, Young & Andress of Akron, Ohio.

From an examination of the communications enclosed, I understand that the Standard Oil Cloth Company had purchased a tank car of naphtha, to be used by said company for cleaning machinery and in the manufacture of oil cloth; that said tank car of naphtha was inspected by your deputy inspector and that the Standard Oil Cloth company now refuses to pay the fees for inspecting the same. You inquire whether or not said tank car of naphtha was required by the inspection laws to be inspected and whether or not the inspection fees therefor should be collected.

In reply I beg to say that section 13 of the act entitled "An act to provide for the inspection of oils, gasoline and naphtha," as passed by the last general assembly, provides as follows:

> "All gasoline, petroleum-ether or similar or like substances having a lower flash test than provided herein for illuminating oils, *under whatever name called, whether manufactured within this state or not, shall be inspected* by the state inspector of oils or his deputies."

In my judgment, this provision is decisive of the inquiry. It is not material whether the purchaser of naphtha intends to use it for illumination or for

cleaning machinery or for any other purpose. The law provides that it shall be inspected and if found to be of a lower flash test than provided for illuminating oils, the same shall be marked "dangerous." It may be that the Standard Oil Cloth Company, being the vendee, is not liable for the inspection fees and that the same should be collected from the vendor.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OILS—INSPECTION OF—"BENZOL."

September 15th, 1908.

HON. WILLIAM H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 10th, enclosing a communication from the Miller Rubber Company of Akron, Ohio, in which the claim is made that a coal tar product known as benzol is not subject to inspection under the law providing for the organization of your department.

Upon consideration of section 13 of said act (99 O. L. 513), I am of the opinion that all substances of a volatile nature similar to that of gasoline and petroleum-ether, are subject to the provisions thereof. If, as a matter of fact, the product known as benzol is so characterized, it should be inspected regardless of the kind of raw material from which it is manufactured.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OILS—INSPECTION OF—FEES.

In fixing rate of inspection fee under act in 99 O. L. 513, oil inspected under section 7 thereof should be counted as a shipment separate from gasoline, etc., inspected under section 13, although both are shipped together.

September 15th, 1908.

HON. WILLIAM H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of September 10th, in which you ask the following question:

What rate shall be charged for the inspection of a shipment consisting of thirty-five barrels of gasoline and thirty barrels of oil?

My attention is called to the fact that section 7 of the act for the inspection of oil, gasoline and naphtha (99 O. L. 513), provides that for "oil which is inspected," the sum of 20 cents per barrel, when the lot inspected does not exceed 50 barrels, may be charged. I note that section 13, which provides for the inspection of gasoline, authorizes the state inspector to charge fees for such inspection "in a sum equal to those provided for in section 7 of this act."

Upon consideration of these two sections, I am of the opinion that the inspection of gasoline is separate from that of oil, and that the fees on the two portions of the shipment should be separately computed. All barrels inspected

under section 13, whether of gasoline, petroleum-ether or both, should be counted as one lot, and those inspected under section 7 should be counted as another lot. The rate, therefore, should be twenty cents in the case submitted by you.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

OIL—INSPECTION OF—FEES.

"Lot," as used in oil inspection law, 99 O. L. 513, means consignment, and is determined by contract between consignor and consignee, unless consisting partly of oil and partly of gasoline or other like substance.

November 30th, 1908.

HON W. H. PHIPPS, *State Inspector of Oils, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter of November 27th, 1908, enclosing a communication addressed to you by Henderson, Livesay & Burr, inquiring further as to the construction of sections 7 and 13 of the act for the inspection of oil, gasoline and naphtha (99 O. L. 513). The point at issue between your department and the gentlemen making the inquiry is as to the definition of the term "lot" as used in section 7. In the opinion of my predecessor, rendered to you on September 16th, 1908, concerning the same sections, it was held that where a single shipment consists partly of oil to be inspected under section 7, and partly of gasoline or other like substance to be inspected under section 13, the shipment should be considered as consisting of two separate lots. Your specific inquiry is as to what shall be the rule for fixing the charge in case a car contains barrels carrying different grades of oil.

In my opinion, the word "lot" as used in section 7, should be construed to mean "shipment." A shipment should be defined as being a consignment to an individual, firm or corporation. No other definition of the term in question would obviate the possibility of arbitrary action. Therefore, a car containing barrels of oil, whether the same is divided into compartments or not, contains as many "lots" as there are consignments.

If a refiner or producer consigns ten barrels of oil to "A," and these barrels are of different grades, nevertheless these ten barrels should be considered as one "lot" under section 7. But if in the same car, or in the same compartment, are five barrels consigned to "A," and five barrels consigned to "B," containing the same or different grades of oil, your department should consider them as two lots. I cannot concur in your view that the grade should determine the lot, for the reason that the grade is determined by the inspection itself. Neither do I accept the view of counsel that all oil in a single car should be treated as one lot. But I am satisfied that the above test, to-wit: that founded upon the question of the consignment, should be final. Of course, if different grades of oil are separately consigned to the same consignee they should be considered as separate lots. A "lot," in other words, is to be determined by the contract between the refiner and the consignee as evidenced by the bill of lading, and cannot be otherwise fixed by the carrier or by your department.

It should be noted, however, that a single consignment which consists partly of oil and partly of gasoline, petroleum-ether or other like substance, should be considered as two lots instead of one.

Very truly yours,

U. G. DENMAN,
Attorney General.

WEIGHTS AND MEASURES—IRISH POTATOES.

In the absence of special agreement, Irish potatoes must be sold by weight and a bushel thereof must weigh sixty pounds. Fraud must be shown in prosecution under section 1061 *R. S.*

December 17th, 1908.

PROF. B. F. THOMAS, *Ex-Officio State Sealer of Weights and Measures, Ohio State University, Columbus, Ohio.*

DEAR SIR:—In your letter of December 11th you present the following question:

> "A bought one peck of potatoes from B, standard measure, as provided in section 4439 R. S. A has said potatoes put on scales, as prescribed in section 4443, and weight was 13 1-2 lbs. A then has B arrested for short weight, and B makes his defense that his measure was a standard measure and evidence showed seal placed there by a sealer of weights and measures previously employed by the city. Has B committed any crime?"

Section 4439 R. S. provides that:

> "The unit or standard measure of capacity for substances not being liquids, from which all other measures of such substances shall be derived and ascertained, shall be the standard half-bushel furnished this state by the government of the United States, the interior diameter of which is thirteen inches and thirty-nine fortieths of an inch, and the depth is seven inches and one-twenty-fourth of an inch."

Section 4443 R. S. provides that:

> "A bushel of the respective articles hereinafter mentioned shall mean the amount of weight, avoirdupois, in this section specified, viz.: * * * of Irish potatoes, sixty pounds; * * * ."

Since the provisions of section 4443 are special, while those of 4439 are general, according to the rules of statutory construction the provisions of section 4443 should prevail in cases where the purchaser has not stipulated whether the bushel involved is to be ascertained by measure of capacity or by the amount of weight. Where, therefore, A orders a given number of bushels of Irish potatoes from B without knowing or stipulating the kind of measure, he is entitled to bushels of sixty pounds each.

I find upon an examination of the history of section 4443 that the earlier forms of this statute as found in 56 O. L. 171, 60 O. L. 21, 70 O. L. 39 and 74 O. L. 33, used the following language:

> "Whenever the following articles are (hereafter) sold and no special agreement as to the measure is made by the contracting parties, the bushel shall consist of the following weights: * * * of Irish potatoes, sixty pounds * * * ."

While this provision is not contained in the several amendments of section

4443, subsequent to the act of 74 O. L. 33, it should be taken into consideration in enforcing section 1061 R. S., under which I understand the prosecution in the case you cite is being brought.

Since, in the facts presented by you, the purchaser knew that the potatoes he was buying were being measured by the legal standard measure provided for in section 4439 R. S., and since there was, therefore, no evidence of fraud in this case, I am of the opinion that B has committed no crime under the provisions of section 1061 R. S.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

SCHOOL BUILDINGS—FIRE PROTECTION.

Means by which boards of education may raise money for the purpose of complying with orders of chief inspector of workshops and factories as to improvement of buildings for protection from fire.

Duties of local authorities as to compliance with such order; remedies for failure or refusal to act.

August 14th, 1908.

HON. JOHN H. MORGAN, *Chief Inspector of Workshops and Factories, Columbus, Ohio.*

DEAR SIR:—You ask this department to explain the various ways set out in the statutes for raising funds with which unsafe school buildings may be repaired, as required by your order under sections 2572 ((1536-312)) and 2572*a* ((1536-313)), Revised Statutes. You also ask what means you have of enforcing your orders under such sections.

Section 2572 R. S. provides:

> "Whoever, being the owner, or having control as an officer, agent or otherwise, of any opera house, hall, theater, church, schoolhouse, college, academy, seminary, infirmary, sanitarium, children's home, hospital, medical institute, asylum, or other building used for the assemblage or betterment of people, in a municipal corporation, county or township, in the state of Ohio, permits it to be used when any door affording exit therefrom is locked or barred, or opens inwardly; when the place is not provided with ample means for the safe and speedy egress of the persons who may be there assembled; when sufficient water and proper means to apply it, or other efficient means are not provided on each floor to extinguish any fire which may occur therein; or when the certificate provided for in section twenty-five hundred and sixty-nine or section twenty-five hundred and seventy, which certificate shall also apply to buildings mentioned in section twenty-five hundred and seventy-two, as the case may be, has not beeen issued, or is not in full force, shall be deemed guilty of a misdemeanor, and on conviction thereof before any court of competent jurisdiction shall be fined not more than five hundred (500) dollars, nor less than fifty (50) dollars, and ten (10) dollars additional for each day or night such building is permitted to be used after such conviction is had and until such

changes, alterations or additions have been made sufficient to warrant the issuing of certificate by the chief inspector of workshops and factories; and such fines and costs shall be recovered in the name and for the use of the municipal corporation, if such building is located within the corporate limits; if not, then for the use of the county in which located and suit is brought; and it shall be the duty of the mayor, with the aid of the police, or the prosecuting attorney, with the aid of the sheriff, if such building is not located within a municipal corporation, to see that the provisions of this act are strictly enforced."

Section 2572a R. S. provides that:

"Wherever any structure referred to in section 2572 shall have been inspected by the state inspector of workshops and factories, * * * in case such inspector shall find on inspection that such structure is not properly arranged for the safe and speedy egress of persons who may be there assembled, or not properly provided with means for the extinguishment of fire at or in such structure, as now required by law, or that such structure is such as to endanger the lives of the persons who may be there assembled, from fire or other cause, he shall notify the owner, officer or agent in charge of such structure, and the mayor of the municipal corporation, if such structure is located therein, if not, then the prosecuting attorney of the county wherein the same is located, in writing, of the fact that he refuses such certificate, specifying his reasons and the alterations, additions and appliances necessary to be made and furnished before a certificate will be issued; and no certificate required by law, in regard to the safety of such structure, shall be issued by the mayor or any officer or person under any provision of the law till the requirements of the foregoing notice are complied with to the satisfaction of the state inspector, and it shall be the duty of the mayor of any municipality, with the aid of the police, or the prosecuting attorney, with the aid of the sheriff, upon receiving such notification, to prohibit the use of such buildings for the assemblage of people until the necessary changes, alterations and additions have beeen made and the inspector's certificate has been issued."

1. Section 3958 R. S. provides that boards of education shall annually, between the third Monday in April and and the first Monday in June, fix the rate of taxation for all school purposes for the following year, providing a separate levy for each of four funds therein named. Under section 3960 R. S. the amount of said levy is to be certified, in writing, to the county auditor, on or before the first Monday in June.

Section 3959 R. S. provides that the maximum levy shall not exceed 12 mills, but permits an additional levy of not more than five mills a year for a period not exceeding five years, provided that such additional levy has been approved by a majority vote of the electors of the school district.

Section 3994 R. S. authorizes the board of education of any school district to issue bonds to the amount of a two-mill tax upon the property of the district to "improve public school property."

Sections 3991 and 3992 R. S. authorize the issue of bonds "to complete a partially built schoolhouse, to enlarge, repair or furnish a schoolhouse," etc., after a majority vote of the electors of the district upon the submission of the proposition to them by the board of education.

While it seems that the extra five-mill levy of section 3959 R. S. is to be certified to the county auditor, at the same time as the annual levy, the board of education may issue bonds under sections 3991, 3992 and 3994 R. S. at any time during the year.

If, in the judgment of the county commissioners, a board of education has failed to perform any one of its duties, the county commissioners may perform the same under the following provisions of section 3969 R. S. as contained in the act approved March 31st, 1908:

> "If the board of education in any district fail in any year to estimate and certify the levy for a contingent fund, as required by this chapter, or if the amount so certified is deemed insufficient for school purposes, or if it fail to provide sufficient school privileges for all the youth of school age in the district, or to provide for the continuance of any school in the district for at least thirty-two weeks in the year, or to provide for each school an equitable share of school advantages, as required by this title, or to provide suitable schoolhouses for all the schools under its control, or to elect a superintendent or teachers, or to pay their salaries, or to pay out any other school money needed in school administration, or to fill any vacancies in the board within the period of thirty days after such vacancies occur, the commissioners of the county to which such district belongs, upon being advised and satisfied thereof, shall do and perform any or all of said duties and acts, in as full a manner as the board of education is by this title authorized to do and perform the same; and all salaries and other money so paid by the commissioners of the county shall be paid out of the county treasury as other county expenses are paid, but the same shall be a charge against the school district for which said money was paid, and 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; and the members of a board who cause such failure shall be each severally liable, in a penalty not to exceed fifty nor less than twenty-five dollars, to be recovered in a civil action in the name of the state upon complaint of any elector of the district, which sum shall be collected by the prosecuting attorney of the county, and when collected shall be paid into the treasury of the county, for the benefit of the school or schools of the district."

In the history of this section of the statutes the word "contingent," as used in this section, has always included all four of the funds named in section 3958 R. S. By reason of this fact, and under the broad and general powers conferred by section 3969 R. S., the county commissioners may increase the levy for any or all of the four funds named in section 3958 R. S., and may increase the total levy to the 12-mill maximum of section 3959 R. S. They may also call an election under section 3959 R. S. for a vote upon the proposition of an additional levy of not exceeding five mills. A levy fixed by the county commissioners is to be certified to the county auditor under section 3960 R. S. on or before the first Monday in August. I believe, however, that the time provision for certifying levies under section 3960 R. S. is directory and not mandatory, and that the county commissioners may report an increased levy to the county auditor after the first Monday in August, provided that the county auditor be given a reasonable time in which to prepare his annual duplicate and deliver the same to the county treasurer, as provided by law. (See Lewis' Sutherland on Statutory Construction, sections 612, 613.)

The county commissioners also have the power to interfere in case the board of education fails to act under sections 3991, 3992 and 3994 R. S.

2. Upon receiving notice from the state inspector of workshops and factories, under sections 2572 and 2572*a* R. S., that any of its school buildings are unsafe, it is the duty of the board of education to exhaust its legal powers, if necessary, in order to effect the changes and alterations or additions ordered by such inspector. It is the duty of the board not only to provide a maximum levy, if necessary, under section 3959 R. S., and to issue bonds under section 3994 R. S., but also to submit the proposition for a greater levy under section 3959 R. S. and the proposition for the issue of bonds under section 3991 and section 3993 R. S. to a vote of the people.

It is the duty of the "mayor of any municipality, with the aid of the police, or the prosecuting attorney, with the aid of the sheriff," to prohibit the use of such buildings until the changes ordered have been made and the inspector's certificate has been issued, and such officers are responsible for the faithful performance of such duties. Should the board of education attempt to use such buildings, after notice from the inspector, and without making the changes ordered and receiving the inspector's certificate, it may be enjoined from such use and be made liable to the penalties provided in section 2572 R. S.

Should any schools be closed, as above stated, by reason of any failure on the part of the board of education to make sufficient levies, to issue bonds, to submit the proposition of an increased levy or a bond issue to a vote of the electors, or to use unexpended money in its building or contingent funds, it is the duty of the county commissioners to perform any or all of such duties or acts, and in case the county commissioners take such action each member of the board of education is liable to the penalty provided in section 3969 R. S.

The powers conferred upon the chief inspector of workshops and factories by sections 2572 and 2572*a* R. S. have been amplified by the act approved April 28th, 1908, entitled: "An act to enlarge the powers of the chief inspector of workshops and factories in the matter of public schools and other buildings, and to increase the number of district inspectors." (99 O. L. 232.) Section 9 of this act provides:

> "Any person, firm, board or corporation, being the owner or in control of any building mentioned in this act, who shall use or permit the use of such building, in violation of any order prohibiting its use, issued in accordance with this act, or who shall fail to comply with the requirements of any order so issued relating to the change, improvement or repair of such building, shall be fined not less than ten, nor more than one hundred dollars, and each day that such use or failure shall continue, shall constitute a separate offense."

Wherever provisions of this latter act specifically cover exactly the same subject matter contained in parts of sections 2572 and 2572*a* R. S. the provisions of the latter act will govern in those particulars, although the latter act does not repeal such sections of the statutes.

Since so many means have been provided by law for raising funds for school purposes, there can be but little or no excuse for the failure of a school district to properly safeguard its schools for the protection of its children, and a board of education or a school district can hardly complain of the closing of its schools, or the infliction of the above penalties where the board has been derelict in its duties under the law, or the electors of such district have refused to vote for a levy or a bond issue necessary to the safety of its schools.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

(To Various State Boards)

ACCOUNTANCY—STATE BOARD OF—POWERS AND FEES.

"The practice of accounting" defined.
Fees chargeable under sections 5 and 6 of the act creating the state board of accountancy.
Powers of board as to recognition of certificates issued in other jurisdictions.

July 31st, 1908.

State Board of Accountancy, Columbus, Ohio.

GENTLEMEN:—I desire to acknowledge the receipt of your letter, in which you ask for the construction of certain parts of the "Public Accountancy" act, passed May 9th, 1908.

You submit the following questions. In the consideration of section 1 of said act you inquire:

1. What constitutes the "practice of accounting?"
2. Is an accountant's assistant or clerk "in practice?"
3. Can an officer or employe of a corporation be "in practice?"

In the consideration of section 4 of said act you inquire:

1. "Is the board authorized to charge the same fee for certificates issued under 'waiver clauses,' sections 5 and 6 of the act?"
2. "If the board is authorized to make such charge for certificates issued under sections 5 and 6, and requires that payment of fee of twenty-five dollars be made at time of filing application, is it authorized to return such fee in case the applicant is, in the opinion of the board, clearly ineligible under either of said sections?"

In the consideration of section 5 your board has adopted as a definition of the term "public accountant" the following:

"A public accountant is a person skilled in the affairs of commerce and finance, and particularly in the accounts relating thereto, who places his services at the disposal of the community for remuneration and maintains an office for the transaction of such business; whose time, during the ordinary hours of business, is not entirely under the control of any one individual, firm or corporation."

You inquire:

1. "Is the board authorized to adopt such definition as that quoted above?"
2. "Can an accountant's assistant or clerk (on a salary) be considered as being 'a public accountant' or 'practicing the profession of public accounting,' or can any person be considered as a public accountant who is not actively engaged as such, either on his own individual account or as a member of a firm?"

3. "Is the board authorized to receive and consider applications from, and issue certificates to persons who, while otherwise qualified, do not maintain either an office or residence within the state of Ohio?"

4. "Is it necessary that the applicant shall have been engaged continuously in the practice of accounting for at least three years immediately preceding the time of filing such application?"

In the consideration of section 6 you furnish a list of states having similar laws and you submit a list of incorporated accountant organizations empowered by the British empire to confer the degree of "chartered accountant" (C. A.), such title being "substantially equivalent" to that of certified public accountant in the United States.

You inquire:

1. "Is the state board of accountancy authorized under section 6 of the Ohio law to recognize the British degree of 'C. A.' as equivalent to the American degree of 'C. P. A." even though the Ohio law does not specifically refer to the degree of 'C. A.,' but does refer to degree issued 'by or under the authority of a foreign nation?' "

2. "Is the board authorized to adopt as a part of its rules and regulations, a clause providing that Ohio certificates will only be issued to certified public accountants of other states (or the equivalent in foreign countries) in the event that such state (or foreign country) accords similar privileges to the holders of certificates issued by the Ohio board?"

3. "Is the board authorized to adopt reasonable regulations in respect to the issue of Ohio C. P. A. certificates to the holder of certificate as chartered accountant (the British degrees), providing that the applicant shall have been in individual practice in the United States for, say, one to three years, and providing, also, that the British subject having declared his intention of becoming an American citizen, shall show such declaration is bona fide; that he intends to carry out such declaration within a reasonable time, or as soon as permitted by law?"

In reply to your communication, I beg to state that in the construction of section 1 it is my opinion:

1. A person is "in the practice of accounting" when he is engaged in the profession of keeping and examining accounts.

2. Whether an accountant's assistant or clerk is engaged in the business of the "practice of accounting" is a question of fact to be determined by the consideration of his duties. If his duties pertain to the keeping and examination of accounts and he devotes his time, while employed, to that business and not to some other work as an assistant or clerk (such as writing or filing letters), then he is engaged "in the practice of accounting," and when so engaged for a period of three years is entitled to take the examination.

3. An officer or employe of a corporation may be engaged in the "practice of accounting" if his duties pertain to that business; that is, if it is his duty to keep and examine the accounts of the firm or corporation by which he is employed.

In the construction of section 4 it is my opinion:

1. That the board is authorized to charge the same fee for certificates issued under sections 5 and 6 as under section 4.

2. The board is not authorized to return the fee if the applicant is not eligible under sections 5 and 6.

In the construction of section 5 it is my opinion:

1. The definition adopted by the board is, in my judgment too restrictive. A person skilled in accounting, who is engaged in the business of examining and auditing the accounts of the general public, who applies his skill to the affairs of the community and to the books of any person, firm or corporation that may submit the same for accounting, is "practicing the profession of public accounting." He may or may not work for an accounting firm or be a member thereof.

2. Whether or not an accountant's assistant or clerk is "practicing the profession of public accounting" in accordance with this construction must be determined from the proofs presented.

3. The board is authorized to receive and consider all applications and issue certificates to all persons who are qualified under the act, whether or not they maintain an office or residence within the state of Ohio.

4. Section 5 requires that the applicant shall have practiced the profession of public accounting for at least three years prior to the filing of the application, but said section does not specifically require that this term of practice shall immediately precede the date of the filing of the application. I am therefore of the opinion that the provisions of this section are met if the applicant shall have practiced his profession for a period of three years at any time before the filing of his application.

In the construction of section 6 it is my opinion:

1. That the board is authorized to recognize the British degree of "chartered accountant" when conferred under the authority of the British empire, if the board is satisfied that the standard and requirements for such degree are "substantially equivalent" to those established by this act.

2. The board is not authorized to adopt a rule that Ohio certificates will only be issued to certified public accountants of other states in the event that such state accords similar privileges, to the holders of certificates issued by the Ohio board. The board may, however, satisfy itself that the standard and requirements of those states are equivalent to that required by the Ohio law.

3. The board is not authorized to adopt a rule that holders of certificates of "chartered accountants" shall have been in individual practice in the United States for a definite time, nor that such person shall show that he intends to carry out his declaration of becoming an American citizen. The board would, however, be authorized to revoke the certificate for his failure upon giving notice.

In the construction above given it is assumed that the applicants have fulfilled all other requirements of law and possess the educational and other qualifications required by the act, and nothing in this opinion is to be construed as preventing the board from satisfying itself that the statements contained in the applications and proofs submitted are true and that every applicant possesses the general and special education required by the standard prescribed in the act.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

COMMERCIAL FERTILIZER CONTAINING MINERAL SUBSTANCE MUST BE SO LABELED.

June 8th, 1908.

HON. THOMAS L. CALVERT, *Secretary Ohio State Board of Agriculture, Columbus, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter of June 6th, in which you call attention to that part of section 4446*a* of the commercial fertilizer act, which reads as follows:

> "And no false or misleading name, brand or trade mark shall be used in designating any commercial fertilizer, or a name, brand or trade mark indicating or denoting that the essential ingredients thereof were obtained from bone or animal substance, when, in fact, the source of the same was wholly or in part a mineral substance."

You inquire whether or not brands designated as steamed bone, acidulated bone, dissolved bone, etc., comply with the above provision when part of the ingredients are obtained from rock phosphate or substance other than animal matter.

In reply thereto I desire to say that, in my opinion, if the package contains part mineral substance that fact should be designated in the branding. A brand containing dissolved bone and rock phosphate should be labeled so as to show that fact, otherwise it will not comply with the requirements of the law.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

STATE CONFERENCE OF CHARITIES AND CORRECTIONS--EXPENSE OF PROBATE JUDGE IN ATTENDING MAY NOT BE PAID.

February 13th, 1908.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—In reply to your communication of February 4th, relative to your authority to issue a certificate to a probate judge provided in section 656*a*, I beg leave to say that it is not contemplated in the provisions of section 656*a* that officers and persons other than those enumerated in said section, are to receive compensation for their attendance upon said conferences. And I am of the opinion that the provisions for the payment of expenses in said section do not apply to probate judges.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

CHILDREN'S HOME—CONTROL OF INMATES.

Inmates of children's home remain under control of trustees until age of sixteen unless indentured, when control of trustees extends until age of majority, although apprenticeship terminated before such time.

July 17th, 1908.

HON. H. H. SHIRER, *Secretary Board of State Charities, Columbus, Ohio.*

DEAR SIR:—Your communication of July 13th is received, in which you submit the following inquiries:

> "First. A boy has been admitted to the county children's home at the age of fourteen years. This boy continues in the home until he is sixteen years old. Can the board of trustees legally retain this boy in the home after he reaches this age, or do they have any legal jurisdiction over him after that age?
>
> "Second. A girl admitted to the children's home at the age of ten years is placed in a family home by articles of indenture. She is now seventeen years of age and circumstances are such that it is absolutely necessary that she be removed from the family home. Can the board of trustees lawfully return this girl to the children's home until some other arrangement can be made for her, or does her removal from the aforesaid family home sever all authority and guardianship by the board of trustees from that time?"

In reply thereto I beg to say that section 932 of the Revised Statutes, as amended April 24, 1908, is in part as follows:

> "All inmates of said home who by reason of abandonment, neglect or dependence have been admitted, or who have been by the parent or guardian voluntarily surrendered to the trustees, shall be under the sole and exclusive guardianship and control of the trustees during their stay in said home, until they arrive at the age of sixteen years; and if such child is placed out, indentured, or adopted, then such control shall continue until such child shall become of lawful age."

This provision expressly gives to the trustees of the children's home the sole and exclusive guardianship and control of all inmates until they arrive at the age of sixteen years. It therefore follows that when a boy who is an inmate of a children's home arrives at the age of sixteen the board of trustees of said home loses its guardianship and control over him.

The above section, however, provides that if such child is placed out, indentured or adopted, that the guardianship and control shall continue until such child shall become of lawful age.

I am, therefore, of the opinion that a girl who has been indentured by the trustees of a children's home will remain under the control of said trustees until she arrives at lawful age, and said trustees may, if it be deemed proper, return such girl to the children's home or make such other arrangement as in their judgment will be for the best interest of the girl.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BOARD OF STATE CHARITIES—NON-RESIDENT INSANE—BIENNIAL REPORT OF BOARD.

Board of state charities may not admit to any of the state hospitals for the insane an insane person confined in an institution of another state or territory, except upon application of authorities of such institution and after transportation of such person into Ohio.

Biennial report of board of state charities to general assembly should be made November 15th, 1909.

September 29th, 1908.

Board of State Charities, Columbus, Ohio.

GENTLEMEN:—Yours of the 26th inst. requests an opinion of this department upon the several inquiries therein presented. The substantial facts connected with each of such questions are as follows:

Certain individuals in the first three instances cited have been committed to various institutions and hospitals for the insane in other states, to-wit: The Government Hospital for the Insane at Washington, D. C.; the Central asylum at Lakeland, Ky., and the State hospital at Independence, Ia.

Your inquiry invites consideration of the act of the general assembly of the state of Ohio, passed and approved May 9th, 1908 (99 O. L. 323, 326), which gives certain authority in the matter of commitment of the non-resident insane to the state hospitals of this state, and presents the question whether, by virtue of the act above cited, the individuals now confined in the several hospitals above named can be, by any action of your board, committed to any of the Ohio hospitals for the insane.

The act in question has no extra territorial effect. It cannot be employed for changing the status of any person confined in an asylum outside of the state unless upon request of the authorities of such institution, and only then according to the method provided in amended section 632*a* and 632*b* of the Revised Statutes. In the three instances cited it must be assumed that the individuals were regularly committed to such institutions. An order made by your board could not invalidate, vacate or set aside any procedure adopted when such individuals were admitted to the institutions in question. The act makes provision for those who have not gained legal residences in the state of Ohio being admitted to any of the benevolent institutions of the state therein named, when such persons are within this state. It provides no process for sending to any other state institution for any individual confined therein, and therefore I conclude that the act cannot apply to such persons. If the board of managers, directors or trustees of such foreign institution request admission to a benevolent institution of this state, of a person then confined in such foreign institution, such action might present a case upon which your board might act. But this does not seem to be contemplated by the questions you have presented.

The fourth instance presents facts showing that an application has been made by the authorities of Cook county, Illinois, for the return to Ohio of an inmate of the Jefferson insane asylum of Cook county.

This presents a different question from those preceding for the reason that an application has been made by the proper authorities for such removal. In connection with such instances as you have cited, existing sections governing such institutions should be taken into consideration. Section 700 R. S. provides:

> "No person shall be admitted into either of the hospitals belonging to the state, except an inhabitant of the state, unless by joint resolution

of the general assembly, which joint resolution shall specifically name the person to be admitted; and no person shall be considered an inhabitant within the meaning of this chapter who has not resided within the state one year next preceding the date of his or her application, and no person is entitled to the benefits of the provisions except those whose insanity has occurred during the time such persons have resided within the state."

These provisions seem to forbid the authority of this board sending to any other state for any insane person. If such insane person is brought within the state by the friends of such person, free of expense to the board, I see no reason why the application made by the authorities of Cook county should not be acted upon by this board. In this class of cases observe that the requirements of section 632a R. S. are not mandatory upon this board, but you are permitted to exercise your discretion therein.

The further question presented by you involves the construction of section 658 of the Revised Statutes. The portion to which you specially direct our attention is that which reads:

"The board of state charities shall prepare for the use of the general assembly a full and complete report of their doings during the preceding biennial period."

You state that in conformity with this arrangement you have prepared a report for the biennial period ending November 15th, 1907, but, on account of the change of the time of election of state officers, you desire to know whether your next report shall be for the biennial period ending November 15th, 1909, or for the year ending November 15th, 1908.

Section 172 R. S. provides that

"the fiscal year in all the departments of the state, the benevolent, correctional and other institutions of the state, the public works and public buildings shall close on the 15th day of November annually; and all annual reports from such departments and institutions shall be made with reference to that date, etc."

When the report of your board is prepared, as required by section 658 R. S., it should include all of your doings during the biennial period ending November 15th, 1909.

Section 1 of article XVII of the constitution, as adopted November 7th, 1905, provides that the election of state officers shall be held on the first Tuesday after the first Monday of November in the even numbered years. This requires the election of members of the general assembly at such time.

Section 25 of article II of the Constitution of the state provides that all regular sessions of the general assembly shall commence on the first Monday of January bienially. And it contains the further provision that the first session, under the constitution, should commence on the first Monday of January, 1852. Computing the biennial periods from the said last mentioned date, the last session, to-wit: that beginning on the first Monday of January, 1908, should be considered as a regular session.

As the amendment to section 658 R. S. was evidently framed with the intention of giving the general assembly a full and complete report of the doings of your board during the biennial period next preceding the session of

the general assembly, it would seem to require that the "biennial period" contemplated by such amendment should be made to conform to the requirements of section 1 of article XVII, and of section 25 of article II of the constitution by making the biennial period expire with November 15th, 1909. This construction should be adopted because of the requirements of the act of May 9th, 1908, amending section 645 R. S. (99 O. L. 324), in which the following language is used:

> "The board of trustees or board of managers of the benevolent and correctional institutions shall biennially, after the close of the fiscal year *next preceding* the regular session of the general assembly, make to the governor a report of their proceedings during the two years, accompanied with the report of the superintendent and such others employed in the institution, as they may deem important, etc."

It is therefore apparent that section 568 and section 645 R. S., as amended *supra*, in defining the biennial period in question, referred to the two years next preceding the regular session of the general assembly The date of the next regular session of the general assembly will depend upon the adoption of the constitutional amendment submitted to the voters this fall, but, pursuant to the constitution and laws as now existing, said reports, for the use of the general assembly, need not be made until November 15th, 1909.

The foregoing, in my opinion, covers all questions presented in yours of the 26th inst.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

LOCAL OPTION—PRESCRIPTION.

Prescription for intoxicating liquors to be used for medicinal purposes required by search and seizure act may not be written by a dentist; application of law in township, municipal and residence districts discussed.

January 16th, 1908.

DR. H. C. BROWN, *Secretary Ohio State Board of Dental Examiners, Columbus, Ohio.*

DEAR SIR:—I have given consideration to the following inquiry submitted by you: Has a dentist the right to prescribe intoxicating liquors for medicinal purposes under the local option and search and seizure laws?

This question hinges upon the right of a pharmacist to sell intoxicating liquors for medicinal purposes. The search and seizure act, as a whole, is intended to be supplementary to the various local option acts, and the right to sell on prescription, as conferred by the former act, is limited by the provisions of the several local option measures.

The municipal local option act, commonly denominated the "Beal law," provides that:

> Sec. (4364-20*c*). The phrase 'intoxicating liquors,' as used in this act, shall be construed to mean any distilled, malt, vinous or any other intoxicating liquors; but nothing in this act shall be construed to

prevent the selling of intoxicating liquors at retail by a regular druggist for exclusively known medicinal, pharmaceutical, scientific, mechanical or sacramental purposes; and when sold for medicinal purposes it shall be sold only in good faith, upon written prescription issued, signed and dated in good faith by a reputable physician in active practice, and the prescription used but once."

The township local option law provides as follows:

"Sec. (4364-25). * * * Whoever sells, furnishes or gives away any intoxicating liquors as a beverage, or keeps a place where such liquors are kept for sale, given away or furnished, shall be fined not more than five hundred dollars, nor less than five dollars, and imprisoned in the county jail not exceeding six months; but nothing in this section shall be construed so as to prevent the manufacture and sale of cider, or sale of wine manufactured from the pure juice of the grape, cultivated in this state, nor to prevent (a) legally registered druggist from selling or furnishing pure wines or liquors for exclusively known medicinal, art, scientific, mechanical or sacramental purposes."

The residence district local option law, known as the "Jones law," provides:

"Sec. (4364-30*g*). * * * Nothing in this act shall be construed to prevent the selling of intoxicating liquors at retail by a regular druggist for exclusively known medicinal, mechanical, pharmaceutical, scientific or sacramental purpose; and when sold for medicinal purposes shall be sold only in good faith upon a written prescription, signed and dated in good faith by a reputable physician in active practice, and the prescription used but once. Such prescription shall contain the name of the party for whom the liquor is prescribed, and direction for its use."

Sections 14, 15 and 16 of the so-called "search and seizure" act, sections (4364-30*za*) to (4364-30*zc*), inclusive, of the Revised Statutes, do not, in my judgment, serve to broaden the provisions of the foregoing sections.

Under the municipal and residence district local option acts it is clear to me that a druggist may not fill a prescription written by a dentist. The words "reputable physician in active practice," as therein used, cannot, I think, be construed to apply to dentists for the reason that I am unable to find any definition of the word physician that is broad enough to include both professions. The principle that the language of a proviso in a criminal statute is to be liberally construed in favor of the accused (Lewis' Sutherland Statutory Construction, section 356), can only apply when the construction contended for is possible.

In the case of the township local option law, it would appear that sales for medicinal purposes need not be made upon prescription.

Section 15 of the "search and seizure" act, however, provides that:

"Any person who * * * shall sell intoxicating liquors for medicinal purposes except on written prescription shall be fined not less than fifty dollars nor more than five hundred dollars."

While, in my judgment, this latter provision operates to make a prescription necessary in territory "dry" under a township election, it does not, nor does

any portion of the contents of this or related sections make it necessary that such prescription should be signed by a physician. My understanding is that the word "prescription" applies to a written recommendation issued by a dentist as well as to a similar paper prepared by a physician. The section under consideration being a criminal section, the exception therein would have to be construed liberally in favor of the accused.

In my opinion, therefore, a prescription written by a dentist may not be filled in a drug store located in territory "dry" under the municipal and residence district local option laws; but such prescription may lawfully be filled at a drug store located in a "dry" township. However, it was quite evidently the intention of the legislature to provide that prescriptions for intoxicating liquors to be used for medicinal purposes should be written by physicians as distinguished from dentists in all cases, and I believe that it would be a violation of the spirit of the township local option law for a druggist located in "dry" territory to fill a prescription written by a dentist.

Very truly yours,

WADE H. ELLIS,
Attorney General.

STATE DENTAL BOARD—ADMISSION TO EXAMINATION—SALARY OF SECRETARY.

State dental board may accept from applicant for examination evidence of graduation from dental college other than that embodied in a diploma; power of board in this respect defined.

Secretary of state dental board entitled to per diem fee as member of board, in addition to salary as secretary.

May 16th, 1908.

DR. F. R. CHAPMAN, *Secretary Ohio State Dental Board, Columbus, Ohio.*

DEAR SIR:—You advise me that the date of the next examination of applicants for registration by your board has been fixed at the 16th of June, 1908; that the commencement exercises of the University of Michigan will take place on the 18th of June of the same year; and that an application has been made for admission to the examination by certain students who are now in the last year of the course in dentistry at that university. You desire my opinion as to whether your board may admit these persons to the examination referred to.

Section 9 of the act of April 7th, 1908, regulating the practice of dentistry in this state provides that:

> "Each person who desires to practice dentistry in this state shall * * present evidence satisfactory to the board (referring to the state dental board) that he is a graduate of a reputable dental college as defined by the board."

The primary meaning of the word "graduate" is, as defined by Webster, "one who has been admitted to a degree in a college or university." Scholastic degrees are universally evidenced by diplomas and are said to be conferred upon the delivery to the graduate of such a document by the proper officer of the institution conferring the same. However, the diploma itself is merely

evidence of the degree. It is, to be sure, the best evidence. But, if we assume that a degree may be earned and the candidacy for such a degree approved by the governing body of a college or university prior to the time fixed for the formal ceremony of conferring degrees known as "commencement," it would follow that there might be evidence of graduation other than the diploma itself. Whether or not the practice of a particular college or university permits the use of such other evidence is a question of fact.

The language above quoted is significant in that by inference it assumes the existence of evidence other than a diploma and confers upon the board the discretion to determine the sufficiency of such evidence.

The board is not required to admit to the examination upon "diploma" only; that word does not appear in the section quoted as it does in the act regulating the practice of medicine and surgery. The board has power, under section 3 of the act, to make reasonable rules and regulations, and in matters of this sort whatever action is taken should be by the adoption of a uniform rule. In my judgment the board has the power to adopt a rule defining what shall constitute evidence of graduation sufficient to admit to the examination; they may not by such rule, however, admit persons whose course has not been completed, or whose candidacy for a degree has not been approved by the governing body of the institution.

A liberal construction of the act, such as that suggested, is, it seems to me, demanded by a consideration of the purpose of the law as well as the language of the particular section. (People v. Eichelroth, 78 Cal. 141.)

If, therefore, in the case submitted by you the board sees fit to prescribe a rule to the effect that in case an applicant presents evidence that he has completed a course at a reputable dental college, that he is a candidate for a degree therefrom, and that his candidacy has been approved by the trustees, regents or faculty of such college, so that no step in his graduation remains to be taken save only the formal conferring of his degree, such applicant may be admitted to the examination, the board would, in my judgment, be acting within the scope of its powers. If the applicants from the University of Michigan could conform to this rule they might be admitted. I may remark, however, that the board has power, if it sees fit, to require the presentation of a diploma in every case and thus to exclude these applicants.

You inquire, also, whether, under section 5 of the dental law, the secretary of the state dental board is entitled to receive compensation as a member, in addition to such salary as may be fixed by the board for him as secretary. The secretary is required by section 3 to be a member of the board. While the question is not free from doubt, I am of the opinion that the secretary is entitled to compensation as a member of the board, in addition to salary as the secretary.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CRIMINAL LAW—CONSTRUCTION OF DENTAL REGISTRATION ACT.

Registered dentist, not a graduate, may lawfully use prefix "Dr." in connection with his name.

June 23rd, 1908.

DR. F. R. CHAPMAN, *Secretary Ohio State Dental Board, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your recent letter, in which

you inquire whether a registered dentist who is not a graduate of a dental college violates the act of April 7th, 1908, by prefixing to his name the title "Dr."

Section 22 of the act provides, in part, that:

> "Whoever * * * assumes a title, or appends or prefixes to his name letters which falsely represent him as having a degree from a legal dental college * * * shall be fined, etc."

In my judgment this use of the prefix "Dr." by a registered dentist does not violate the above provision. If registered without being a graduate he must have been a legal practitioner as defined by section 4404 of the Revised Statutes. I assume that the prefix "Dr." was, before the enactment of the original registration act, in general use by dental practitioners regardless of educational qualifications. While, strictly speaking, the title is one that belongs to the holders of scholastic degrees only, yet it is well known that its popular use has never been limited to that class of persons.

This section is a criminal section and is to be strictly construed. I do not believe that a court would hold that the use of a prefix which, for generations, has popularly signified qualification to practice a profession, merely, would constitute a representation that the user was a graduate; and if it should be held that the question of false representation is for the jury and not for the court, I believe that it would be practically impossible to convict a person charged with so using the term "Dr." under this section. The use of this word by an unlicensed person is, of course, an offense under section 18 of the act. That section does not make such use dependent upon false representation, and a dental graduate may violate that section, though holding a diploma which confers the degree of doctor of dental surgery. The distinction between the two sections is clear.

Yours very truly,

WADE H. ELLIS,
Attorney General.

FISH AND GAME LAWS—TRIAL BY JURY.

There is no right of trial by jury in prosecutions under fish and game laws in which imprisonment is not a part of the sentence which may be imposed.

July 3rd, 1908.

GENERAL JOHN C. SPEAKS, *Chief Warden Ohio Fish and Game Commission, Columbus, Ohio.*

DEAR SIR:—In your letter of July 3rd you ask whether a jury trial may be granted in the cases of offenses under sections 22 to 56, both inclusive, of the present fish and game law.

Although section 5, article I, of the constitution provides that "the right of trial by jury shall be inviolate," the courts all agree that this section means the right of trial as it existed at the time of the adoption of the constitution. Under the common law many more cases were decided without a jury than today.

> "The doctrine of the common law, that fines for such minor offenses could be imposed and collected, without the intervention of a jury, and

by magistrates who had no jurisdiction in the trial of jury cases, is abundantly established by many cases and text writers. Indeed, the doctrine is nowhere denied."

"A statute which authorizes a penalty by fine only, upon a summary conviction under a police regulation, or of an immoral practice prohibited by law, although imprisonment, as a means of enforcing the payment of the fine, is authorized, is not in conflict with either section 5 or 10 of article I of the constitution, on the ground that no provision is made for a trial by jury in such cases." Inwood v. State, 42 O. S. 186.

See, also,

Markle v. Akron, 14 Ohio 11.
Wightman v. State, 10 Ohio 452.
Thomas v. Ashland, 12 O. S. 124.

"The constitutional limitation as to trial by jury is on the power to abridge, and not on the power to extend, the right of trial by that method." Gunsaullus v. Pettit, 46 O. S. 28.

Since imprisonment is no part of the penalty imposed under sections 22 to 56, both inclusive, of the present fish and game laws, and since the legislature has not extended the right of jury trial to such cases I am of the opinion that no jury trial is permitted under this section.

Respectfully submitted,

JOHN A. ALBURN,
Assistant Attorney General

FISH AND GAME LAWS—SUSPENSION OF SENTENCE.

Sentence imposed under fish and game laws may not be suspended under probation act, 99 O. L. 339; fish and game commission has sole power of suspension and remission.

August 21st, 1908.

GENERAL JOHN C. SPEAKS, *Chief Warden Fish and Game Commission, Columbus, Ohio.*

DEAR SIR:—In your recent communication you ask whether a justice of the peace or other officer having jurisdiction in fish and game cases has authority to suspend or remit fines or to place the defendant upon probation, and you further ask what proceedings should be instituted in case such officer has no such authority to suspend or remit fines, in order to compel him to collect the fines assessed and forward the same to the president of the fish and game commission, as provided in section 71 of the fish and game laws.

Section 57 of the fish and game code, approved May 9, 1908, entitled "An act to revise and consolidate the laws relating to the appointment, powers and duties of the commissioners of fish and game" (99 O. L. 364), provides:

"Whoever violates any provision of sections twenty-one to fifty-six, both inclusive, shall be fined not less than twenty-five dollars nor more

than two hundred dollars, and the costs of prosecution, and upon default of payment of fine and costs shall be committed to the jail of the county or to some workhouse, and there confined one day for each one dollar of fine and costs against him. He shall not be discharged or released therefrom by any board or officer except upon payment of the portion of the fine and costs remaining unserved or upon the order of the commissioners of fish and game; provided, that for a violation of section fifty-eight the defendant shall be fined as above prescribed or imprisoned not less than thirty days nor more than six months, or both."

Section 71 of the same act provides that:

"All fines, penalties and forfeitures arising from prosecutions, convictions, confiscations, or otherwise under this act (unless otherwise directed by the commissioners of fish and game), shall be paid by the officer before whom the prosecution is had or by whom the fine is collected, to the president of the commissioners of fish and game, and by him paid into the state treasury."

Section 79 of the same act provides that whoever violates any provisions of section 78 "shall not be discharged therefrom by any board or officer except upon payment of the portion of fine and costs remaining unsatisfied by service therein or upon the order of the commissioners of fish and game."

I understand that attempts have been made to suspend sentences in fish and game cases under authority of the following provisions of an act approved May 9, 1908, entitled "An act to provide for probation for persons convicted of felonies and misdemeanors, (99 O. L. 339):

"Section 10. In all cases where 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 Ohio state reformatory, or that the defendant be fined and committed until said fine be paid, the court or magistrate, at its discretion, 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 may direct that such suspension continue for such period of 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 be 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 such defendant may be given the opportunity to pay the fine within a reasonable time; provided, that upon the payment of the fine being made, judgment shall be satisfied and the probation cease."

It is to be noted that under this act, where imprisonment is not a part of the penalty the magistrate may not suspend the execution of the sentence, but may only give the defendant a reasonable time in which to pay the fine. It such fine is not paid within a reasonable time, it is the duty of the magistrate to commit the defendant.

I am of the opinion that the provisions of the suspension and probation act

above quoted, being general in their nature, should yield to the provisions of the fish and game act, which are specifically applicable to a particular class of cases.

Lewis' Sutherland on Statutory Construction, section 346, states the principle involved as follows:

> "Where there is an act or provision which is general, and applicable actually or potentially to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general act, they are not necessarily so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment. The general act would operate according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act. That would be deemed an exception, unless the terms of the later general law manifested an intention to exclude the exception. If the general and special provisions are in the same act, or passed on the same day in separate acts, or at the same session of the legislature, the presumption is stronger that both are intended to operate."

Since both of these acts were passed upon the same day, it cannot be doubted that the provisions of the fish and game act, being specific, should prevail over the general provisions of the other act, and justices and other officers have no authority to suspend sentence in such cases or to place the defendants upon probation. In addition to the above matter set forth, I find from an inspection of the senate journal, house journal and records of the governor's office, that the fish and game code was passed by the senate and by the house, was signed by the president of the senate and the speaker of the house, and also signd by the governor, each step being taken after performance of the same act in regard to the law providing for the suspension of sentences and probation; and I believe that the provision of article II, section 16, as to the governor, "if he approves he shall sign said bill and thereupon said bill shall be law," makes the act last signed, in this case the fish and game code, prevail over the act previously signed.

Magistrates may be compelled by mandamus to execute sentences imposed by them and are liable on their bond for a loss to the state through their failure to properly transmit fines in fish and game cases to the fish and game commission.

Very truly yours,

W. H. MILLER,
Assistant Attorney General

LAND OWNED BY VILLAGE FOR WATERWORKS PURPOSES IS EXEMPT FROM TAXATION.

January 21st, 1908.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Acknowledging the receipt of yours of the 13th inst., I beg to say that where a village purchases land surrounding the intake of the water

system, such purchase being necessary in order to protect the purity of the water supply, the land so acquired is exempt from taxation pursuant to the provisions of section 2732 Revised Statutes.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BOARD OF HEALTH—APPOINTMENT.

Appointments to membership on local board of health not invalid because made after time specified in section 223 M. C.

March 6th, 1908.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Replying to yours of the 3rd inst., I beg to say that in the instance cited by you the mayor had no authority to set aside the appointment of the board of health and appoint a new board of five members upon the ground, as given by him, that all appointments made since 1903 were illegal because not made at the time specified in section 223 of the municipal code. The failure to appoint at this specified time did not invalidate the appointments which had been made and could not destroy the right of the appointees to serve the term for which they were appointed.

Yours very truly,

WADE H. ELLIS,
Attorney General.

STATE BOARD OF HEALTH—PRINTING.

Printing for state board of health must be done under direction of supervisor of public printing.

May 27th, 1908.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 25th, in which you inquire whether the state board of health is, since the enactment of house bill No. 1268, obliged to defray the expense of printing out of one of its appropriations as heretofore, or whether such printing is now to be done by the supervisor of public printing.

Replying thereto, I beg to state that section (409-33), being section 9 of the act establishing the state board of health as originally enacted, made a special appropriation for printing. This provision being especially made, of course superseded the general provision contained in the act providing for the office of supervisor of public printing, and its specific effect was to take from the duties of the supervisor a matter that otherwise would have come within his province.

Now that the special provision above referred to has been repealed, I am

of the opinion that the general provision applies to the printing for the department of the state board of health. No one would seriously question that the board is an "executive department" within the meaning of the language used in sections 312, et seq., being the act relating to the supervisor of public printing. The various police and regulative powers imposed upon the board to be exercised in the name of the state would impel to this conclusion were there no other similar considerations. I conclude, therefore, that printing for the department of the state board of health is, under the law as it is at present, to be done under the direction of the supervisor of public printing.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

MATERNITY HOSPITAL—ATTENDANCE AT BIRTHS.

Midwife may attend births in materity boarding houses and lying-in hospitals regulated by act in 99 *O. L.* 13.

June 6th, 1908.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—I have your letter of June 5th, in which you request my opinion as to the right of a midwife to attend births in maternity boarding houses and lying-in hospitals which are regulated by the act approved February 18th, 1908, 99 O. L. 13.

You direct my attention particularly to the language of section 4 of the act referred to, which provides as follows:

> "Every birth which takes place in such maternity boarding house or lying-in hospital shall be attended by a legally qualified physician, who shall forthwith report the fact of such birth to the board of health of the city, village or township in which such maternity boarding house or lying-in hospital is located."

In my opinion the phrase, "legally qualified physician," as therein used, is to be given a meaning broad enough to include registered midwives.

Section 4403*e* R. S. provides for the registration of members of this profession and authorizes them to practice the same except as to certain abnormal conditions.

The intent and purpose of the section above quoted is to provide a method for reporting births in such places by a legally responsible person. This purpose is consistent with that of the entire act, as expressed in the title thereof, which is: "An act to regulate the establishment, maintenance and inspection of maternity boarding houses and lying-in hospitals."

Having regard, then, to the general purpose of the act, and the particular purpose of the section quoted, I conclude that a midwife may attend births wherein the abnormal conditions excepted by section 4403*e* are not present, and which take place in maternity boarding houses and lying-in hospitals.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

RIVERS AND WATER COURSES—POLLUTION OF—MUNICIPAL CORPORATIONS.

Municipal corporation may not, without exercising the right of eminent domain, and excepting by prescription, empty its sewage into a stream to the injury of lower riparian proprietors; in no case may a public nuisance be thus created; redress of such injuries and restraint of such nuisances both as to navigable and non-navigable streams, may be obtained in state courts; procedure therein.

July 2nd, 1908.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of an inquiry presented by your department which, in substance, is as to the right of a municipality to pollute a navigable stream by the introduction of its sewage therein, and also the proper jurisdiction to invoke to prevent such pollution.

A review of the statute law of this state compels the conclusion that no right has ever been conferred upon the municipalities of the state to drain their sewage into any stream unless the same has been duly appropriated for that purpose. The many acts of the general assembly vesting in the state board of health and the various local boards of health authority to provide against the creation of nuisances is proof of such statement. In addition to the powers conferred upon such boards by section 2122 R. S. and related statutes, and which deal, in the main, with the relation of such boards to individuals and private corporations, should be mentioned the full and ample powers conferred upon the state board of health by the act of the 77th general assembly, entitled "An act to authorize the state board of health to require the purification of sewage and public water supplies and to protect streams against pollution." (99 O. L. 74.)

So far as the statute law is concerned, no authority is thus conferred by the general assembly whereby a municipality can claim the right to contaminate any stream of the state.

With regard to the decisions of the supreme court of this state, the citation of the most important authorities bearing upon this proposition is contained in the report of the case of the city of Mansfield v. Balliet, 65 O. S. 451. In substance the court therein held, where a municipal corporation, without a legal appropriation in which the riparian owner is afforded an opportunity to obtain compensation, causes its sewage to be emptied into a natural water course, thereby creating a nuisance, inflicting special and substantial damages upon such property, it is liable to an action for the damages so sustained. In this opinion the early case of Rhodes v. City of Cleveland, 10 Ohio 160, was approved and followed. This opinion was afterwards distinguished by the supreme court in the decision of the case of the City of Cleveland v. Standard Bag and Paper Company, wherein the court announced that when a part of a stream of water being wholly within a municipal corporation, so that none but its residents are thereby affected, is generally devoted to the purpose of an open sewer for more than twenty-one years, as against a riparian owner who contributes to and acquiesces in such use, it becomes charged with a servitude authorizing its like use by other riparian owners.

Also, in the case of the City of Mansfield v. Bristor, 76 O. S. 270, the same court announced, where a drain laid by property owners in a public street under permission from the city, empties into a natural stream, and

thereafter, without express license from the city, is used as a sewer to discharge sewage into the stream to the injury of a lower riparian owner, the drain is a nuisance and the city is liable for negligence in not abating it.

Many other opinions of our own courts could be given bearing upon this question, but it is sufficient to say that the rights thus passed upon are largely personal as concerning riparian owners and, as against them, a right by prescription, or by common usage, for more than twenty-one years, has been sustained.

But in so far as the question presented by your department is concerned, it contemplates the right of a municipality to so pollute a stream as to create thereby a common nuisance and render the waters of such stream unfit for domestic use. No municipality nor the public in general can ever acquire the right to create and maintain a nuisance or to indulge in such acts and practices as would be detrimental to the public health. The same rule follows whether the stream so polluted be navigable or non-navigable. (Woodruff v. Mining Co., 18 Fed. Rep. 753.)

These are general principles and have been fully sustained by both the state and federal courts:

Smith v. Deniff, 50 L. R. A. 737.
Peterson v. Santa Rosa, 119 Calif. 387.
Dwight v. Hager, 150 Ill. 273.
Robb v. LaGrange, 158 Ill. 21.
Chapman v. Rochester, 110 N. Y. 273.
Bolton v. New Rochelle, 84 Hun 281.
O'Brien v. St. Paul, 18 Minn. 176.
Moody v. Saratoga Sprs., 17 App. Div. N. Y. 207.
Joplin Consol. Mining Co. v. Joplin, 124 Mo. 129.
Platt Bros. & Co. v. Waterbury, 48 L. R. A. 691.
Owens v. Lancaster, 182 Pa. St. 257.

Second. The second question requires an examination of the jurisdiction over navigable streams vested in the congress of the United States and in the legislatures of the several states. If the question contemplates making an application of the rules of law to the Ohio river and kindred streams it will be observed by the legislation of congress bearing thereon that the control over such streams by congress is merely to insure open navigation, free from obstructions or anything which might interfere with some express federal power. It was said by the U. S. district court for the district of California, in Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. Rep., 753, that (quoting from page 770):

> "As to congress it might be sufficient to say that it has no authority whatever to say what shall or shall not constitute a nuisance within a state, except so far as it affects the public navigable waters, and interferes with interstate or foreign commerce, or obstructs the carrying of the mails. Under its authority to regulate commerce between states and especially post roads, congress may doubtless declare and punish as such, the *obstruction* of the navigable waters of the state, as a nuisance to interstate and foreign commerce, and there its authority ends."

This authority of congress is evidenced, in part, by the acts of September 19, 1890 (26 Statutes at Large 453), of August 18, 1894 (28 Statutes at Large

363), and of March 3, 1899 (30 Statutes at Large 1153). These, in substance, all declare it to be unlawful to throw, discharge or deposit from or out of any craft of any kind, or from any shore, wharf, manufacturing establishment or mill of any kind, any refuse matter of any kind or description whatever, into any navigable water of the United States, or into any tributary of any navigable water, *whereby navigation shall or may be impeded or obstructed.*"

Regarding the title to such waters and the soils under them, the supreme court of the United States early decided, in the case of Martin v. Waddell, 16 Peters 410, that:

> "When the Revolution took place the people of each state themselves became sovereign, and in that character hold the absolute right of all navigable waters, and the soils under them, for their own common use, subject only to the rights surrendered by the constitution.
>
> "That the right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belong exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it."

The rule as announced by our own supreme court is that:

> "He who owns the land on both banks of a navigable river owns the entire river, subject only to the easement of navigation."
>
> Walker & Fulton v. Board of Public Works, 16 Ohio 540.

The same rule was held applicable to a stream not navigable. (Benner v. Blattee, 6 Ohio 504. This doctrine was reaffirmed in Lamb v. Ricketts, 11 Ohio 311. These cases make no discrimination as to rivers, whether navigable or not, but, in fact, hold that there is no difference in the ownership of the bed of such rivers. (People v. Canal Appraisers, 33 N. Y., citing page 489.)

It is thus apparent that, as to the pollution of navigable streams by municipalities, the federal government does not assume to control, or in any way regulate the same, but recognizes the jurisdiction of the several states so to do. This is in keeping with the well-recognized doctrine regarding the police powers of the states. All such legislation is predicated upon, and is the outgrowth of the police power, and, concerning its exercise, the supreme court of the United States has said:

> "The police power is inherent in the several states, and is left with them under the federal system of government, and may always be exercised by state legislatures. It follows that the federal government cannot exercise any police power within the several states, but can exercise such power only where the authority of congress excludes, territorially, all state legislation." (U. S. v. DeWitt, 9 Wallace (U. S.) 41; Slaughter House cases, 16 Wallace (U. S.) 36; Munn v. Illinois, 94 U. S. 113.)

It is thus apparent that the statutes of Ohio, regarding this question, apply equally to navigable and to non-navigable streams. They extend the jurisdiction of any municipal corporation so as to prevent the pollution of its water supply for a distance of twenty miles beyond the corporation limits. The act itself prescribes a penalty against any person polluting any running stream of water which is used for domestic purposes by any municipality, of a fine of not less than $5.00 nor more than $500.

The municipalities need not rely upon the criminal jurisdiction of the state courts to thus protect their water supply, but may proceed in the court of common pleas of the proper county, for an injunction to restrain any person or corporation from so polluting any such stream.

I therefore conclude that the court of common pleas is the proper jurisdiction in which to ask for equitable relief against such acts, and the criminal jurisdiction can be invoked either by indictment of a grand jury, or, in the first instance, before an examining court.

Yours very truly,

WADE H. ELLIS,
Attorney General.

BOARD OF HEALTH—LOCAL—JURISDICTION OF, TO CONSTRUCT SEWER.

Township board of health may not construct sewer within limits of incorporated village.

July 16th, 1908.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge the receipt of yours of the 14th inst., requesting an opinion upon the following question:

"Have township trustees or the township board of health authority to construct sewers in a village within the township and pay for the same from the township funds?"

In my opinion such power is not conferred upon the board of township trustees. Pursuant to section 2117, Revised Statutes, the trustees of the township shall constitute a township board of health, which shall be for the township outside of the limits of any city or village. Such boards possess the same powers and have the same duties imposed upon them as are imposed or granted to boards of health in cities or villages, but in this grant of power to such boards of health, the exercise of the same is limited to the township outside of the limits of any city or village. As the various villages and cities have similar authority and are required to maintain boards of health, it cannot be presumed that the township trustees can trespass upon the authority otherwise vested in village officers. This it made apparent by the powers conferred upon the state board of health by section (409-25) R. S.

With regard to the construction of sewers and the disposal of sewage, the state board of health, when called upon by the state or local governments, and municipal or township boards of health, shall investigate and report to the local officers thereon, and the local officers are forbidden to introduce a system of sewerage unless the same shall have been submitted to and received the approval of the state board of health.

The subject of sewers has been left by the municipal code (paragraph 19 of section 7 M. C., (section (1536-100) R. S.) to councils in villages and to the boards of public service in cities (section 140 M. C.). The power thus conferred upon such officers in villages and cities respectively is full and ample "to open, construct and keep in repair sewage disposal works, sewers, etc."

A special provision regarding the construction of sewers in counties (section (4510-67), etc., R. S.) also lends force to the argument that within their re-

spective jurisdictions the local officers, in whom is vested the authority over the subject of sewers, have entire charge thereof to the exclusion of all other officers. Exception is made, as heretofore pointed out, in favor of the state board of health, and also in favor of local boards of health under circumstances where nuisances are created, to abate the same, but the power does not exist in local boards of health to create against the city or village any liability for the construction of a system of sewerage, for that authority is vested in officers other than the boards of health.

Yours very truly,

SMITH W. BENNETT,
Special Counsel.

BOARD OF HEALTH—LOCAL—NUISANCE.

Local board of health may proceed against nuisance existing in public street.

July 31st, 1908.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—Yours of the 28th inst. presents the following question to this department for an opinion thereon:

> A nuisance exists in the main street of a village, caused by a pond of stagnant water, which emits disagreeable odors, and the village council has refused to establish a grade and remove this water. You inquire whether the board of health or any other authority has power to compel council to take the necessary steps to abate this nuisance, and, if so, what procedure should be followed?

This question is substantially answered in the opinion rendered your department of even date regarding the powers of village boards of health and village councils. The village board of health need not await the action of the council thereon, but it can proceed pursuant to the provisions of section 2118 R. S., and adopt an order or regulation covering this particular subject, and, after the same has been duly adopted, advertised and recorded, it can be enforced as other ordinances of council or orders or regulations of the board of health, pursuant to the provisions of section 2120 R. S. Such order or regulation, when duly made by the board of health, may be served upon the proper officer of the municipal corporation, and he will be required to obey the same.

Very truly yours,

W. H. MILLER,
Assistant Attorney General

VILLAGE—WATER SUPPLY.

Village council or board of health may prohibit residents of municipality from obtaining water from contaminated source of supply.

July 31st, 1908.

State Board of Health Columbus, Ohio.

GENTLEMEN:—I beg to acknowledge receipt of yours of the 28th inst., presenting a question for determination by this department regarding conditions existing in the village of Put-in-Bay, Ohio. Your advices are as follows:

The village of Put-in-Bay desires to install sewers and a public water supply, both of which are needed. They are now building the sewers, but do not have money enough to put in a new water supply at this time. They believe this could be managed by contracting with some water company, provided this company could be given the exclusive right of furnishing water to the village. At the present time considerable water is being pumped from the bay at the boat landings, and this water is greatly polluted with sewage and is not safe for domestic purposes. Has the council power to contract with a private company to supply water from a pure source, and can it prohibit anyone furnishing water that is polluted or in danger of being polluted?

The village may contract with a water company for supplying with water the streets, lands, lanes, squares and public places within such village. (Section 3551 R. S.) This power also includes the further purpose of supplying the citizens of such village with water for such time and upon such terms as may be agreed upon. (Section 2434 R. S.) The contract ordinance may also provide, either through its village council, or through its board of health, by ordinance, order or regulation that the citizens of the village shall be forbidden from taking water from the bay at the boat landings for domestic purposes or from any other place where the same is or may be polluted with sewage. Such provision can be enforced by a penalty feature attached to such ordinance, order or regulation making it a misdemeanor to violate the provisions of such ordinance, order or regulation.

Very truly yours,

W. H. MILLER,
Assistant Attorney General

BOARD OF HEALTH—VILLAGE—SEWERS.

Village board of health may by regulation compel private owners to connect with public sewerage system.

July 31st, 1908.

State Board of Health, Columbus, Ohio.

GENTLEMEN:—You have presented an inquiry in yours of the 28th inst. which is as follows:

"Has a village council authority to pass and enforce an ordinance providing that all premises having connection with the public water supply, or having a private water supply that permits of the introduction of modern plumbing, should make connection with a new system of sanitary sewers, regardless of existing methods of disposing of house drainage?"

I assume from the statement involved in the foregoing question that the village under consideration has adopted a system of sanitary sewers and that the same have been constructed and are now in use. If this is correct, and if it is necessary to protect the health of the community, the council or the village board of health can provide by ordinance or resolution that all

houses and buildings so situated, as described in the foregoing question, shall be compelled to connect the house drainage with such system of sanitary sewers. This power can be enforced by the adoption of an ordinance providing that it shall be a misdemeanor for anyone coming within the class described to refuse, after reasonable notice, say thirty days, to make the necessary connection in such house drainage and such sewers.

It has been repeatedly held that a municipality may change its system of drainage if the welfare and comfort of its inhabitants will be thereby enhanced and the citizens of such municipality are required to conform thereto, provided it be not done in wanton disregard of private rights.

Such powers can also be exercised, as heretofore stated, by the board of health of a village by making such order or regulation, if it is deemed necessary for the public health, prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. As I have heretofore advised in former opinions, all such orders or regulations intended for the general public shall be adopted, advertised, recorded and certified as are ordinances of cities and villages, and the courts are required to give them the same force and effect as is given city or village ordinances. This is provided for in sections 2118, 2122 and related sections of the Revised Statutes.

Very truly yours,

W. H. MILLER,
Assistant Attorney General

WATER SUPPLY—MUNICIPAL—PURIFICATION OF—ISSUE OF BONDS FOR, NEED NOT BE SUBMITTED TO VOTE OF PEOPLE.

October 14th, 1908.

DR. C. O. PROBST, *Secretary State Board of Health, Columbus, Ohio.*

DEAR SIR:—Complying with your request for an opinion upon the questions suggested in yours of the 10th inst., I beg to advise that the language used in section 5 of the act of the general assembly of the state of Ohio, passed and approved April 8th, 1908, entitled "An act to authorize the state board of health to require the purification of sewage and public water supplies and protect streams against pollution" (99 O. L. 74), exempts the officers having jurisdiction to provide for the raising of revenues by tax levies, etc., from the requirements contained in sections 2835 and 2837 R. S. The special provision contained in section 5 of the act aforesaid, that "the question of the issuance of such bonds shall not be required to be submitted to a vote" is an exception to the general requirement contained in the sections of the Revised Statutes above referred to.

It is, therefore, not necessary to have the question of the issuance of such bonds, for such purpose, submitted to a vote of the qualified electors.

Yours very truly,

W. H. MILLER,
Assistant Attorney General

TUBERCULOSIS—COUNTY HOSPITAL FOR TREATMENT OF—POWER OF COUNTY COMMISSIONERS TO PROVIDE FOR CONSTRUCTION.

County commissioners must submit to vote of people a proposed levy for purpose of constructing county tuberculosis hospital at cost exceeding $15,000.

December 7th, 1908.

DR. C. O. PROBST, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department an inquiry as to the operation of the act of the general assembly, approved May 9th, 1908 (O. L. 456), in conjunction with that of the act of April 3rd, 1908 (99 O. L. 62), the direct question being whether, in the construction of county hospitals for the care and treatment of persons suffering from tuberculosis, the county commissioners are limited by the provisions of section 2825 R. S.?

Section 2 of the act of April 3rd, 1908, provides in this regard as follows:

> "And whenever in any county funds are not available to carry out the provisions of this act, the county commissioners shall levy for that purpose, and set aside the sum necessary which shall not be used for any other purpose, and the commissioners of the county may issue and sell the bonds of said county in anticipation of said levy."

The conclusion cannot be avoided that if it is necessary to levy a tax for the purpose, the act of May 9th, 1908 (99 O. L. 456), must be followed by such officers. Such provision is as follows:

> "The county commissioners shall not levy any tax, or appropriate any money for the purpose of building public buildings, purchasing sites therefor, or for land for infirmary purposes, except in case of casualty, and except as hereinafter provided, the expense of which will exceed fifteen thousand dollars ($15,000.00) or for building any county bridge, the expense of which will exceed eighteen thousand dollars ($18,000.00), except in case of casualty and except as hereinafter provided, without first submitting to the voters of the county the question as to the policy of building any public county building or buildings, or for the purchasing sites therefor, or for the purchase of lands for infirmary purposes, or for the building of a county bridge, by general tax"

If the expense of the building exceeds $15,000 the provisions of section 2825 R. S. appear to be mandatory. While the provisions of section 2 of the act to provide for county hospitals, etc., appear to be likewise mandatory, yet the authority given the county commissioners to levy for the purpose of the construction of such building is limited by that of section 2825, supra, as to amount and as to the method, provided the amount of $15,000 is exceeded. It is well sustained by the supreme court of this state and the courts of last resort of various states of the Union, that between two conflicting sections of the Revised Statutes that which is last adopted, being the latest expression of the general assembly thereon, must control.

I therefore am of the opinion that the provisions of the act of May 9th, 1908 (99 O. L. 456), control the act of April 3rd, 1908, in the particulars heretofore given.

Very truly yours,

U. G. DENMAN,
Attorney General.

MATERNITY HOSPITAL—DEFINITION OF.

State board of health may classify hospitals as "regular" and "maternity" hospitals for purposes of act in 99 O. L. 13.

December 26th, 1908.

DR. C. O. PROBST, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR:—I have your inquiry of the 17th inst., requesting an official opinion upon the following question:

In the inspection and licensing of maternity boarding houses and lying-in hospitals, it is contended that section 1 of the act of February 18th, 1908 (99 O. L. 13), exempts from the provisions of the law hospitals accepting all classes of cases, or those which may rightfully be denominated regular hospitals as distinguished from lying-in hospitals.

The section of the act in question is as follows:

> "Whoever for hire, gain or reward, receives, cares for, or treats within a period of six months, more than one woman during pregnancy, or during or after delivery, except women related by blood or marriage; or whoever for hire, gain or reward has in his custody or control at any one time two or more infants under the age of two years, unattended by parents or guardians, for the purpose of providing them with care, food and lodging, except infants related to him by blood or marriage, shall be deemed to maintain a maternity boarding house or lying-in hospital. Provided, however, that nothing herein shall be construed to prevent a nurse from practicing her profession under the care of a phyician in the home of a patient, or in a regular hospital other than a lying-in hospital."

The statute nowhere contains a definition of a "regular hospital," but it is evident that there must be in the professions of medicine and nursing a wide distinction between a so-called "regular hospital" and that of a "lying-in" hospital. The definition is given in the foregoing section of the law as to what shall be deemed a maternity boarding house or lying-in hospital. The exemption is specifically made of those nurses practicing their profession under the care of a physician in the home of a patient or in a regular hospital other than a lying-in hospital, and the distinction is further observed in section 2 of the act wherein it is provided that your board shall have the power to grant a license to maintain a maternity boarding house or lying-in hospital. Such power does not extend to licensing regular hospitals, although such hospitals may accept, nurse and otherwise care for maternity cases. The evil sought to be controlled does not apply to that class.

I am of the opinion that the right exists in the state board of health to classify, for the purposes of such act, all such institutions or hospitals as either "regular hospitals" or "maternity boarding houses" or "lying-in" hospitals. Such classification, if made by your board upon the basis of the number and class of cases accepted for treatment therein, as well as upon other established tests pertaining to such practice, would, in my opinion, be sustained by the courts of the state. Those institutions which met the requirements pertaining to "regular hospitals" would be exempt from the provisions of the act in question.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BOARD OF HEALTH—LOCAL—ORDERS OF MAY BE ENFORCED AT INSTANCE OF PRIVATE INDIVIDUAL.

December 26th, 1908.

DR. C. O. PROBST, *Secretary, State Board of Health, Columbus, Ohio.*

DEAR SIR:—I am in receipt of yours of the 22nd inst., containing an inquiry of which the following is the substance:

When a board of health adopts an order for the prevention of nuisances under section (1536-730) R. S., must the proceedings for the enforcement of such order be taken by the board of health, or may they be taken by any private individual?

The board of health of a municipality or township may, pursuant to the provisions of section 2123 R. S. ((1536-736)) proceed after an order of abatement has been made, as provided in the preceding section, to cause the arrest and prosecution of the person or persons offending, or may elect to do and perform by its officers and employes what the offending party should have done as prescribed in the order so made by it. In other words, the board may cause the arrest and prosecution of the person for refusing to obey its lawful order as to the abatement of the nuisance; or it can proceed to abate it and certify the cost and expense thereof to the county auditor to assess against the property whereon the nuisance exists and thereby make the same a lien upon the same, which will be collected as other taxes.

In addition to the power thus conferred upon the board of health any individual affected thereby can cause the arrest of any person or corporation maintaining a nuisance, pursuant to chapter 7, title 1, part 4th of the Revised Statutes. (See section 6919 et seq.)

The prosecutions on actions taken by the board of health are not exclusive of the right conferred upon other individuals.

Yours very truly,

U. G. DENMAN,
Attorney General.

STATE MEDICAL BOARD—SECRETARY—LIABILITY FOR COSTS.

September 12th, 1908.

DR. GEORGE H. MATSON, *Secretary State Medical Board, Columbus, Ohio.*

DEAR SIR:—Replying to your inquiry of September 11th, I beg to state that section 6471 R. S. authorizes costs to be adjudged against a prosecuting witness in cases in which the defendant is *acquitted*. When the defendant is dismissed because the affidavit is defective, he cannot be said to have been acquitted, and, therefore, this section does not apply.

Your attention is also called to section 213 R. S., in which it is provided that no undertaking shall be required of any officer acting on behalf of the state. In prosecutions which you are required by law to conduct you are represented by counsel furnished by this department, and section 213, which is a portion of the act relating to the duties of the attorney general, applies to you.

My conclusion, therefore, is that you are not obliged to furnish any security for costs; that you are not personally liable as prosecuting witness for any

costs in any event, and that a magistrate is without authority in any case to obtain his costs from a prosecuting witness when an affidavit is dismissed without trial.

Yours very truly,

W. H. MILLER,
Assistant Attorney General

POLICE COURT—SUSPENSION OF SENTENCE.

February 10th, 1908.

DR. F. H. FROST, *Clerk Ohio Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—Your letter of January 31st, the receipt of which is acknowledged, inquires as to the power of a police judge to suspend the execution of a sentence imposing a fine for violation of the pharmacy act.

Upon an examination of the authorities, I am satisfied that a judge having final jurisdiction of such offenses, such as that conferred upon police courts of certain cities in this state, may suspend the execution of sentences imposed after conviction thereof. This is by virtue of a power that is said to inhere in every court having final jurisdiction without express statutory authority. (Webber v. State, 58 O. S. 616).

Very truly yours,

WADE H. ELLIS,
Attorney General.

INTOXICATING LIQUORS—RIGHTS AND DUTIES OF PHARMACISTS AS TO SALE OF, UNDER DOW LAW AND LOCAL OPTION LAWS.

September 18th, 1908.

DR. FRANK H. FROST, *Secretary State Board of Pharmacy, Columbus, Ohio.*

DEAR SIR:—You have requested my opinion as to the duty of a pharmacist under existing statutes with regard to the sale of intoxicating liquors.

The Dow law, so-called, imposes a tax upon the business of trafficking in intoxicating liquors. Any business, by whatever name called, is liable for this tax if carried on in such manner as to satisfy the statutory definition thereof. Section (4364-15) R. S. being section 7 of the Dow law, provides that:

> "Nothing in this act shall be construed as applying to a regular druggist, selling intoxicating liquors upon prescription issued in good faith by a reputable physician, in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, as defined in section 4364-16 of the Revised Statutes of Ohio."

Section (4364-16) R. S., referred to in the above clause, further defines the phrase, "trafficking in intoxicating liquors," as follows:

> "The buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes."

It is clear that under the provisions of these sections, a pharmacist, although his place of business may be located in wet territory, may not sell intoxicating liquors for any purpose other than mechanical, pharmaceutical or sacramental purposes, save upon prescription issued in good faith by a reputable physician in active practice. Therefore, such pharmacist may not sell to customers, even for known medicinal purposes, except upon prescription, without making himself liable for the payment of the Dow tax. Furthermore, in selling upon prescription under the Dow law, the pharmacist is obliged to exercise reasonable care to ascertain that that which purports to be a prescription was issued in *good faith* by a *reputable* physician in *active* practice. He is not obliged to inquire into the facts of each case, but if there is, in the transaction, that which ought to excite the suspicion of a reasonable man, he must investigate such facts before making a sale.

A pharmacist located in wet territory may, however, sell intoxicating liquors for mechanical, pharmaceutical or sacramental purposes in any quantity. In making such sales, however, he must satisfy himself that the liquor is to be used for one of these purposes and, if put upon his notice by suspicious circumstances, as above described, must make the sale at his peril.

There are at present four local option laws respecting the sale of intoxicating liquors, to-wit: the township law, the municipal law, the residence district law and the county law. These four acts have been supplemented by the enactment of the so-called "search and seizure" law, which bears directly upon the question at issue herein.

The municipal local option law, section (4364-20*c*), provides that:

> "Nothing in this act shall be construed to prevent the selling of intoxicating liquors at retail by a regular druggist for exclusively known medicinal, pharmaceutical, scientific, mechanical or sacramental purposes, and when sold for medicinal purposes it shall be sold only in good faith, upon written prescription issued, signed and dated in good faith by a reputable physician in active practice, and the prescription used but once."

The township local option law, section (4364-25), provides that:

> "Nothing in this section shall be construed so as * * * to prevent a legally registered druggist from selling or furnishing pure wines or liquors for exclusively known medicinal, art, scientific, mechanical or sacramental purposes."

The residence district local option law contains the same proviso as that quoted from the township local option law, with the following addition:

> "Such prescription shall contain the name of the party for whom the liquor is prescribed and direction for its use."

The county local option law (99 O. L. 35, section 3), contains the same provision as that quoted from the township local option law.

The "search and seizure" law (section (4364-30*b*)), provides that in every county, township, municipal corporation or district in which the sale of intoxicating liquors as a beverage is prohibited, every retail pharmacist shall keep a record of sales and prescriptions. A further provision therein is that:

"Any person who shall * * * alter or change in any way, * * any prescription, or shall fail to cancel any such prescription, or shall sell intoxicating liquors for medicinal purposes except on written prescription, shall be fined not less than $50.00 nor more than $500."

It is apparent from an inspection of these laws that intoxicating liquor may be sold for mechanical, pharmaceutical, scientific and sacramental purposes in districts dry under any one of the local option laws, under the same circumstances and conditions as those described above in the consideration of the Dow law. It is also apparent, however, that no pharmacist may sell for medicinal purposes in dry territory, except upon prescription, unless he wishes to make himself liable to criminal prosecution as well as to the payment of the Dow tax. In this connection it does not matter whether the druggist knows, as a matter of fact, that his customer desires the liquor for medicinal use. The prescription is required. Furthermore, it is required by all the laws, excepting the township law, that the pharmacist satisfy himself, as hereinbefore described, as to the good faith of the physician in writing the prescription, the reputableness of his character and the activity of his practice.

In a dry township the failure of a druggist to satisfy himself on these points might, under a strict construction of the law, make him liable for the Dow tax upon the business of selling intoxicating liquors, without making him liable to criminal prosecution for a violation of the local option law. However, I would advise that it is the duty of all pharmacists in township local option districts, as well as other similar districts, to satisfy themselves as to the good faith of a transaction before selling upon a prescription.

The "search and seizure" law supplements the township law, which otherwise would not require prescriptions in the case of sales for medicinal purposes, and, by virtue of the provisions of the latter act, such prescriptions are now necessary in such township districts. The duty of a pharmacist in regard to sales for medicinal purposes is enlarged by the "search and seizure" act in several other respects, in that that law requires that a record of all prescriptions shall be kept and all prescriptions shall be cancelled when presented, etc. The provision for cancellation as effectively prohibits the use of a prescription more than once as does the express language in some of the local option laws.

The refilling of a prescription is not evidence of selling liquor within the meaning of the Dow law and, except in so far as it might raise a presumption of bad faith, such refilling in a wet district would not make the pharmacist liable for the Dow tax.

The question as to what constitutes intoxicating liquor can scarcely be answered in a general way, as each case must rest upon its own facts. I deem it worth while to suggest, however, that it would seem to be a clear violation of the law for a pharmacist to compound and dispense a mixture containing a large percentage of intoxicating liquor according to a formula furnished by the customer for alleged medicinal purposes, without a physician's prescription; and that it would also violate the law for the druggist to compound and dispense intoxicating liquor mixed with other ingredients after his own formula, if, as a matter of fact, the other ingredients would not prevent the mixture from being used as a beverage.

A physician who is also a druggist may, of course, write and fill his own prescriptions. However, if he issues prescriptions for intoxicating liquor, knowing the same to be for use as a beverage, etc., he will lay himself liable to the criminal penalties of section (4364-30*zc*), being section 16 of the "search and seizure" act.

I have endeavored to answer all of your inquiries and to cover generally the broad question submitted by you. However, the infinite number of circumstances that might arise precludes any attempt to anticipate all the possibilities under the liquor laws of the state.

Very truly yours,

W. H. MILLER,
Assistant Attorney General

(To the Officers of the Various State Institutions)

BENEVOLENT INSTITUTIONS—TRUSTEE MAY NOT BE INTERESTED IN CONTRACT.

April 20th, 1908.

DR. CHARLES H. CLARK, *Superintendent Cleveland State Hospital, Cleveland, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you submit the following inquiry:

> "Has the Cleveland state hospital the legal right to receive and consider a bid for supplies from a company in which one of our trustees is a stockholder?"

In reply I beg to say section 6969 of the Revised Statutes provides as follows:

> "It shall be unlawful for any person holding any office of trust or profit in this state, either by election or appointment, or any agent, servant or employe of such officer, or of a board of such officers, to become, *directly* or *indirectly*, interested in any contract for the purchase of any property, *supplies*, or fire insurance for the use of the county, township, city, village, hamlet, board of education or *public institution* with which he is connected."

This provision makes it unlawful for a trustee of your institution to be either directly or indirectly interested in any contract for the furnishing of supplies to the institution.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BENEVOLENT INSTITUTION—PURCHASE OF SUPPLIES.

Respective powers and duties of board of trustees, superintendent and steward or financial officer in the purchase of supplies for benevolent institution.

November 17th, 1908.

HON. O. L. ANDERSON, *Steward, Columbus State Hospital, Columbus, Ohio.*

DEAR SIR:—You have presented to this department the inquiry as to the powers of the steward or financial officer of the institutions mentioned in section 649 R. S. (99 O. L. 383), in purchasing supplies for such institution or institutions. It will be observed by the amendment of May 9th, 1908, above cited, that the following language was employed by the general assembly in such amendment:

> "Under the authority and advice of the superintendent and in accordance with the regulations of the board of trustees or managers, the steward or financial officer of such institution shall purchase all its sup-

plies, upon the best possible terms and at the lowest cash value. But before making such purchase, he shall submit to the board of trustees or managers at their monthly meeting a detailed estimate, showing the requirements of the institution for the following month. Such statement must show the approximate amounts necessary to be expended by such steward or financial officer in his department, for which money has been appropriated by the general assembly, and the special purpose for which it is to be used, including the quantity, quality and estimated cost, as nearly as can be determined, of each article to be purchased or repairs to be made. Before such estimate shall be submitted to the board, it shall be approved by the superintendent of the institution, signed by him and the steward or financial officer thereof. He shall also see that the grounds, buildings, and all other property belonging to the state are properly preserved and kept in order, and shall perform such other duties as are assigned him by the board of trustees or managers or by the superintendent."

By this statute certain specific duties devolve upon each of the officers, to-wit: the board of trustees, the superintendent and the steward or financial officer.

The board of trustees is to adopt specific rules and regulations in compliance with section 643 R. S. The steward or financial officer shall purchase all the supplies, and such purchase shall be made in accordance with the regulations of the board of trustees and also under the authority and advice of the superintendent. The change in the language as to the power of the superintendent, in this regard, should be observed. Under the former law the purchase of the supplies was to be made by the steward or financial officer under *the direction of the superintendent.* The word "direction" is stricken out and the words "authority and advice" are substituted therefor.

Other limitations are imposed upon the steward or financial officer by the act in question, such as making the purchase upon the best terms and at the lowest cash value. It is also incumbent upon him, before making any purchase, to submit to the board of trustees or managers, at their monthly meeting, a detailed estimate showing the requirements of the institution for the following month. Special emphasis is laid by the statute, upon the contents of such statement, concerning which the statute is very specific, and such requirements are unnecessary here to recapitulate.

Concerning the estimate or estimates submitted to the board, the same is required to be approved by the superintendent of the institution and signed by him, also by the steward or financial officer thereof. Subject to the regulations thus set forth in section 649 R. S., the steward or financial officer is the officer who is charged, by law, with the purchasing of the supplies of the institution. Accurately speaking, the purchases are not made by the superintendent, nor by the board, and while each have their particular duties in connection therewith to perform, the purchase shall be made by the steward or financial officer.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

EPILEPTICS—HOSPITAL FOR—FORM OF COMMITMENT TO NOT GOVERNED BY 99 O. L. 323.

December 2nd, 1908.

Board of Trustees, The Ohio Hospital for Epileptics, Gallipolis, Ohio.

GENTLEMEN:—I have your inquiry of the 20th inst. and submit herewith my official opinion upon the questions therein presented. Briefly stated, you have inquired as to whether section 704, as amended by an act of the general assembly of the state of Ohio, approved May 9th, 1908 (99 O. L. 323, 326), relates to the form of medical certificate to be used in committing patients to the Ohio hospital for epileptics, as well as to state hospitals for the insane.

Section 704, as amended, is contained in chapter 9, title V, part 1, of the Revised Statutes. This chapter is entitled "Asylums for the Insane." The Ohio hospital for epileptics is chapter 10*a* of title V, and is designated as "The Ohio Hospital for Epileptics." The amendatory law referred to does not, in the opinion of this department, apply to the Ohio hospital for epileptics. The related sections all refer to the asylums for the insane, and the procedure adopted makes evident the intention of the general assembly that the provisions thereof should be made to apply to such institutions alone.

There are other questions presented in your letter, but as they are dependent upon the proposition here answered, it is unnecessary to further consider the same.

I herewith return to you the correspondence and papers transmitted to this department.

Very truly yours,

U. G. DENMAN,
Attorney General.

GIRLS' INDUSTRIAL HOME—DURATION OF CONFINEMENT IN.

Duration of confinement in girls' industrial home may not be fixed by commitment made by juvenile court.

May 19th, 1908.

HON. THOMAS D. BINCKLEY, *Member Board of Trustees Girls' Industrial Home, Columbus, Ohio.*

DEAR SIR:—You have referred to this department a communication addressed to you by Mr. Henry Baer, attorney at law, relative to the discharge of Mary Schmidt from the girls' industrial home at Delaware, with the request that this department advise you as to your powers and duties in the matter:

Mr. Baer says in his letter that Mary Schmidt is an inmate of the Girls' industrial home and that she is now of legal age and is therefore entitled, under the commitment of the juvenile court of Hamilton county, to be discharged from said institution.

It is true that the commitment, a copy of which I have, orders that "Mary Schmidt be and she is hereby committed to the care, custody, maintenance and control of the girls' industrial school of Delaware, Ohio, there to remain until she arrives at legal age, or until discharged by this court or by due process of law."

If said commitment controlled, the said Mary Schmidt, if she is of legal age, would be entitled to be discharged from said institution. But section 773 of the Revised Statutes, which was passed in its amended form April 23, 1904, provides that:

"A girl duly committed to the home shall be kept there, disciplined, instructed, employed and governed under the direction of the trustees, until she is either reformed or discharged, or bound out by them according to their by-laws, or has attained the age of twenty-one years."

I am of the opinion that when a girl is once committed to the girls' industrial home, and received by the superintendent thereof, her discharge or release from said institution will be governed by the above provisions in said section 773 and not by the order of commitment.

I herewith return the correspondence.

Yours very truly,

WADE H. ELLIS,
Attorney General.

ABSTRACT OF TITLE TO MASSILLON STATE HOSPITAL LAND.

May 19th, 1908.

To the Board of Trustees, Massillon State Hospital, Massillon, Ohio.

GENTLEMEN:—I have examined the abstract of title to the southwest quarter of section 22, township 10, range 9, Stark county, Ohio, and find that the legal title to the same is in the following persons: Lydia Roush, widow of Reuben Roush, deceased; Ollie E. Troup, Mary M. Hartzell, Katherine Koontz, F. M. Roush, Anna Rutter, Ida M. Rutter, Laura Miller, Lincoln A. Roush, Minnie Jacoby and Maud E. Gerber. The said Lydia Roush has in the property under consideration a life estate, and the other persons named have each of them therein an undivided 1-10th remainder in fee The following incumbrances appear of record:

1. The lease shown at section 40 to the Maple & Geiger Oil Co. This should be released or other satisfactory arrangement made before the conveyance of this property is accepted by the state.
2. The actions shown at sections 42 and 43 of the abstract resulting in judgments and executions on the undivided 1-10th interest of Ollie E. Throup constitute liens against said interest, and the suit shown at section 44, apparently being one to marshal liens, might seriously affect the title to the premises.

In my judgment, the claims of Katherine Wehe, plaintiff in the three actions referred to, should be satisfied and such satisfaction made to appear of record. No examination has been made for special assessments. No examination has been made in the circuit or district courts of the United States for pending suits or judgments.

Subject to the foregoing, I am of the opinion that a deed from the above named persons will convey a good and perfect title to the state of Ohio in and to the above described premises. Before such is deed is accepted, however, I would urge that the incumbrances which have been noted be removed.

Very truly yours,

WADE H. ELLIS,
Attorney General.

PENITENTIARY—LODGING FOR MEMBERS OF BOARD OF MANAGERS.

Warden of penitentiary may provide lodging and board for members of board of managers while in attendance at board meetings held at penitentiary.

May 14th, 1908.

MESSRS. JOHN C. RORICK *and* M. J. SLOAN, *Members of Board of Managers Ohio Penitentiary, Columbus, Ohio.*

GENTLEMENS—I am in receipt of your request for an opinion construing section (7388-4) of the Revised Statutes of Ohio, with reference to the question whether the members of the board of managers of the Ohio penitentiary can, during the sessions of the board, stay as guests of the warden at the institution and to be temporarily kept and supplied with bed and board.

The section in question is as follows:

> "No member of the board and no officer of the penitentiary, except the warden and his family and matrons, shall become residents of the same, or live therein, and said matrons may receive their provisions therefrom; but the sessions of the board shall be held in the institution in suitable rooms furnished for the purpose."

What meaning should be attached to the words "residents" and "live therein," as used in the foregoing section?

In my opinion, the quoted words should receive, in the connection in which they are used, their usual and ordinary meaning, and not a strained or technical definition.

Webster defines "resident," when used as an adjective, "dwelling or having an abode in a place for a *continued length* of time; fixed; residing." When used as a noun, "one who resides or dwells in a place for some time." The courts of last resort of the various states have sustained in such language, or its equivalent, the definitions given. The import or signification attached to such language is uniformly that of a fixed abode, as in Barney v. Oelrichs, 138 U. S. 529. It is contradistinguished from a place of temporary sojourn, and a mere transient is not a resident. This definition has been adopted by the supreme courts of seventeen of the various states having the question presented to them. The term "resident" has been held not to include one sojourning in a place for a special purpose. (71 Pa. St. 302.)

The prohibition against a member of the board becoming a resident of the penitentiary, or living therein, should receive the construction given in the foregoing citations as a prohibition against living, dwelling or staying therein as his fixed habitation during his term.

This construction gives to the law under consideration that rational view by which to assist in accomplishing the business of the board, especially as shown by the latter part of the section, which provides that "the sessions of the board shall be held in the institution in suitable rooms furnished for the purpose."

I therefore am of the opinion that it is lawful for the warden to entertain the members of the board at the institution, both day and night, during the necessary sessions of the board.

Very truly yours,

WADE H. ELLIS,
Attorney General.

PROBATION OF PERSON CONVICTED OF FELONY—CONSTRUCTION OF ACT OF MAY 9TH, 1908, 99 O. L. 339.

Powers and duties of board of managers of penitentiary under act in 99 O. L. 339, providing for probation of persons convicted of felony, under suspended sentence.

June 29th, 1908.

HON. O. B. GOULD, *Warden Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Your communication is received, in which you submit the following inquiries relative to the probation of persons convicted of felonies and misdemeanors under authority of senate bill No. 395, passed by the general assembly May 9th, 1908:

First. Does section 3 of said act give the board of managers of the penitentiary authority to have persons whose sentences are suspended brought to the prison for the purpose of taking photographs and giving the Bertillon measurements?

Second. Under section 4 of said act would the board of managers be warranted in using its discretion in the matter of requiring employment as in parole cases, or must the board make each and every requirement that is made of paroled prisoners?

Third. Does section 4 of said act require the board of managers to furnish blanks to each and every county at once, or is it sufficient to furnish such blanks upon receipt of the copy of judgment provided for in section 5 of said act

Fourth. Under section 5 of said act, who shall determine when "the requirements and conditions required by the board of managers have been properly and fully met?"

In reply to these several inquiries I beg to say:

First: Section 3 of said act provides as follows:

> "Whenever a sentence to the penitentiary or to the Ohio state reformatory has been imposed, but the execution thereof has been suspended, and the defendant placed on probation, the effect of such order of probation shall be to place said defendant under the control and management of the board of managers of the institution to which he would have been committed, and he shall be subject to the same rules and regulations as apply to persons paroled from said institutions after a period of imprisonment therein."

Under this section a person who has been convicted of a felony or misdemeanor, and whose sentence has been suspended, shall be subject to the same rules and regulations as apply to paroled prisoners from said penitentiary. The rule as provided by the board of managers, that all prisoners, upon their commitment to said penitentiary, shall be photographed and given the Bertillon measurements, does not, in my judgment, apply to persons whose sentences have been suspended, as provided in this act, and the officers of said penitentiary are without authority to require such persons to be brought to the prison for the purpose of being photographed and given said Bertillon measurements. No person may be conveyed to the Ohio penitentiary except upon a legal commitment, and in cases where the sentence is suspended no commitment could be issued.

Second: Under the provisions of this act the board of managers are re-

quired to exercise the same control and management and to enforce the same rules and regulations over persons whose sentences have been suspended under said act as are exercised and enforced over paroled prisoners.

Third: Section 4 of said act requires the board of managers of the penitentiary to furnish the clerk of courts of each county with blank forms setting forth the requirements and conditions used by them in the parole of prisoners in their institutions. I assume that the furnishing of such blanks, upon the receipt of a copy of the judgment, provided for in section 5, is a sufficient compliance with this provision.

Fourth: Section 5 provides that "upon entry in the records of the court of the order for such probation, the defendant shall be released from custody of the court, as soon as the requirements and conditions required by the board of managers have been fully met."

In my judgment, it is the duty of the court having jurisdiction of the case to determine whether or not this provision of the act has been complied with before ordering the release of the prisoner.

Yours very truly,

W. H. MILLER,
Assistant Attorney General

SENTENCE MAY NOT BE MODIFIED AT SUBSEQUENT TERM OF COURT.

December 28th, 1908.

HON. O. B. GOULD, *Warden, Ohio Penitentiary, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge the receipt of your letter of November 19th, in which you state that on July 8th, 1908, you received a prisoner sentenced for the term of one year, with the condition that every third week he be kept in solitary confinement. You further state that you have received a certified copy of a journal entry on November 19th, modifying the former sentence by eliminating therefrom the penalty of solitary confinement every third week and substituting hard labor therefor. You ask the opinion of this office as to whether or not the sentence can be thus modified.

In reply thereto I beg to state that it is my opinion that a judge cannot modify a sentence at a different term of court from the one at which the sentence was passed.

Yours very truly,

U. G. DENMAN,
Attorney General.

REFORMATORY—COMPLIANCE WITH ACT IN 99 O. L. 228.

Board of managers of Ohio state reformatory must credit to each prisoner confined therein for failure to support children, etc., 40c per day; payment of such credits must be left to the general assembly, no fund being available therefor.

August 3rd, 1908.

Board of Managers, Ohio State Reformatory, Mansfield, Ohio.

GENTLEMEN:—In yours of the 29th ultimo you have requested this department to give you an opinion upon the operation of the act of the general as-

sembly of the state of Ohio, passed and approved April 28th, 1908, entitled "An act to compel parents to maintain their children."

The propositions involved in your inquiry are:

> How can the board of managers of the reformatory credit and pay to a person sentenced and confined under said act, the amount of 40c per day for each working day, during the period of such confinement, as provided in section 7 of said act, when no appropriation has been made for that purpose?

Section 7, in so far as it relates to the duties of the board of managers of the penitentiary or reformatory, is as follows:

> "And the board of managers of the penitentiary, or reformatory to which any person is sentenced and confined under this act, shall credit such person with forty cents per day for each working day during the period of such confinement, and the same shall be paid, or caused to be paid, by the board of managers of said penitentiary or reformatory, to the trustees appointed by the court under this act. In all cases of conviction under this act where the person is confined in either a workhouse, penitentiary or reformatory, the name and postoffice address of said trustee so appointed by the court shall appear in the mittimus. The trustee appointed by the court under the provision of this act shall make quarterly reports of the receipts and expenditures of all moneys coming into the hands of said trustee as herein provided, said reports to be made to the county commissioners of the county from which such person was sentenced, or to the board of managers of the penitentiary, or reformatory, as the case may be, and the court may require said trustee to enter into a good and sufficient bond for the faithful performance of the duties so imposed as such trustee."

An examination of the statutes governing the duties of the board of managers of your institution provides for setting apart, out of the earnings of the persons confined therein, the following: 50 per cent. of the gross earnings of the inmates is authorized to be expended by the authority and under the direction of the board of managers for the purpose of equipping and maintaining industrial training schools at such institution. It is made the duty of the superintendent to make monthly reports to the auditor of state of all money received and expended under this provision.

The superintendent is further authorized to place to the credit of each prisoner such amount of his earnings as the board of managers may deem equitable and just, provided that such credit shall in no case exceed 20 per cent. of his earnings, and the funds thus accruing to the credit of any prisoner shall be paid to him or his family.

There is a further provision that at least 25 per cent. of such earnings shall be left for and paid to such prisoner at the time of his restoration to citizenship (section (7388-25) R. S.) It is manifest that when the act in question provides for the credit and payment of 40c per day for each working day during the period of a prisoner's confinement, the amounts of such credits, under such act, are contemplated to be in addition to those provided for in section (7388-25) R. S. and such act cannot be construed as taking any part of the gross earnings of inmates, as mentioned in said last cited section of the Revised Statutes for the payment of the credit which the prisoner or prisoners receive pursuant to section 7 of the act in question. Such act does not provide that the amounts

of such credits shall be paid by the board of managers of the reformatory out of the earnings of the inmates, and as those earnings are contemplated to be divided pursuant to the provisions of section (7388-25) R. S., no part of the same has been or could be appropriated to the purposes of the act of April 28th, 1908, without working *pro tanto* a repeal of section (7388-25) R. S. This is not done either expressly or by indirection.

Further examining the act of the general assembly at its last session, making appropriations for the reformatory, there does not appear to be any appropriation made for carrying out the provisions of this act. It is true that there is appropriated, among other items, $58,000 for current expenses. The credits and earnings under this act could no more be construed as "current expenses" of the reformatory than could the credits and earnings of the prisoners under section (7388-25) R. S. Such credits are not current expenses. By the failure of the general assembly to designate how and from what funds the credits shall be paid, it leaves the board of managers without any direction in that regard; but I am of the opinion that it becomes the duty of the board of managers to credit each person entitled thereto with the amount of 40c per day for each working day during the period of such confinement, thus leaving the question of payment of said credits to be provided for by the general assembly in such manner as it may deem best.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

BENEVOLENT INSTITUTION—SEWAGE DISPOSAL.

In re claim of Cameron Septic Tank Company for infringement of its patents.

December 16th, 1908.

GENERAL J. W. R. CLINE, *Commandant, Ohio Soldiers' and Sailors' Home, Sandusky, Ohio.*

DEAR SIR:—I am in receipt of a communication from you, enclosing literature and request for royalty from the Cameron Septic Tank Company. The company encloses a decision of the United States circuit court of appeals upholding the validity of five claims allowed by the patent office relative to the process of treating sewage by anaerobic and aerobic action, combined with a filter operation. It is claimed by this company that the process of treating sewage employed at the Ohio soldiers' and sailors' home is an infringement of their patent rights.

When the case cited, Cameron Septic Tank Co. v. Village of Saratoga Springs et al., was before the United States circuit court for the northern district of New York, it was held by this court that all the claims of the complainant company were invalid and their bill for infringement of U. S. Patent No. 634,423 was dismissed. On appeal to the United States circuit court of appeals, second circuit, the court affirmed the action of the lower court in dismissing all apparatus claims, but sustained claims Nos. 1, 2, 3, 4, 21, relative to the process of treating sewage. Inasmuch as the defendants in this case did not deny the infringement, but attacked the claims of the complainant largely on the ground that an attempt was being made to obtain patents upon a process of nature long utilized in many countries in the disposal of sewage, and since it

is held by experts upon this subject that a more complete defense could be made to the claims of the Cameron Septic Tank Co., I am inclined to believe a different conclusion might be reached by the court if such a case were brought before the court in this jurisdiction.

After conferring with the engineer who constructed your sewage disposal plant, and also with the engineers for the Ohio state board of health, who have made frequent tests and examinations of the process employed at the Ohio soldiers' and sailors' home, I am persuaded that your process differs in several material respects from the process patented by the Cameron Septic Tank Co., and that in your case there is no infringement of the patent rights of this company.

Since the state of Ohio cannot be sued for damages in any matter without its consent, I believe that you would not be justified in paying the royalties to this company in the absence of clear proof that you are infringing upon their patent rights and employing their patented process.

As to the validity of this patent, I understand that the claims of the Cameron Septic Tank Company are being resisted in a number of cities of Ohio and that there is in prospect a new adjudication of the validity of their patent rights in case this company brings suit against any cities and villages in Ohio. Should the company disagree with the conclusions herein expressed and insist that the process employed by you is an infringement, I would advise you to request from them a statement in detail, setting out fully and specifically their contentions that your process is an infringement upon their patent rights. You can then submit this statement to this office and to the state board of health for consideration.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

ABSTRACT OF TITLE TO MADISON HOME PROPERTY.

April 23rd, 1908.

Board of Trustees of the Home of the Ohio Soldiers, Sailors, Marines, Etc., Madison, Ohio.

GENTLEMEN:—Your board desires my opinion as to the title of the state of Ohio in three certain tracts of property situated in Madison township, Lake county, Ohio, being the land upon which is situated the home of the Ohio soldiers, sailors, marines, etc. In this connection I may remark that the act creating your board (97 O. L. 69, section (674-16) et seq. Bates), recites that the title of the state to such tract has been approved by the attorney general, whereas the records of this office show that no abstract of the title to the premises was ever furnished to the attorney general until the one on which this opinion is based was handed to me.

The tract under consideration consists of three parcels, one of approximately three acres, lying on the Middle Ridge road, in Madison township; one of seven and one-half acres lying on said road east of the first tract, and the third of five acres, lying in the rear of the first tract.

On the first tract, the mortgage shown at page 12 of the abstract appears of record as an incumbrance, but the remoteness of the date of its filing and the smallness of the amount secured, afford a reasonable presumption of fact that the mortgage, while not released of record, has been paid off while it is almost cer-

tain that the statute of limitations has by this time run on any right of action which might be found thereon. I do not, therefore, regard this defect as of any importance.

The deed of Jonas Tower, shown at page 9 of the abstract, is to the trustees of the "Madison Educational Society," while the deed for this same tract, shown at page 38, is that of the "Madison Seminary." It is to be assumed, of course, that these two organizations are, in fact, the same, and the abstractor so regarded it, as is apparent from the note on page 14, to the effect that no record evidence of the change of name was found. If these two names, in fact, refer to the same organization, there should be a record of change of name by proceedings in the common pleas court of Lake county. It would be well to ascertain whether there is any record of such a proceeding, but I do not regard the absence of such record as in itself a serious defect in the title to the first parcel. Its place may be supplied by the affidavits of persons familiar with the affairs of the seminary, preferably individuals who have served as its officers, and such affidavits might be verified by authenticated copies of the records of the society. Such affidavits when obtained, should be recorded in Lake county in order to obtain a perfect record title.

As to the second parcel, the absence of any record of the death of the wife of John Warren is of no importance, as it is almost certain that her right of dower, if any, has long since been barred.

Failure to release the lease shown at page 27 does not affect the title of subsequent grantees of the lessor after the expiration of the time for which it was to run.

There are no defects in the title of the third parcel above described, up to the time when it became the property of the National Women's Relief Corps.

The foregoing comments relate to the history of the title to the three parcels, as shown by the abstract, from the year 1840, at which date the abstract begins, to the dates of the deeds by which the National Women's Relief Corps acquired title to them.

By the two deeds of the Madison Seminary, shown at pages 38 and 43, and the deeds of C. M. Gillett, shown at pages 42 and 50, in both of which the National Women's Relief Corps was the grantee, a trust was imposed upon the first and second tracts above described. The legal title of the grantee as created by the first deeds from the respective grantors, is in fee simple, and the attempt of the two later deeds to cut this estate down and create a remainder in the state of Ohio was, in my opinion, ineffectual These later deeds, however, together with the entry on the record of the first from the Madison Seminary, should be considered in defining the trust created by the earlier deeds. The failure of the two later deeds to create a remainder in the state of Ohio as trustee is rendered unimportant by the deed of the National Women's Relief Corps to the state of Ohio, as shown at page 65, which deed conveys an estate in fee simple without express mention of the trust, which, however, attaches to the land without such expression.

The trust created by the deeds of the Madison Seminary and C. M. Gillett is of the class known as charitable trusts, and as such it is peculiarly appropriate that the state should adopt the policy it has adopted with reference to this land. The beneficiaries of the trust are, generally speaking, those which your board is authorized by section (647-17) R. S. to admit into the home which has been erected on the property in question The trustee, as the legal title now stands, is the state of Ohio, and the state holds the land charged with the duty of maintaining a home such as that described in the deeds abstracted and in the act cited. So long, therefore, as there continue to be persons who satisfy the requirements as to beneficiaries of the trust, it will be the state's duty to

continue to maintain the home, although this duty is one that is imposed only upon the conscience of the legislature. When the class of beneficiaries becomes extinct, as in time it is bound to do, the state may satisfy the requirements of the law by devoting the land, or the proceeds of its sale, to any charitable or public purpose; but the question of the ultimate disposition of the land is not now before me and no opinion is expressed thereon.

As to the third tract above described, the intention of the grantor, as expressed in the deed shown at page 60, beginning on page 62 of the abstract, is not clear. It does not appear that it was meant thereby to create a charitable trust which should run with the land; on the contrary, the intention not to restrict the ownership of the grantee was clearly expressed. However, as the general assembly, in section 1 of the act creating the board, has treated the premises as entire, it would seem that the question as to whether the trust attaches to the third parcel is of minor importance.

Subject to such exceptions as have been heretofore made, I am of the opinion that the title of the state of Ohio, as disclosed by the abstract in my possession, is good and perfect and in fee simple, but that the trust imposed upon the land by the grantors to the National Women's Relief Corps ought to be discharged in the future by the general assembly in the same manner as it is, under authority of section (674-16) and succeeding sections, at present being discharged.

Yours very truly,

WADE H. ELLIS,
Attorney General.

BENEVOLENT INSTITUTION—TRUSTEES—INTEREST IN EXPENDITURES

Bona fide sale, by trustee of benevolent institution, of building material to vendee who sells the same to the institution is lawful.

June 22nd, 1908.

HON. CHARLES L. JOHNSON, *Member Board of Trustees, Toledo Hospital for the Insane. Castalia. Ohio.*

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

I am a stockholder in and secretary and sales manager of the Castalia Portland Cement Company, and I am also a member of the board of trustees of the Toledo hospital for the insane. The Castalia Portland Cement Company has for a number of years sold cement to the Toledo Builders' Supply Company. The supply company has during the same time sold our product to the Toledo hospital for the insane. Query: Would the purchase of cement from the supply company by the hospital board bring me, as a member of the board, within the inhibition of section 628 of the Revised Statutes of Ohio?

In reply, I beg to say that if your company makes a straight-out sale of cement to the Toledo Builders' Supply Company, without regard to the future sale or use thereof, and the Toledo Builders' Supply Company afterwards sells a part or all of the same cement to the Toledo hospital for the insane, and such sale is made without collusion upon the part of the Castalia Portland Cement Company, I am of the opinion that it would not in any sense bring you within the inhibition of section 628 R. S.

Yours very truly,

WADE H. ELLIS,
Attorney General.

ABSTRACT OF TITLE TO OHIO UNIVERSITY LAND.

May 19th, 1908.

DR. ALSTON ELLIS, *President, Ohio University, Athens, Ohio.*

DEAR SIR:—I have examined the abstract of title to a certain tract of land, being 70 ft. off of the south side of inlot No. 12, in the village of Athens, and find that E. B. Sayre has acquired a complete title to the same, subject to the interest therein already owned by the president and trustees of the Ohio university. Said title is, however, subject to the following incumbrances:

1. The mortgage shown at page 76 of the abstract, being in the form of a trust deed securing the payment of certain bonds of the College Place Improvement Co., a corporation, is unsatisfied of record. Arrangements should be made, if possible, to release the premises under consideration from the lien of this mortgage.
2. No examination has been made for municipal and other special assessments.
3. No examination has been made in the circuit and district courts of the United States for pending suits and judgments.

Subject to the foregoing qualifications, I am of the opinion that a deed from the said E. B. Sayre would vest in the president and trustees of the Ohio university a good and perfect title to the above described premises.

Very truly yours,

WADE H. ELLIS,
Attorney General.

OHIO UNIVERSITY—PRESIDENT AS EX-OFFICIO MEMBER OF BOARD OF TRUSTEES.

President of Ohio university may act as member of board of trustees thereof, notwithstanding article VII, section 2, constitution of Ohio.

July 2nd, 1908.

HON. ISRAEL M. FOSTER, *Secretary, Ohio University, Athens, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of yours of the 25th ult., presenting therewith a copy of a resolution as follows:

WHEREAS, That part of section 2 of the act of the general assembly of Ohio, passed February 18th, 1804, whereby the president of the Ohio university is made an ex-officio member of the board of trustees of the university, is inconsistent with, and repugnant to, the provisions of section 2, article VII, of the constitution of the state, which provides that the trustees of all the state institutions shall be appointed by the governor; and,

WHEREAS, Our supreme court has, by repeated decisions, held that all laws or parts of laws in force on the first day of September, 1851, that are inconsistent with and repugnant to the constitution of 1851, are, by implication, repealed; now, therefore, be it

Resolved, That the office of president of the board of trustees of the Ohio university be and the same is hereby established, and that such office shall be filled by a member of said board, who shall preside at the meetings of said board.

Accompanying such resolution you have certified that the following motion was adopted:

That further consideration of said resolution be postponed until the annual June session of the board and, in the meantime, that the legal questions therein involved be submitted to the attorney general.

I have had the benefit of the discussion in the form of briefs of the contentions of all parties to this resolution. After consideration thereof, it is evident that the act of 1804, incorporating the Ohio university, was a contract between the state and the institution which could not be lawfully altered by future acts of the general assembly of Ohio, or by change in the constitution of the state, without the consent of the corporation. These decisions have been sustained in the cases of Armstrong v. Treas., 10 Ohio 325, and Matheny v. Golden, 5 O. S. 361. The decisions of our supreme court, in the foregoing cases, recognize the well-established rule announced by the supreme court of the United States in the case of Dartmouth College v. Woodward, 4 Wheat. 518.

It is further evident that there is no conflict between the act of 1804, establishing this university, and the constitution of 1851, so that the amendment to the constitution did not work a repeal of section 2 of the act of February 18th, 1804, providing for such incorporation. I therefore am of the opinion that the president of the university becomes thereby an ex-officio member of the board of trustees and is entitled to perform all the duties imposed upon such officer.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

OHIO STATE UNIVERSITY—BUILDINGS—INSTRUCTORS.

All buildings erected upon campus of Ohio state university must be controlled by trustees of university and open to all students thereof.

State officers may be employed as instructors in Ohio state university at compensation additional to salaries as such officers, provided such employment does not interfere with discharge of official duties.

January 8th, 1908.

HON. W. O. THOMPSON, *President, Ohio State University, Columbus, Ohio.*

DEAR SIR:—In your recent letter you ask:

1. Whether "the trustees of the Ohio state university have the right or power to permit the erection on the campus of a "club house to be used as a headquarters for all kinds of student activities."

2. Whether section 2 of an act passed April 2nd, 1906, 98 O. L. 368, makes it illegal for the trustees of the Ohio state university to enter into a contract with persons named as officers in the above act for their services as teachers in the university, and whether this act prohibits such persons therein named as officers of the state from receiving remuneration for such services.

1. Section (4105-15) R. S. provides that:

"The board of trustees shall have power to receive, and hold in trust, for the use and benefit of the college, any grant or devise of land, and any donation or bequest of money or other personal property, to be applied to the general or special use of the college; all donations or bequests of money shall be paid to the state treasurer and invested in the same manner as the endowment fund of the college, unless otherwise directed in the donation or bequest."

Section (4105-13) R. S. provides that:

"The board of trustees shall have the general supervision of all lands, buildings and other property belonging to said college, and the control of all expenses therefor; provided, always, that said board shall not contract any debt not previously authorized by the general assembly of the state of Ohio."

Under existing law, I am of the opinion that such a building may be donated for the use of the university, but that such building must be given and turned over to the trustees, and that the board of trustees will have complete control and supervision of the same. No donations may be received which will restrict the use of any portion of such building to any particular club or organization, or to any purpose outside of or contrary to the specific objects or purposes for which the university is established. The trustees can no more lease grounds for such building to be controlled by others than it can lease ground for a building which will not be used in connection with the university. Such a building as proposed would become the property of the state, and its advantages, therefore, must be open to all students of the university without discrimination, under the rules and regulations of the board of trustees.

2. Section 2 of 98 O. L. 368 (284*d* R. S.), declares that:

"Provided, further, that no fees whatever, in addition to the above named salaries, shall be allowed to such officers; and provided, further, that no additional remuneration whatever shall be given any such officer under any other title than the title by which such officer was elected or duly appointed. The salaries herein provided for shall be in full compensation for any and all services rendered by said officers and employes, payment for which is made from the state treasury."

There is nothing in this act to prevent an officer named therein from teaching in the university at such times as do not conflict with the proper performance of his official duties. Since the statute refers to services required by law or rendered by such officers in their official capacity, and since such teaching is not so required and is done in an individual capacity, compensation may be made to persons holding the offices named in this act for services as instructors in the university.

Very truly yours,

WADE H. ELLIS,
Attorney General.

OHIO STATE UNIVERSITY—COLLEGE OF EDUCATION—OBSERVATION AND PRACTICE WORK.

Trustees of Ohio state university may, by contract with board of education of city of Columbus, arrange for joint appointment of teachers in public schools of that city to assist in observation and practice work in connection with college of education of university.

June 16th, 1908.

DR. W. O. THOMPSON, *President, Ohio State University, Columbus, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of June 9th, in which you request my opinion as to the authority of the board of trustees of the Ohio state university to arrange for observation and practice work in connection with the public schools of the city of Columbus as a portion of the curriculum of the college of education of the university, and in furtherance of such an object to supplement the salaries of teachers in the public schools, to be designated or appointed by the joint action of the trustees and the public school authorities.

Section 7 of the act of April 16, 1906, 98 O. L 312, being section (4105*g*) Bates' statutes, provides that:

> "The Ohio state university * * * may establish a teachers' college or (of) professional grade."

Section (4105-11) R. S., being a portion of the act creating the board of trustees of the Ohio agricultural and mechanical college, whose successors in office and powers the trustees of the Ohio state university are, provides in part as follows:

> "The board of trustees shall have power * * * to determine the number of professors and tutors, elect the same and fix their salary. They shall also have power * * * to fix and regulate the course of instruction and prescribe the extent and character of experiments to be made."

Section (4105-44), being section 9 of the act establishing the Ohio state university as such, provides:

> "That said board of trustees shall fix the compensation for the president, professors, tutors and all other employes of the university."

Section (4105-45) provides:

> "It shall be the duty of the board of trustees, in connection with the faculty of the university, to provide for the teaching of such branches of learning as are related to agriculture and the mechanic arts, mines, and mine engineering and military tactics, and such other scientific and classic studies as the resources of the fund will permit."

Section (4105-10) provides, as to the trustees of the Ohio agricultural and mechanical college, that they shall have

> "the right, as such, of suing and being sued, of contracting and being contracted with."

The foregoing are all the statutory provisions relating to the powers of the board of trustees of the Ohio state university to appoint teachers, to fix and pay compensation to teachers and employes and to enter into contracts. It seems to me that no powers other than these would be involved in the course of action which is now contemplated. The sections and parts of sections quoted are, it will be noted, expressed in most general terms and are quite broad in their scope. I do not find any provisions of the act relating to the Ohio state university which expressly or impliedly forbid the making of such contracts and appointments and the payment of such compensation or salaries as those which the board proposes to make and to pay. I believe, therefore, that the broad grant of power is sufficient, in the absence of such negative provisions, to authorize the board to enter into a contract or contracts with the board of education of the city of Columbus, under and by virtue of which certain teachers of the public schools of that city may be designated by the board of trustees to direct observation and practice work in the college of education, and paid a compensation by the trustees therefor.

If there is any doubt as to the authority of the trustees to prescribe such a course as that described, aside from any question as to their power to appoint teachers and to pay salaries in the manner described, I believe that such authority may be derived from the power "to prescribe the extent and character of experiments to be made." If this course of work is to be considered as different from that included within the collegiate course of instruction, it would at least be experimental in its nature.

I have not considered the question of the power of the board of education of the city of Columbus to enter into such a contract or to make such an arrangement as that described. I presume that the board of education will, in case of doubt, seek the advice of the proper legal officer.

Respectfully submitted,

WADE H. ELLIS,
Attorney General.

(To the Houses and Members of the General Assembly)

STATE BOARDS.

List of state boards composed in whole or in part of governor, auditor of state, secretary of state, treasurer of state and attorney general.

January 21st, 1908.

To the House of Representatives, 77th General Assembly of Ohio.

GENTLEMEN:—I beg leave to acknowledge the receipt of house resolution No. 68, in which I am requested to advise the house of representatives as follows:

> First. As to the number of boards or commissions whose functions relate to the taxation system of the state of Ohio, and whose members consist, in whole or in part, of the following state officers: The governor, the attorney general, the auditor of state, the secretary of state and the treasurer of state.
>
> And also the official designations of such boards or commissions as well as the statutory authority by virtue of which they exist and exercise the functions for them prescribed.
>
> Second. As to the number of boards or commissions whose functions relate to any matter other than the taxation system of the state, whose membership is made up, in whole or in part, of the above named state officers, as well as the official titles or designations of such boards or commissions, and the statutory (provisions) by virtue of which they exist and exercise the functions for them prescribed.

In reply thereto I beg leave to submit the following information in tabular form:

I.

Boards and commissions whose functions relate to the taxation system of the state:

1. Annual state board of equalization for banks; consists of the governor, the auditor of state and the attorney general; sections 2808 and 2809, Revised Statutes.
2. Annual state board of equalization for railroads; consists of the auditor of state, the treasurer of state, the commissioner of railroads and telegraphs and the attorney general; sections 2811 and 2812 Revised Statutes.
3. Annual state board of equalization for interurban and suburban electric railroads; consists of the auditor of state, the treasurer of state, the commissioner of railroads and telegraphs and the attorney general; sections (2776-8), (2776-9) Revised Statutes.
4. Decennial state board of equalization. The auditor of state is ex-officio a member of this board, the other members of which are chosen in the several senatorial districts by the electors thereof. Sections 2818 and (2818-1) Revised Statutes.

5. State board of appraisers and assessors for express, telegraph and telephone companies; consists of the auditor of state, ex-officio president; the treasurer of state and the attorney general; sections 2778*a*, 2779 and 2780 Revised Statutes.

6. State board of appraisers and assessors for freight line and equipment companies; consists of the auditor of state, ex-officio president; the treasurer of state and the attorney general; sections (2780-9), (2780-10) and (2780-11) Revised Statutes.

7. State board of appraisers and assessors for sleeping car companies; consists of the auditor of state, ex-officio president; the treasurer of state and the attorney general; sections (2780-14), (2780-15) and (2780-16) Revised Statutes.

8. State board of appraisers and assessors for electric light, gas, natural gas, pipe lines, waterworks, street, suburban or interurban railroads, express, telegraph, telephone, messenger or signal, union depot, railroad, water transportation and heating or cooling companies ("Cole law"); consists of the auditor of state, ex-officio president; the treasurer of state, the attorney-general and the secretary of state; sections (2780-19), (2780-20) and (2780-21) Revised Statutes. Under section (2819-1) this board appoints annual boards of review for municipal corporations.

9. The board of tax remission; consists of the governor, the auditor of state and the attorney general; section 167 Revised Statutes.

10. The board of remission of penalties prescribed for failure of domestic or foreign corporations to file reports with the secretary of state ("Willis law"); consists of the governor, the secretary of state and the attorney general; section (2780-28).

11. The board of appeals from the decision of the secretary of state as to the levy of fees due from foreign corporations complying with the laws of Ohio ("Willis law"); consists of the auditor of state, the secretary of state and the attorney general. Section 148*c* of the Revised Statutes.

II.

Boards or commissions whose functions relate to matters other than the taxation system of Ohio:

1. Legislative apportionment board; consists of the governor, the auditor of state and the secretary of state; article XI, section 11 of the constitution.

2. Commissioners of the sinking fund; consists of the auditor of state, ex-officio president; the secretary of state, ex-officio secretary, and the attorney general; article VIII, sections 8, 9, 10 and 11 of the constitution, and sections 219 to (244-9), inclusive, Revised Statutes.

3. Board of state charities; consists of the governor, ex-officio president, and six persons appointed by the governor, not more than three of whom may be from the same political party; sections 655 to 658, inclusive, Revised Statutes.

4. State board of health. The attorney general is ex-officio a member of this board, the other members of which are appointed by the governor with the advice and consent of the senate. Sections (409-24) Revised Statutes.

5. Commissioners of public printing; consists of the secretary of state, the auditor of state and the attorney general. Sections 314, 318

and 320 et seq. Revised Statutes. Under sections 132 and 134 Revised Statutes, the commissioners of public printing have authority to contract for paper for the use of the state.

6. Emergency board; consists of the governor, the auditor of state, the attorney general, the chairman of the house finance committee and the chairman of the senate finance committee. Section (17-3) Revised Statutes.

7. Board of deposit; consists of the treasurer of state, the auditor of state and the attorney general. Sections (200-3) and (200-4) Revised Statutes.

8. Commission on fees of county officials; consists of the auditor of state, ex-officio chairman, secretary of state and the attorney general. Sections (1298-3), (1298-4) and (1298-5) Revised Statutes.

9. Commissioners to examine voting machines; consists of the governor, the secretary of state and the attorney general. Section (2966-54) Revised Statutes.

10. Commission to hear and determine petitions for the consolidation of insurance companies; consists of the governor (but in event of his disability to act, some competent person, a resident of the state, to be appointed by him), the attorney general and the superintendent of insurance. Section 3597 Revised Statutes.

11. Board for the relief of persons who wrongfully paid for Ohio state university lands in Virginia military district; consists of the secretary of state, the auditor of state and the attorney general. Section (4105-50) Revised Statutes.

12. Under section 783 Revised Statutes, the governor, the auditor of state and the secretary of state must approve plans, specifications and estimates for state buildings.

13. Under section (3821-68) Revised Statutes, the governor, the auditor of state and the secretary of state are authorized to certify to compliance with the free banking act.

14. Under section (3107-86) the auditor of state, the treasurer of state and the secretary of state are authorized and directed to sell United States land scrip issued for the establishment of an agricultural and mechanical college in Ohio.

15. Under an act in 80 Ohio Laws 122, the governor, the auditor of state and the attorney general are authorized to appoint an agent to adjust the claims of the state against the United States.

16. Under an act in 97 Ohio Laws 559, the governor, the auditor of state, the attorney general, the secretary of the state board of health and one person appointed by the governor, are constituted a state tuberculosis sanatorium commission, and as such are one of the "boards" of the state, although the purpose thereof is temporary.

17. Under an act in 98 Ohio Laws 57, the governor, the auditor of state and three persons, not more than two of whom may be of the same political party, to be appointed by the governor, constitute a commission to select a site and erect a hospital for crippled and deformed children. This act creates a state board, although the purpose thereof is temporary.

The following is a list of the instances in which the governor and the attorney general act concurrently:

In determining the existence of errors in deeds from the state under section 4122 Revised Statutes.

In approving leases of state lands under section (218-22a) Revised Statutes.

In appeals from the decision of the board of medical registration and examination, under section 4403c, and in hearing appeals from the decision of the state board of pharmacy under section 4410, Revised Statutes.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BOARD OF REVIEW—MUNICIPAL—POWERS OF.

January 25th, 1908.

To the Members of the Senate, 77th General Assembly of Ohio.

GENTLEMEN:—I am in receipt of a copy of senate resolution No. 75, as follows:

> "*Be it Resolved*, That the attorney general is hereby requested to inform and advise the senate as to the present powers enjoyed by boards of review in the equalization and valuation of property for the purposes of taxation as limited by the recent decision of the supreme court."

In compliance with the request therein contained, I beg to say that the boards of review created and acting under the provisions of section (2819-1) Revised Statutes (95 O. L. 481) have had their powers defined by the supreme court of this state in the case of Davies, jr., Auditor of Lucas Co., et al. v. The National Land & Investment Co., reported in 76 O. S. 407. The syllabus of that case is as follows:

> "After the completion of the decennial appraisement of real estate in any municipality of this state, and its equalization in accordance with the statutes in force for that purpose it is not competent for the board of review of any such municipality, created and acting under the provisions of section 2819-1, Revised Statutes of Ohio (95 O. L. 481), during the running of the decennial period, to select certain tracts or lots therein for revaluation and to increase their taxable value above that fixed by the preceding decennial valuation, unless such increase in value is caused by the erection of new structures and not returned, or unless such increase becomes necessary in equalizing such real estate on account of omitted lands or lots restored to the tax list, new entries and additions, or, in correcting gross inequalities in existing valuations, requiring a new equalization of the property so increased with other real property affected thereby. And such increase and equalization cannot be made except upon complaint of an owner or owners of real estate interested therein, and after due notice of the time and place of hearing of said complaint, to persons whose real estate may be affected by such increase and equalization.
>
> "A complaint filed by the clerk of such board of review, even if filed under its order, is not the complaint contemplated by said section (2819-1). It must be the complaint of an owner of real estate interested in a new equalization."

It is apparent from this decision, being the latest expression from the supreme court upon this subject, that such boards are not boards of original appraisal, but are merely boards of equalization, and that they have no power to fix a new valuation upon real estate during the interim between decennial appraisements, unless such real estate sought to be valued comes within the exceptions mentioned in that statute; that is to say, they may review the returns of new entries and the valuation of lands newly platted which are within the corporation, the value of new structures as returned, and the value of structures destroyed as returned and lost, and lands restored to the tax list. If, in the course of such proceeding, it is found in any case that certain real estate, as compared with other real estate in the locality, has been listed too low, and other real estate listed too high, so that gross inequalities exist, the values may be increased or reduced, as justice demands, but this increase in value may not be made arbitrarily, but only in the process of equalization which seems to be considered the paramount purpose of such boards. Such equalization can only be done after a bona fide complaint has been filed with such board by an owner of real estate interested in a new equalization.

The foregoing restrictions and limitations upon the powers of boards of review apply only to proceedings in connection with real estate. No such limitation applies when the board is proceeding to increase the valuation in the return of a taxpayer's personal property or in a proceeding to compel him to make a return of such personal property. Full and ample power is conferred upon such boards to compel every owner of personal property to return the same at its full value in money. - Their powers, however, do not extend to such subjects of taxation as bank stocks and certain others, where special authority has been conferred upon other boards and officers to fix, adjust or equalize the valuation of the same for purposes of taxation.

Very truly yours,

WADE H. ELLIS,
Attorney General.

CONSTITUTIONAL LAW—COMPENSATION OF MEMBERS OF BOARDS OF EDUCATION.

General assembly may authorize boards of education to fix compensation of members to be determined by specific services, but not to fix such compensation if apportioned according to time.

January 29th, 1908.

HON. ALVAH R. CORLETT, *House of Representatives, Columbus, Ohio.*

DEAR SIR:—I have given consideration to the inquiry presented by you as to whether the general assembly had the power to delegate to boards of education the right to fix the amounts of the salaries of the members thereof. Replying thereto, I refer you to article II, section 20 of the constitution, which 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 supreme court, in construing this section, has pointed out the distinction between "salary" and "compensation." In Thompson v. Phillips, 12 O. S. 617, it said:

> "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."

It was also held in Gobrecht v. Cinti., 51 O. S. 68, that:

> "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 $5.00 for his atttendance,' is not 'salary' within the meaning of section 20 of article II of the constitution. * * *"

These and other authorities bearing upon the proper construction of this clause of the constitution lead me to express the opinion that a provision in an act for compensating members of the board of education by giving to each member of the board who is present at the session thereof a fixed amount would be constitutional, but that if it attempted to establish the same by a yearly allowance to be determined by the board of education itself, it would violate the section of the constitution above quoted.

Very truly yours,

SMITH W. BENNETT,
Special Counsel.

CONSTRUCTION OF HOUSE BILL NO. 1005, AMENDING SECTION 2825 R. S.

February 25th, 1908.

HON. GEORGE W. BOWERS, *Member House of Representatives, 77th General Assembly, Columbus, Ohio.*

DEAR SIR:—You have submitted to me house bill No. 1005, with a request for an opinion as to the effect of certain language incorporated thereby in section 2825 Revised Statutes. The language in question, with the context, is as follows:

> "Sec. 2825. The county commissioners shall not levy any tax * * * for building any bridge, * * * except as hereinafter provided, the expense of which will exceed fifteen thousand dollars ($15,000), *except in case of county bridge, the expense of which will exceed eighteen thousand dollars* ($18,000), without first submitting to the voters of the county, etc."

This additional language is of doubtful effect, but, in my judgment, it should be interpreted to mean that county bridges which will cost $18,000 or less may be built and the tax levied without first submitting to the voters of the county the question of the policy of building such bridge.

Very truly yours,

WADE H. ELLIS,
Attorney General.

SUPPLEMENTARY AND FINAL LIST OF STATE BOARDS, COMMISSIONS, ETC.

February 26th, 1908.

To the Members of the House of Representatives of the 77th General Assembly.

GENTLEMEN:—I beg to acknowledge the receipt of house resolution No. 78, in which I am requested to inform the house as follows:

> "First. As to the number of state boards or commissions, not including those called for by house resolution No. 68, authorized and existing by authority of law, for the performance of whose functions and moneys of the state of Ohio, raised by taxation, have been taken from the general revenue fund of this state during the years 1906 and 1907; the official titles or designations of such boards or commissions, the number of members constituting each, and the official authority by whom the members of such boards or commissions were appointed, as well as the statutory authority by virtue of which such boards or commissions were created and exercised the functions for them prescribed.
>
> "Second. As to the number of state boards or commissions authorized and existing by authority of law, the expenses for the performance of which are defrayed from revenues derived from sources other than the general revenue fund of the state; the official titles or designations of such boards or commissions, the number of members constituting each and the official authority by whom the members of such boards or commissions have been appointed; and the statutory authority by virtue of which the said boards or commissions were created and by which they exercise the functions for them prescribed."

I deem it best to submit the information required by the above resolution in tabular form, but for the sake of convenience desire to call attention to certain classifications which should be made.

In the first place, two classes of boards whose compensation or expenses have been, during the years 1906 and 1907, paid out of the general revenue fund of the state ought to be distinguished. There are certain boards in the exercise of whose functions moneys are collected and paid into the state treasury to the credit of the general revenue fund, where they remain automatically appropriated, so to speak, to the use of such boards. These boards are to be distinguished from those whose support is derived from the regular general revenue fund.

A further classification of the various boards will be made in replying to both branches of the resolution according to the functions exercised by them. Certain state boards may be characterized as administrative. Others, for the purpose of distinguishing them, may be properly designated as institutional. Of the institutional boards there are those which exercise control over the penal and reformatory institutions of the state; those having supervision of the different benevolent institutions, and those the duties of which relate to educational institutions. There have been during the two years contemplated in the request of the resolution, various boards or commissions appointed under statutory authority, for the purpose of selecting sites for state institutions, etc. These bodies should be separately classified.

In addition to these boards which fall into the above mentioned classes, there are a number of boards of various degrees of importance which, for lack of classification, may be grouped together as miscellaneous.

I.

BOARDS WHOSE COMPENSATION OR EXPENSES HAVE BEEN PAID OUT OF THE GENERAL REVENUE FUND OF THE STATE DURING THE YEARS 1906 AND 1907, AND NOT OUT OF ANY SPECIAL PORTION OF SAID FUND.

a. Administrative Boards.

1. Ohio State Board of Arbitration; consists of three members appointed by the governor, with the advice and consent of the senate; section (4364-90) R. S., etc.

2. Ohio State Board of Pardons; consists of four members appointed by the governor, with the advice and consent of the senate; section (409-42) R. S. etc.

3. State Library Commission; consists of three members appointed by the governor, with the advice and consent of the senate; section 342 R. S. etc.

4. Ohio State Board of Agriculture; consists of ten members elected by the annual meeting of the state board of agriculture and the representatives from county agricultural societies; section (3691-25) R. S., etc.

5. Board of Live Stock Commissioners; the state board of agriculture is by section (4211-9) R. S., constituted the board of live stock commissioners.

b. Institutional Boards.

1. *Penal and Reformatory Institutions.*

6. Board of Managers of the Ohio Penitentiary; consists of five members appointed by the governor, with the advice and consent of the senate; section (7388-1) R. S.

7. Board of Managers of the Ohio State Reformatory; consists of six members appointed by the governor, with the advice and consent of the senate; section (7388-17) R. S.

2. *Benevolent Institutions*

8. Board of Trustees of the Cleveland State Hospital; consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 698, etc., R. S.

9. Board of Trustees of the Columbus State Hospital; consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 698, etc., R. S.

10. Board of Trustees of the Dayton State Hospital; consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 698, etc., R. S.

11. Board of Trustees of the Athens State Hospital; consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 698, etc., R. S.

12. Board of Trustees of the Toledo State Hospital; consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 698, etc., R. S.

13. Board of Trustees of the Massillon State Hospital; consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 698, etc., R. S.

14. Board of Directors of the Longview Hospital; consists of five members, two of whom are appointed by the governor, with the advice and consent of the senate, one by the judges of the court of common pleas of Hamilton county, one by the probate judge of said county and one by the commissioners thereof; sections 698, 723, etc., R. S.

15. Board of Trustees of the Boys' Industrial School (classed by section 634 R. S. with the benevolent institutions of the state); consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 752, etc., R. S.

16. Board of Trustees of the Girls' Industrial Home (classed by section 634 R. S. with the benevolent institutions of the state); consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 765, etc., R. S.

17. Committee of Visitors for the Girls' Industrial Home; consists of three women appointed by the governor; sections 766 and 767 R. S.

18. Board of Trustees of the Ohio Institution for the Education of the Deaf and Dumb; consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 659, etc., R. S.

19. Board of Trustees of the Ohio State School for the Blind; consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 665, etc., R. S.

20. Board of Trustees of the Ohio Institution for Feeble Minded Youth; consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 671, R. S.

21. Board of Trustees of the Ohio Soldiers' and Sailors' Home; consists of five members appointed by the governor, with the advice and consent of the senate; section (674-4), etc., R. S.

22. Board of Managers of the Home of the Ohio Soldiers, Sailors, Marines, their Wives, Mothers and Widows, and Army Nurses; consists of five members appointed by the governor, with the advice and consent of the senate; section (674-16), etc., R. S.

23. Board of Trustees of the Ohio Soldiers' and Sailors' Orphans' Home; consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, 676, etc., R. S.

24. Board of Visitors for the Ohio Soldiers' and Sailors' Orphans' Home; consists of five women appointed by the governor; sections 675*a* and 675*b* R. S.

25. Board of Trustees for the Ohio Hospital for Epileptics; consists of five members appointed by the governor, with the advice and consent of the senate; sections 634, (751-1) R. S.

3. *Educational Institutions.*

26. Board of Control of the Ohio Agricultural Experiment Station; consists of five members appointed by the governor, with the advice and consent of the senate; section (409-2), etc., R. S.

27. Voluntary Crop Correspondents, of which there may be an indefinite number appointed by the secretary of the board of agriculture; section (409-35), R. S.

c. Temporary Boards to Select Sites, etc.

28. Board of Commissioners for the Erection of the Lima State Hospital; consists of six members appointed by the governor; section (721-3), etc., R. S.

29. Sultana Monument Commission; consists of three members appointed by the governor. 98 O. L. 308.

30. Vicksburg Military Park Commission; consists of six members appointed by the governor. 94 O. L. 401.

31. Commissioners of the Jamestown Ter-Centennial Exposition; consists of five members appointed by the governor. 98 O. L. 644.

32. Commissioners to the Louisiana Purchase Exposition; consisted of eight members appointed by the governor. 95 O. L. 644.

33. Fort Meigs Commission; consists of three persons appointed by the governor. 97 O. L. 651.

d. Miscellaneous.

34. The Codifying Commission; consists of three persons appointed by the governor. 98 O. L. 221.

35. Ohio State Board of Uniform State Laws; consists of three members appointed by the governor; section (409-59) R. S.

36. State Board of Examiners (School); consists of five members appointed by the state commissioner of common schools; section 4065 R. S.

37. Special commissions to investigate and report upon claims for damages arising from the overflow of state canals and reservoirs; consist of three members each, appointed by the board of public works and the claimant or claimants, or, in case of disagreement, by the governor; section (218-32) R. S. During the years 1906 and 1907 nine of these boards were appointed.

BOARDS SUPPORTED IN WHOLE OR IN PART BY MONEYS BY THEM COLLECTED AND PAID INTO THE STATE TREASURY TO THE CREDIT OF THE GENERAL REVENUE FUND.

38. State Board of Public Works; consists of three members chosen by the electors of the state; article VIII, section 12, of the constitution, and section (218-2) R. S., etc.

39. The Canal Commission; consists of two members appointed by the governor, under authority of section (218- 236*d*) R. S. This board ceased to exist April 28th, 1906, having been abolished by the act in 98 O. L. 304.

40. Railroad Commission of Ohio; consists of three members appointed by the governor, with the advice and consent of the senate; section (244-11), etc., R. S.

41. Fish and Game Commission; consists of five commissioners appointed by the governor, with the advice and consent of the senate; section 405, etc., R. S.

42. Ohio State Board of Medical Registration and Examination; consists of seven members appointed by the governor, with the advice and consent of the senate; section 4403, etc., R. S.

43. Ohio Board of Pharmacy; consists of five members appointed by the governor, with the advice and consent of the senate, from a list submitted by the Ohio State Pharmaceutical Association; section 4406, etc., R. S.

44. Bureau of Inspection and Supervision of Public Offices, department of auditor of state; consists of three deputy inspectors appointed by the auditor of state, who is ex-officio chief inspector; section (181-1), etc.

II.

BOARDS WHOSE COMPENSATION OR EXPENSES ARE NOT PAID OUT OF THE GENERAL REVENUE FUND OF THE STATE.

a. Administrative Boards.

1. Ohio State Board of Dental Examiners; consists of five members ap-

pointed by the governor, with the advice and consent of the senate; section 4405, etc., and section 6991 R. S.

2. Ohio State Board of Veterinary Examiners; consists of five members; the secretary of the state board of agriculture and the secretary of the state board of health are ex-officio members and the other three are appointed by the governor, with the advice and consent of the senate; section (4412-1) etc., R. S.

3. Ohio State Board of Embalming Examiners; consists of five members; the president and secretary of the state board of health are ex-officio members; the other three members are appointed by the governor; section (4412-11) R. S.

b. Institutional Boards.

4. Board of Trustees of the Ohio State University; consists of seven members appointed by the governor, with the advice and consent of the senate; section (4105-37) etc., R. S.

5. Board of Trustees of Ohio University; elected by the Ohio university corporation; section (4105*a*) etc., R. S.

6. Board of Trustees of Miami University; elected by the Miami university corporation; section (4105*a*) etc., R. S.

7. Board of Trustees of the Combined Normal and Industrial Department at Wilberforce University; consists of nine members, five of whom are appointed by the governor, with the advice and consent of the senate, and three of whom are appointed by the board of trustees of Wilberforce university, and of which the president of Wilberforce university is ex-officio a member; section (4105-54), etc., R. S.

8. Committee to Examine Applicants for Admission to the Bar; is appointed by the supreme court under authority of section 559. Excepting the grant of authority and the limitation therein that this committee shall consist of not less than three members, this body is governed entirely by the rules of the court.

I deem it proper in this connection to mention two boards which more properly belong within the two classes described in house resolution No. 68, but which were not included in the list submitted in compliance with the request of said resolution, to-wit, the School Book Board, consisting of the governor and the secretary of state, and existing by virtue of section (4020-1) R. S., and the Canvassing Board, consisting of the governor and secretary of state, and exercising its functions under sections 2955 and 2986 R. S.

Very truly yours,

WADE H. ELLIS,
Attorney General.

DEPOSITORY—COUNTY—AWARD WHEN BIDS ARE SAME.

County commissioners have discretion as to distribution of funds among several banks bidding the same rate of interest.

April 3rd, 1908.

DEAR SIR:—Replying to your inquiry of the 3rd, relative to the legality of certain procedure adopted by the county commissioners of Wyandot county in designating a depository for the public moneys of the county, I beg to say that

section 3 of the depository act does not seem to require that the award of the money to the various banks must be done at the time of the opening of the bids, but the commissioners can have time to consider the various proposals made by the different banks.

In this case three banks in the county were bidders for all of the funds, and one bank in the county for only $10,000 of the funds. Two per cent. was bid by each bank. You have not stated what was the sum of public money to be awarded. The provision of the law is that no bank shall receive a larger deposit than $400,000, and that where the highest bidder on account of the large amount of money to be deposited is not entitled to all of the funds of the county, the commissioners, after awarding to the highest bidder all that it is entitled to, shall award the balance to the next highest bidder or bidders respectively.

As the bid of each one of the banks was the same, the county commissioners would be authorized, under section 3 of the act, to divide the funds to be deposited and award a portion thereof to each of the banks or trust companies, provided they offer the proper sureties, securities, or both.

I find no objection to the plan pursued by the county commissioners in this instance.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

BOARD OF AGRICULTURE—STATE—STATUS OF.

General assembly may and should appropriate money to pay principal and interest of bonds issued by state board of agriculture.

April 16th, 1908.

HON. I. E. HUFFMAN, *Secretary, Senate Committee on Finance, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge the receipt of your letter, in which you inquire as to the validity of the outstanding bonds issued by the Ohio state board of agriculture and as to the policy of the state in the payment of such bonds and interest.

In reply thereto I beg to say that, in my opinion, the bonds are valid obligations which the state should pay, the same as any other debt. The Ohio state board of agriculture is a public agency established by the state for the promotion of its agricultural interests, and is an arm of the state for the purpose of performing purely public functions.

I presume the question arose before your committee because of the contention in an action in the common pleas court of this county wherein the plaintiff claimed that the Ohio state board of agriculture is a private corporation, and sought to restrain the publication of the fertilizer report. In this connection permit me to say that that case has been submitted to the court and I feel confident the decision will show that there is nothing in the claim.

The Ohio state board of agriculture was created in 1846 for the purpose of promoting the agricultural interests of the state. It was created in the same manner that the Ohio university and the Miami university were created The state has the same authority to pay these bonds as it has to appropriate money

for these universities and for many hospitals and other educational and charitable institutions They are not private corporations in the ordinary meaning of the term.

The policy of the state should be to provide the necessary funds for the board of agriculture to carry on the work which has been entrusted to it. The work of gathering and publishing the annual agricultural reports and crop statistics; of protecting the live stock of the state; of nursery inspection and the prevention of insect pests; of conducting an annual agricultural exhibit and of conducting farmers' institutes are all matters of vital importance to the farmers of our state, and the legislature has the clear right to aid this, our most important industry.

I shall be glad to defend in any court your action, for I believe the Ohio state board of agriculture should in every particular be recognized as a state department.

Yours very truly,

WADE H. ELLIS,
Attorney General.

(To the Prosecuting Attorneys)

ROADS AND HIGHWAYS — OPENING OF — REPAIR. COURT STENOGRAPHER — SCOPE OF DUTIES.

Trees and rocks removed from land appropriated for road belong to original owner unless included in bill of damages.

Township road connecting at one end only with public highway must be repaired by road superintendent.

Court stenographer may be allowed additional compensation, to be taxed as costs, for making transcript of testimony taken before grand jury.

January 8th, 1908.

HON. EDWARD B. FOLLETT, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter, in which you submit the following questions:

> "1. When a township or county road is laid out, and the compensation and damages paid, and, in opening the road, trees and rocks must be removed, can the county or township authorities make such use of the wood and stone as they see fit, or is such use in any wise dependent upon the will of the abutting land owner?"
>
> "2. When a township road is fixed by the trustees at a width of 16 feet and is not such as is described in section 4678 R. S., is it legal for the trustees to provide that the road shall be maintained by the township? The road in question runs from a county or township road to a plantation and is used by the owners of some four or five different farms."
>
> "3. Referring to the last sentence of section (474-9), section 5, Everett's Ed. of Bates' Ann. Ohio Statutes, in regard to the testimony of witnesses taken before the grand jury by the official court stenographer, should a court stenographer, appointed by the court of common pleas and drawing a fixed salary of one thousand dollars per year, be allowed the compensation specified in said section for transcripts ordered by the prosecuting attorney, and should same then be collected as costs in the case, or is such work covered by the regular salary of the stenographer?"

In reply thereto I beg to say that it is my opinion:

First. If such property was merely located on the land appropriated and was not included in the bill for damages, it belongs to the abutting owner, but if it is part of the land which was appropriated and for which compensation was received by the abutting owner, then such property may be disposed of by the authorities mentioned. Whether the authorities may use the wood and stone depends on whether compensation has been made for them.

Second. The road should be kept in repair by the road superintendent, as provided by section 4715.

Third. The official stenographer should be allowed the statutory compensation per folio, the same to be taxed and collected as other costs in the case.

Very truly yours,

WADE H. ELLIS,
Attorney General.

EXPENSE OF ELECTION FOR INCORPORATION OF VILLAGE.

Township trustees may refuse to proceed with election upon question of incorporation of village until expense of such proceeding is paid by petitioners.

January 8th, 1908.

HON. EDWARD S. STEPHENS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—Replying to yours of the 31st ult., regarding the authority of the township trustees to require payment by the petitioners of the expenses incurred in calling, holding and conducting the election provided for by section (1536-15) R. S., and related sections, I beg to state that it is apparent by a consideration of section (1536-26) that the officers required to perform the services need not do so if, upon demand of the petitioners, the payment of the fees are not made. It would therefore operate to abate the proceedings if the officers were not paid for their services, and while the township trustees have not the authority to require a deposit of costs in advance, yet the statute operates to compel the payment of the fees as requested, or the services need not be performed.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BOARD OF EDUCATION—TOWNSHIP—VACANCY IN OFFICE.

When all members of township board of education resign, county commissioners may act as such board until successors can be elected.

January 9th, 1908.

HON. CHARLES C. KEARNS, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Your communication of January 7th is received, in which you submit an inquiry as to the filling of vacancies in the board of education where the entire board has resigned.

In reply, I beg to say section 3981 of the Revised Statutes provides a method for the filling of vacancies in the membership of boards of education. It contains no provision, however, for the appointment of an entire new board, and I know of no provision of law by which such appointments can be made. I am of the opinion, however, that relief may be had under section 3969 of the Revised Statutes, whereby the county commissioners are authorized to perform the duties of a board of education until such time as a new board can be elected.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ARREST—EXPENSE OF CITIZEN ASSISTING POLICE OFFICER.

County commissioners may not pay expense of citizen incurred in assisting police officer in arrest of person charged with violation of state law.

January 11th, 1908.

HON. CHARLES C. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—In your letter of January 4th you state that upon request of the chief of police of Sidney, one of your citizens allowed him to use his automobile and sent a man with the machine to assist the police in pursuit of a murderer; that the machine was injured during the trip and the owner has presented a bill to the county commissioners, asking them to pay for the damage done to the machine. You ask whether the commissioners have any authority to pay this bill.

Under existing law there is no provision for the payment of any such bill by the county commissioners. Section 6918 R. S. makes it the duty of any person called upon by such officer to assist him in apprehending a person charged with crime, but makes no provision for the payment of any compensation, expenses or damages.

Inasmuch as the chief of police was performing his duty as a municipal officer, I would suggest that the city solicitor be consulted as to whether the city, under the provisions of the municipal code, should make payment of such amount.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ROADS AND HIGHWAYS—FREE TURNPIKE COMMISSIONERS.

January 11th, 1908.

HON. H. T. SHEPHERD, *Prosecuting Attorney, St. Clairsville, Ohio.*

DEAR SIR:—Replying to your recent letter, under section 4775 a person who owns land lying within the bounds of a road, but who does not reside within the bounds of said road, cannot be appointed a road commissioner. The first part of this statute sets out the following as the requisite qualifications:

> "The commissioners shall appoint three judicious free-holders of the county resident within the bounds of said road, to be commissioners of such free turnpike road."

In the absence of specific exceptions in the remainder of the statute the above requirements must govern and control as to such qualifications.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BOARD OF EDUCATION—ARCHITECT.

Board of education need not advertise in employment of architect for construction or improvement of school building.

January 16th, 1908.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—Your communication of January 13th is received, in which you submit the following inquiry:

> "Do the Ohio statutes require boards of education about to erect or remodel buildings for school purposes, in selecting an architect, to proceed by four weeks' legal advertising and competitive bidding, in the same manner as provided in the laws for the letting of building contracts for construction purposes, or are said boards free to select an architect by such methods as they deem best?"

In reply I beg to say section 3988 of the Revised Statutes provides:

> "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 shall proceed as follows:
>
> "(1.) The board shall advertise for bids, for the period of four weeks, in some newspaper of general circulation in the district, and two such newspapers, if there are so many; and if no newspaper has a general circulation therein, then by posting such advertisement in three public places therein, which advertisement shall be entered in full by the clerk on the record of the proceedings of the board."

Paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 of said section provide for the submission of bids and the letting of the contract for the improvement. This section contains no provision relative to the employment of an architect, and I am unable to find any other provision of the statutes which expressly authorizes boards of education to employ architects. I am, however, of the opinion that in the express grant of power to boards of education to contract for the construction of school buildings is implied the power to employ necessary architects.

From an opinion rendered the governor, under date of December 19th, 1906, by this department, relative to the erection of the Sultana monument, I quote the following:

> "As to the charge that the commission had, or was about to enter into a contract with the Leland & Hall company for the construction of the monument without competitive bidding, I find that this was not supported by any evidence; but that the only contract they had entered into was one with Mr. Landi, a New York sculptor, for the construction of a working model to be cast in bronze, for which they had agreed to pay, when approved by the commission, the sum of

$4,000, and that while this contract may have been unnecessary and might have been submitted to competition or included in the entire contract for the construction of the monument, it was not required by law to be so awarded, and was awarded in good faith."

I am of the opinion that the conclusion herein reached will apply to boards of education in the employment of architects. I desire, however, to submit this suggestion: If a board of education deems it advisable to employ an architect at competitive bidding, the resolution should provide that the contract will be let to the lowest and *best* bidder, so as to reserve to the board of education the right to exercise their discretion in the selection of the architect without regard to the amount of the bid submitted.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

TOWN HALL—LEVY OF TAX FOR IMPROVEMENT OF.

January 16th, 1908.

HON. EDWARD S. STEPHENS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you submit the following inquiry:

The question of enlarging the township hall in Huron township, Erie county, was submitted to the whole body of electors of said township at the last November election, with the result that a majority of the ballots cast favored the enlargement of said hall. You inquire whether or not the tax to be levied for said improvement, as provided in section 1479 Revised Statutes, shall be placed against all of the property in the township, including the property in the village of Huron.

In reply I beg to say that in as much as the territory included in Huron township embraces the village of Huron, the tax should, in my judgment, be levied against all the property in the township, which of necessity would include the property within the municipality.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

PROSECUTING ATTORNEY—DUTY OF.

January 17th, 1908.

HON. JOS. L. MCDOWELL, *Prosecuting Attorney, Coshocton, Ohio*

DEAR SIR:—Your communication of recent date is received, in which you submit an inquiry as to your duty to prosecute criminal cases brought into the common pleas court of your county on error from the mayor's court.

In reply I beg to say section 1273 of the Revised Statutes provides as follows:

"The prosecuting attorney shall prosecute on behalf of the state all complaints, suits and controversies in which the state is a party,

* * * in the probate court, common pleas court, circuit court, and shall also prosecute cases in the supreme court in cases arising in his county, in conjunction with the attorney general."

Under this provision it is my opinion that it is a part of your official duty to prosecute all criminal cases in the common pleas court of your county without regard to the question as to whether the jurisdiction is original or appellant.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

STATE SENATOR MAY BE VILLAGE SOLICITOR.

January 27th, 1908.

HON. GEORGE J. FREY, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—Replying to yours of the 16th inst., I beg to advise that in my opinion there is no prohibition contained in the statutes against the employment of a state senator as the legal counsel of a village, pursuant to the provisions of section 199 of the municipal code. A person acting under such employment is not filling an office, but merely an employment, the same as if employed by a private corporation.

Very truly yours,

WADE H. ELLIS,
Attorney General.

COUNTY COMMISSIONERS—COMPENSATION OF.

County commissioners must act as turnpike directors without additional compensation.

January 30, 1908.

HON. R. R. NEVIN, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—I desire to acknowledge receipt of your letter of January 28th, in which you inquire whether or not county commissioners are entitled to compensation as turnpike directors, in addition to their compensation as county commissioners. In reply thereto I desire to say that the question seems to be settled in the case of Tynes, Auditor of Scioto County, v. State ex rel. Moeller, in which the supreme court affirmed the judgment of the circuit court, which held that:

> "Said relator, John Moeller, is not entitled to any compensation, under existing laws of the state of Ohio, for services performed as turnpike director."

Moeller was one of the county commissioners of Scioto county and brought an action in mandamus against the auditor of that county to compel the issuance of a voucher for his compensation. The judgment was affirmed May 8th, 1906.

Very truly yours,

WADE H. ELLIS,
Attorney General.

TREASURER OF SCHOOL DISTRICT—COMPENSATION.

Board of education may fix amount of compensation of treasurer of school district at end of period of time for which compensation is to be paid.

January 31st, 1908.

HON. A. C. DENBOW, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—In your letter of January 28th you ask:

1. Whether a board of education may fix the compensation of the treasurer of the board at the end of the year for which he is employed.

2. Whether the treasurer whose compensation was fixed by the board for the year 1906 will draw the same amount for the year 1907, although the board, at the end of the year 1907, has fixed the compensation for the latter year at a less amount.

Section 4056 of the Revised Statutes provides that "the board of education of each school district shall fix the compensation of its treasurer," but leaves the matter of time to the discretion of the board.

Section 3974 of the Revised Statutes provides that "no contract shall be binding upon any board unless it be made or authorized to be made at a regular or special meeting of the board."

Section 3982 of the Revised Statutes strictly requires a roll call "upon a motion to adopt a resolution * * * to elect or appoint an officer or to pay any debt or claim," and directs that "in all cases the roll call and record provided for herein shall be complied with."

In view of these statutes and the policy of the law as to the powers and duties of the boards of education, I am of the opinion that the amount of compensation must, in each case, be definitely fixed by the board as provided above, at such time as they deem fit; that the treasurer, after the expiration of the contract for 1906, must be presumed to enter upon his duties for the following year, subject to such compensation as shall be fixed by the board, and that the amount fixed at the end of the year 1907 is the proper amount to be paid to the treasurer of the board for his services during the year 1907.

Very truly yours,

WADE H. ELLIS,
Attorney General.

FUGITIVE FROM JUSTICE—COMPENSATION OF OFFICER APPOINTED TO CAPTURE.

February 12th, 1908.

HON. LYMAN W. WACHENHEIMER, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you inquire as to the right of an agent or officer, under sections 920 and 1310 of the Revised Statutes, to receive *per diem* compensation in addition to the expenses allowed.

In reply I beg to say that, in my judgment, neither of these sections contemplates that the agent or officer is to receive any *per diem*, but only such necessary expenses as are actually incurred.

Yours very truly,

WADE H. ELLIS,
Attorney General.

INSANITY—INQUEST OF.

Procedure when insane person has escaped from a hospital, a certificate of discharge has been issued by the authorities of such hospital, and such person is subsequently arrested under indictment for criminal offense.

February 12th, 1908.

HON. C. H. HENKEL, *Prosecuting Attorney, Galion, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you submit the following inquiry:

> "An accused person, indicted for an offense under the laws of the state of Ohio, through his attorney, suggested to the court that he was insane, and that question was tried to a jury, as provided in section 7240 R. S. of Ohio. The jury found the accused insane; he was committed to the asylum at Toledo, from where he escaped. The authorities, being unable to find him, issued a discharge. Having located the party, I issued a precipe for warrant and caused his arrest; he is now confined in the county jail.
>
> "Can he be returned to the asylum by proceedings before the probate judge, or will it be necessary to proceed under section 7240 R. S.?"

In reply I beg to say that if the discharge issued by the superintendent of the asylum cites the fact that the person is recovered, such discharge is prima facie evidence of his sanity. If, however, you have reason to believe that he is now insane, an inquest of lunacy may be held by the probate judge, and if he is found to be insane he may be committed to an asylum regardless of the fact that an indictment is pending against him, or proceedings may be had under section 7240 Revised Statutes.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

CORONER—OFFICE RENT OF.

February 12th, 1908.

HON. WILLIAM L. DAVID, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—Your communication of February 8th is received, in which you submit an inquiry as to the authority of the county commissioners to pay office rent for the county coroner.

In reply thereto I beg to say section 859 of the Revised Statutes provides that:

> "A court house, jail, *offices for the county officers* * * * shall be provided by the commissioners when, in their judgment, the same or any of them are needed, etc."

Under this section, I am of the opinion that the county commissioners

may, if they think the same is needed, provide an office for the county coroner and pay the rent therefor.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

DELINQUENT PERSONAL TAXES—FEES OF COLLECTOR.

Collector of delinquent personal taxes not entitled to fees on amount collected from ex-treasurer of county failing to pay taxes over to his successor.

February 12th, 1908.

HON. DAVID R. WILKIN, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—You have in yours of the 8th inst., addressed to this department suggested the following question for determination:

> The county treasurer of Tuscarawas county collected certain taxes, but failed to pay the same into the treasury. The county commissioners authorized the employment of a delinquent personal tax collector and fixed his compensation at 35% of the amount collected. Such collector collected the taxes then held by the ex-county treasurer, paid under the circumstances set forth. Is the collector entitled to compensation as provided in said contract for such services?

In my opinion, the statute does not authorize the employment of a tax collector to collect taxes from officers to whom certain taxpayers had paid the taxes due from them. Such taxes were not "delinquent." The delinquency was that of the ex-treasurer in failing to pay the same into the county treasury. The services thus performed by such tax collector could not become a valid charge against the county or against the amount collected under such circumstances, but upon such information it became the duty of the prosecuting attorney to commence action upon the bond of such county treasurer for the amount so collected that he had failed to pay into the treasury. It follows that payment for any such service to the tax collector was not authorized by law.

Very truly yours,

WADE H. ELLIS,
Attorney General.

TOWNSHIP DEPOSITORY.

February 18th, 1908.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Your communication of February 14th is received, in which you submit an inquiry as to the right of the township trustees, under the township depository act, to contract with a bank in another township if they

could thereby secure a greater rate of interest, notwithstanding the fact that there was a bank in their township which was a safe depository, and willing to pay the 2% rate as provided in said act.

In reply I beg to say that I concur in the view taken by you that the township trustees are without authority to contract with a bank outside of their township when a bank within the township, which is a safe depository, submits a bid at the rate of interest provided in the law.

Very truly yours,

WADE H. ELLIS,
Attorney General.

SPECIAL SCHOOL DISTRICT—TRANSPORTATION OF PUPILS.

February 21st, 1908.

HON. CHARLES C. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you submit the following inquiry:

Has the board of education of a special school district the legal right to pay out of the school funds of the district for the transportation of pupils residing in said district who live two and a half miles from the school house?

In reply I beg to say section 3934 of the Revised Statutes is as follows:

> "Boards of education of special school districts are authorized to provide for the conveyance of the pupils of said district to the school or schools of the district, the expense of said conveyance to be paid from the school fund of the special school districts; provided, however, that boards of education of such districts as provide transportation for the pupils thereof shall not be required to transport pupils living less than one-half of a mile from the schoolhouse; transportation of pupils, in any event, being optional with the board of education."

Under the provisions of this section, boards of education of special school districts have the right, at their option, to transport the pupils of the district, excepting those living less than one-half mile from the schoolhouse, and to pay for the same out of the school fund of the district.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

TREASURER—COUNTY—REDEMPTION OF WARRANTS.

February 27th, 1908.

HON. TOM O. CROSSAN, *Prosecuting Attorney, New Lexington, Ohio.*

DEAR SIR:—In compliance with your recent request for an opinion of this department, I beg to state that, in my judgment, a county treasurer may not publish the notice of redemption provided for by section 1109 R. S. until there is money enough in the treasury to redeem all warrants which have been stamped and are drawing interest under section 1108. It would be his duty,

however, if there were money in the treasury insufficient to pay all of such warrants, to cash stamped warrants as well as unstamped warrants, so long as any funds remained in the treasury to the credit of the proper funds.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

CHILDREN'S HOME—RECONSTRUCTION OF.

County commissioners may proceed to issue bonds, etc., for reconstruction of children's home destroyed by fire without submitting such issue to vote of people.

March 7th, 1908.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you submit the following inquiry:

The children's home of Logan county was totally destroyed last year by fire, and the county commissioners of said county, together with a committee appointed under section 797 R. S., are proceeding to erect a new children's home on the old site; the old building was insured for $14,000, which sum of money is now in the county treasury, together with a building fund of $5,000, making a total of $19,000 available for the construction of the new building; the entimated cost of the new building is $25,000; $6,000 additional is required. Query: Is it necessary to submit the question to a vote of the people before the county commissioners may issue bonds or borrow money for the additional amount required?

In reply I beg to say section 2825 Revised Statutes provides that:

> "The county commissioners shall not levy any tax, or appropriate any money, for the purpose of building public buildings, purchasing sites therefor, or for lands for infirmary purposes, or for building any bridge, *except in case of casualty*, and except as hereinafter provided, the expense of which will exceed fifteen thousand dollars, without first submitting to the voters of the county the question as to the policy of building any public county building or buildings, or for the purchasing sites therefor, or for the purchase of lands for infirmary purposes by general tax."

I am of the opinion that the exception "in case of casualty"in this section relieves your commissioners from the necessity of submitting the question of the issuance of the additional bonds required to a vote of the people.

Yours very truly,

WADE H. ELLIS,
Attorney General.

COUNTY OFFICERS—SALARY VOUCHERS.

March 7th, 1908.

HON. E. N. WARDEN, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you inquire whether or not county commissioners are required to make a finding

as to the amount of the tax duplicate and the population of the county before county auditors are authorized to issue vouchers for the payment of salaries to county officers under the county officer salary law.

In reply I beg to say, under the present salary law the salary of county commissioners is based upon the tax duplicate of the county and the salary of all **other county officers** is based upon the population of the county, both of which are determined by the official records in the county auditor's office.

I am, therefore, of the opinion that all vouchers drawn in payment of the salary of county officers are to be regarded as law vouchers, and that no official action upon the part of the county commissioners is required to authorize the county auditor to issue the same.

Very truly yours,

WADE H. ELLIS,
Attorney General.

TOWN HALL FOR JOINT USE OF TOWNSHIP AND VILLAGE—CONSTRUCTION OF.

Authority to join in construction of town hall for use of village and township can be obtained by officers of these respective subdivisions only by submitting to vote of people at next general election for township and municipal officers.

March 9th, 1908.

HON. EDWARD B. FOLLETT, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—I have your letter of February 27th, advising me as to the arrangement proposed to be entered into by and between the authorities of the incorporated village of Lowell and those of the township of Adams, both in Washington county, and requesting my opinion as to the most expeditious manner in which this arrangement may be legally carried into effect.

In my opinion, the provisions of section 2835 R. S., authorizing the erection of public halls and public offices by the "trustees of any township *or* the council of any municipal corporation," without submitting the question of issuing bonds to a vote of the electors of the political subdivision, do not authorize such trustees and council to enter into a joint enterprise for the construction of a town hall. The procedure by which such a building may be erected by and for the use of the officers of both subdivisions appears to be outlined in section (1480*a*-1) *et seq.*, R. S., and the statutory authority therein contained appears to be exclusive.

I agree with you that authority to deed to the village an undivided half of the lot now owned by the township may be obtained by the trustees under section 1481 R. S.

Answering your further inquiry, I am of the opinion that the questions required to be submitted to the electors of the village and of the township under sections (1480*a*-1) and 1481 R. S. cannot be so submitted until the general election of 1909, but I see no objection to submitting the question of the sale at the same election at which the question of joining in the erection of a joint town hall is submitted.

Very truly yours,

WADE H. ELLIS,
Attorney General.

SPECIAL SCHOOL DISTRICT—BONDS.

March 11th, 1908.

HON. ROBERT S. WOODRUFF, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your recent letter, in which you request my opinion as to the issuance of bonds by the board of education of the Lindenwald special school district for the purpose of building a new schoolhouse.

In reply thereto, I desire to say that the supreme court has declared (67 O. S. 77) that acts of the legislature creating special school districts are in conflict with section 26, article II, of the constitution. And again (73 O. S. 54), the same court decided that the legislature had no power to preserve such districts by "curative" legislation.

While the particular act creating the Lindenwald special school district has not been passed upon, yet rights arising under contract are generally adjudicated by the principles established by the judiciary at the time the contract was made. It is my opinion that the validity of such bonds could be tested by litigation seeking to prevent the levying of a tax to pay the bonds, and the purchasers would take them at their peril.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BOND OF COUNTY DEPOSITORY MAY BE CHANGED BY COMMISSIONERS.

March 11th, 1908.

HON. EDWARD B. FOLLETT, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you submit an inquiry relative to the method of procedure in changing the undertaking given by a county depository, as provided in section (1136-4) and succeeding sections of the Revised Statutes.

In reply I beg to say no procedure is provided in the statute for the substitution of one undertaking for another. I am of the opinion, however, that the county commissioners may, either on their own motion, or at the request of the depository, make such changes and substitutions as they may deem advisable in the surety given by a county depository.

The supreme court has recently held, in the Bryant case, that a surety company bond upon which annual premiums are paid may be terminated upon proper notice at the end of any year, at the option of the assured.

Yours very truly,

WADE H. ELLIS,
Attorney General.

FOOT BRIDGE—CONSTRUCTION OF.

March 11th, 1908.

HON. LAWRENCE E. LAYBOURNE, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Your communication is received, in which you inquire as to the right of county commissioners to build a foot bridge for the accommoda-

tion of pedestrians over a depression in the approach to a bridge, such depression being necessary to prevent overflow of adjacent land.

In reply I beg to say county commissioners are authorized, under section 861 of the Revised Statutes, to construct approaches or ways to all bridges when the expense of such construction exceeds $50.00; otherwise such approaches or ways are to be constructed by the township trustees. From the statement contained in your letter, the cost of construction of the foot bridge contemplated will not exceed $50.00. I am, therefore, of the opinion that its construction comes within the jurisdiction of the township trustees. Township trustees have specific authority, under section 4733 R. S., to construct foot bridges upon the sides of public highways.

Yours very truly,

WADE H. ELLIS,
Attorney General.

CHILDREN'S HOME—INDENTURE OF INMATES.

Trustees of children's home have exclusive power to indenture inmates.

March 13th, 1908.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication of March 11th is received, relating to an apparent conflict between the sections authorizing the trustees of children's homes to indenture inmates thereof and those sections providing generally for the indenture of apprentices.

In reply thereto I beg to say, in my judgment, the power conferred upon trustees of children's homes does not conflict with the power granted parents, guardians or township trustees, to apprentice minors, as provided in sections 3118 to 3135, inclusive. The power of trustees of children's homes over children who are inmates thereof is expressly defined in section 932 of the Revised Statutes, and such children may be indentured, as provided in section 932*a* R. S., while the power to indenture under section 3118 to 3135, inclusive, is limited to cases in which the control of the minor is either in the parents, guardian or township trustees.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

HUMANE SOCIETY—AGENT—SALARY.

County commissioners must allow salary provided by section 3718 to agent of humane society organized under section 3714.

March 19th, 1908.

HON. C. C. KEARNS, *Prosecuting Attorney, Batavia, Ohio.*

DEAR SIR:—Your communication of March 16th is received, in which you submit the following inquiry:

"Are the county commissioners compelled to pay the salary provided in section 3718 R. S. to the agent of a humane society organized under section 3714 R. S.?"

In reply I beg to say that section 3718 R. S., as originally enacted, was section 16 of an act passed by the general assembly March 29th, 1875 (72 O. L. p. 129), and applied only to the organization of county societies. The section has been amended twice since its original enactment. The last amendment, which contains the provision authorizing the payment of salaries to agents, was passed March 8th, 1906, at which time the appointments of all agents of both the state and county associations were required to be approved by the probate judge or mayor of the county or municipality for which they were appointed. I am therefore of the opinion that the amendment of section 3718 which provides for a compensation for humane societies' agents is intended to apply to the agents of either the state or county associations, subject to the limitations contained in said section.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

BOARD OF EDUCATION—IMPROVEMENT OF SCHOOL BUILDINGS.

Board of education may issue bonds in anticipation of taxes, under section 3994, for improvement of schoolhouse in compliance with orders of deputy inspector of workshops and factories.

March 25th, 1908.

HON. JONATHAN E. LADD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Your communication of March 20th is received, in which you submit the following inquiry:

The inspector of workshops and factories, after an inspection, condemned a schoool building and ordered certain improvements and alterations before the building can be used. The board of education is without the necessary funds on hand to comply with the order of the inspector. Query: Is there any way by which the board of education may secure funds sufficient to comply with the order of the inspector without submitting the question first to a vote of the electors of the district?

In reply I beg to say section 3994 of the Revised Statutes authorizes the board of education of any school district to issue bonds to improve public school property, and in anticipation of taxes levied or to be levied for such purposes, said board may, from time to time, as occasion requires, sell said bonds under the limitations as provided in said section without submitting the question to a vote as provided in section 3991 R. S.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

SHERIFFS AND TREASURERS—EXTENSION OF TERM—EFFECT ON ELIGIBILITY TO RE-ELECTION.

Sheriffs and treasurers whose first terms are extended by adoption of article XVII of the constitution, and who serve such extension are, by reason of limitation of article X, section 3, incligible to re-election.

April 4th, 1908.

HON. A. C. DENBOW, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you inquire as to the eligibility of a first-term sheriff who is serving the one-year extension to be a candidate at the coming November election for the term beginning on the first Monday in January, 1909.

In reply I beg to say the supreme court held, in the Karb case, recently decided, that a second-term sheriff was eligible to serve the one-year extension despite the provision in section 3, article X, of the constitution. The question as to the eligibility of a first-term sheriff to be elected and serve his second term after serving the one-year extension, was not, and could not, be raised in that case.

The court say in the opinion that the provision in the 17th amendment, authorizing the extension of terms to conform to biennial elections, is effective in all cases when necessary to conform existing terms to biennial elections.

Inasmuch as there could be no election in 1907 for county officers, it was necessary that all sheriffs whose terms of office expired upon the first Monday of January, 1908, should hold over one year in order that their successors could be elected at the regular biennial election in November, 1908. No such necessity, however, exists this year. The biennial election law is in operation and the expiration of the terms of all county officers conforms thereto. Sheriffs will be elected in all counties of the state at the coming November election and take office upon the first Monday in January, 1909.

I am, therefore, inclined to the view that the court would hold that section 3 of article X no longer conflicts with the biennial election amendment and that the limitations upon the tenure of office of sheriffs and treasurers are in full force and operation and will prevent a first term sheriff, who is serving his one-year extension, from being his own successor for a full term or any part thereof.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

NOTE: This view was subsequently rejected by the supreme court in State ex rel. v. Pontius, 78 O. S. 206.

CHILDREN'S HOME—REMOVAL OF OFFICERS—NON-RESIDENT INMATES.

County commissioners may not remove trustees of children's home.

Superintendent and matron of children's home may be removed by trustees, but not by county commissioners.

Children from other counties may be admitted to children's home under section 944 R. S.

April 8th, 1908.

HON. DAVID R. WILKIN, *Prosecuting Attorney, New Philadelphia, Ohio.*

DEAR SIR:—In your recent letter you ask the following questions:

1. Has the board of county commissioners authority to remove a trustee of the children's home for misconduct during the term for which he was appointed?
2. Has the board of county commissioners authority to remove the superintendent or matron of the children's home?
3. By what authority are contracts entered into for the maintenance of children from other counties in the Tuscarawas children's home?

First. Under section 930 R. S., trustees of county children's homes are appointed by the county commissioners for a fixed term of four years and until their successors are appointed or qualified. The original act, 73 O. L. 64, provided that:

"The said trustees shall have the entire charge and control of said 'children's home' and the inmates therein."

The present statute seems to give them the same full authority. Throop on Public Officers, section 354, says:

"It is conceded in all the cases that where a fixed term is assigned to the office, the appointing power has no absolute power of removal."

Mechem on Public Officers, section 445, states that

"if the tenure is fixed by law * * * the appointing power cannot arbitrarily remove him."

In the absence of statutory authority for such removal, and Ohio decisions in point, I am of the opinion, upon the above grounds, that the county commissioners are without authority to remove such trustees. Under the decision in State v. Bryce, 7 O. 82, where the law provides for removal for misconduct, there can be no removal without notice and hearing.

Second. Section 930 Revised Statutes provides that:

"Said board of trustees shall designate some suitable person, who shall act as superintendent of said home, and who shall also be clerk of said board of trustees; and shall receive for his services such compensation as the board of trustees designate at the time of his appointment; and he shall perform all such duties, and give security for the faithful performance of them, as the trustees by law direct. * * * And the superintendent shall have the entire charge and control of said home, and the inmates therein, subject to such rules and regulations as may be prescribed by the trustees; and said trustees may, upon recommendation of the superintendent, appoint a matron, assistant matron and teachers. * * * The matron shall, under the direction of the superintendent, have the control, general management and supervision of the household duties of said home, and the matron, assistant matron and teachers shall each perform such other duties, and receive for their

services such compensation, as the trustees may by by-laws from time to time direct; *and they may be removed* at the pleasure of the trustees, or a majority of them."

Inasmuch as the superintendent and the matron are under the direct control of the trustees, in the absence of statutory authority, they may not be removed by the county commissioners. While it may be questioned whether the word "they," in the expression "they may be removed," refers to the superintendent, both the superintendent and the matron may be removed by the trustees for the reason that their tenure of office is not fixed by law. According to Throop,

> "the general rule is that, where a definite term of office is not fixed by law, the officer or officers by whom the person was appointed to a board or office, may remove him at pleasure, and without notice, charges or reasons assigned."

The original statute, 73 O. L. 64, provided for removal "at the pleasure of the trustees, or a majority of them, upon good cause." In 78 O. L. page 81, the words "upon good cause" were omitted, and they do not occur in the present statute.

Third. Contracts for the maintenance of children from other counties are entered into under the provision of section 944 R. S.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

PROSECUTING ATTORNEY—DUTY OF.

Prosecuting attorney must, without additional compensation, conduct all litigation in behalf of township officers.

April 14th, 1908.

HON. CHARLES C. UPHAM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you request an opinion as to the duty of a prosecuting attorney to represent township trustees and boards of education in litigated cases. In reply I beg to say that section 1274 of the Revised Statutes provides that the prosecutor

> "shall be the legal adviser for all township officers, and no county or township officer shall have authority to employ any other counsel or attorney-at-law, at the expense of the county, except on the order of the county commissioners or township trustees."

This department has heretofore held that the official duties devolving upon the prosecuting attorney in this provision include services rendered in litigations in which the township trustees or other officers are engaged. Inasmuch as the salary law provided in section 1297 is in full payment for all services required to be rendered by him in his official capacity on behalf of the county or

its officers, I am of the opinion that you may not receive additional compensation for the services rendered township trustees and boards of education in litigated cases.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BOARD OF EDUCATION—CLERK—TERM OF OFFICE.

Successor to clerk of board of education chosen for a term of two years may not take office before expiration of such term.

April 11th, 1908.

HON. FRANK M. ACTON, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—Your communication of April 8th is received, in which you sbumit the following statement of facts:

> On the first Monday in January, 1905, the board of education of Madison township, in Fairfield county, elected William J. Short clerk of said board. On January 21st, 1907, said William J. Short was re-elected by said board for a term of two years. Said school board re-organized on the first Monday in January, 1908, by electing a president, William J. Short claiming to hold over as clerk of said board until the first Monday in January, 1909. The school board, on the first Monday in February, 1908, however, elected William Dunn clerk of said board.

You inquire, first, as to the authority of the school board to elect William J. Short clerk of said board for a period of two years, on January 21st, 1907; and, second, which of the two persons, William J. Short or William Dunn, is now the legal clerk of said board.

In reply I beg to say the two inquiries submitteed by you may be answered together. Section 3920 R. S. authorizes a board of education to elect a clerk for a term not to exceed two years; therefore, if the proceedings on the part of the school board were regular at the meeting on January 21st, 1907, and there is no question other than the duration of the term involved, I am of the opinion that William J. Short is entitled to hold the office for a term of two years.

Very truly yours,

WADE H. ELLIS,
Attorney General.

TREASURER—EXTENSION OF TERM—EFFECT ON ELIGIBILITY TO RE-ELECTION.

April 14th, 1908.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—Your communication of April 11th is received, in which you inquire as to whether a first-term treasurer who is entitled to serve the one-year extension, and resigns at the end of his two-year term, will be eligible to re-

election at the November election, 1908. In reply I beg to say that the limitation in section 3 of article X of the constitution is only against a treasurer serving more than four years in any period of six years. Therefore a treasurer who does not serve the one-year extension will be eligible to election at the November election, 1908.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ACT FOR RELIEF OF NEEDY BLIND, APPROVED APRIL 3, 1908, UNCONSTITUTIONAL.

April 20th, 1908.

HON. WILLIAM L. DAVID, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you request an opinion as to the constitutionality of H. B. No. 828, passed by the general assembly and approved April 3rd, 1908. In reply I beg to say that this bill, entitled "A bill to provide for the relief of needy blind," is intended to take the place of H. B. No. 211, passed by the 76th general assembly, April 25th, 1904, which latter act was declared unconstitutional by the supreme court, in the case of Lucas County v. State, 75 O. S. 114. The second paragraph of the syllabus is as follows:

> "The act entitled 'An act to provide relief for worthy blind,' passed April 25, 1904 (97 O. L. 392), which provides that all male blind persons over the age of twenty-one years, and all female blind persons over the age of eighteen years, who have been residents of the state for five years and of the county for one year, and have no property or means with which to support themselves, shall be entitled to and receive not more than twenty-five dollars per capita quarterly from the county treasury, is unconstitutional for the reason that it requires the expenditure for a private purpose of public funds raised by taxation."

It will be observed from this paragraph of the syllabus that the old law was declared unconstitutional because it required the expenditure of public funds for a private purpose. The new law overcomes many of the objections made by the supreme court to the old law, but I doubt if it is sufficiently definite as to the purpose of the expenditure. There can be no question but that the state has the power to provide for the support of all blind persons who are without means and unable to support themselves, but such persons must come clearly within the class of dependents; in other words, they must be public charges.

Section 2 of the new law permits relief to be granted to any person who, "by reason of the loss of eyesight is unable to attend to the ordinary duties of life and who has not sufficient means *of his own* to enable him to maintain himself." This provision, I think, is too broad. It contains no age limit, as did the old law, thus permitting minors as well as adults, to receive the relief. A minor child may be blind and unable to attend to the ordinary duties

of life, and not have sufficient means *of his own* to maintain himself, yet his parents may be amply able to provide for him, making him in no sense a dependent person or a public charge.

In order to make the law constitutional the beneficiaries must be limited to persons who are without the means of support. The state can and ought to take care of the needy blind, but it can go no further than to provide for those that are actually dependent. I am of the opinion that the law, as it now stands, will not met the constitutional requirements.

In my judgment, there ought not to be any trouble in enacting a valid law to provide for the needy blind. The main requisite to keep in mind is that the relief granted be limited to those who are without means of support and actually dependent on the public.

Very truly yours,

WADE H. ELLIS,
Attorney General.

NOTE: The act referred to in this opinion was subsequently amended in deference to the above criticisms. (99 O. L. 256.)

SOLDIERS' RELIEF COMMISSION—FUNERAL EXPENSES,

April 24th, 1908.

HON. M. W. HUNT, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—In your recent letter you ask what county is liable for the funeral expenses of a soldier who was an inmate of the Sandusky soldiers' home and who died on an electric car in Sandusky county while en route from his home in Toledo, Ohio, to the soldiers' home at Sandusky, Ohio.

While the law contains nothing definite, I am of the opinion that the soldiers' relief commission of Lucas county, the county in which the soldier resided, should be liable for his burial expenses.

I am led to this conclusion largely by the provision of section (3107-46) of the Revised Statutes, which provides for the turning over to the family or friends of the deceased of the money saved by reason of donations, and also because the statutes as to soldiers' relief commissions seem to me to imply that such commissions shall be responsible for soldiers resident within their respective counties.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ROAD LABOR—CONTROL AND DIRECTION OF.

Township trustees and road superintendent have control and direction of persons performing road labor required by law, but may not thereby interfere with county work.

April 24th, 1908.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—Replying to your inquiry as to the two days' labor upon the public highways prescribed by law, I am of the opinion that such work may

be performed upon any and all of the public highways in the township, under the direction of the road superintendent. However, section 4715 of the Revised Statutes provides that:

> "The road superintendent of any district shall, at all times, be under the direct control and supervision of the township trustees wherein such road district lies, and shall perform only such work as is directed by the township trustees."

And section 1448*a* provides that:

> "The road superintendent shall have full control, under the orders of the trustees, however, of all such roads within his district as are assigned him by the township trustees, and shall keep them in good repair and condition for all kinds of public travel."

Section 8 of the act of April 2, 1906 (98 O. L. 329), empowers the trustees of any township to prescribe for the road superintendent the time, place and manner as to the performance of all work on the public roads.

The question, therefore, at issue lies between the township trustees and the county commissioners. While the laws upon this entire subject are complicated and often contradictory, I believe that in cases of conflict between the county commissioners and the township trustees as to the improvement and repair of county roads, the will of the county commissioners should prevail. From a reading of sections 1448*c* and 1448*d* and other statutes, it seems that while the township trustees have the power to care for all roads within their township, nevertheless they should not interfere with the work of the county commissioners in the improvement and maintenance of such roads. Persons performing the two days' labor, however, are under control and direction of the road superintendent and township trustees.

I may be able to answer your inquiries more satisfactorily upon a full statement of the local conditions in your county.

Very truly yours,

WADE H. ELLIS.
Attorney General.

BRIDGES AND CULVERTS—SUPPLEMENTARY TO OPINION OF MARCH 11TH.

April 24th, 1908.

HON. LAWRENCE E. LAYBOURNE, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—Within the last few days there has come to this office further information with respect to the character of the structure proposed at Mad River, near Snyderville Station, in your county, concerning which I wrote you on March 11th and 19th. It appears from the facts thus ascertained that this proposed structure is a "bridge or way," as mentioned in section 861 R. S. and not a "foot bridge," as referred to in section 4733 R. S. Being classified under the former section, the cost of the construction exceeding $50.00, the same

may be done under the direction of the county commissioners and at the expense of the county.

I write you thus again in order to prevent any misunderstanding from previous letters.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BRIDGE APPROACH—CONSTRUCTION OF.

County commissioners must construct sidewalk approach to public bridge, the cost of which exceeds fifty dollars.
Supplementary to opinions of March 11th and April 24th.

April 30th, 1908.

HON. LAWRENCE E. LAYBOURNE, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—In reply to your communication of April 27th, I beg to say that the additional information received by this office, referred to in my letter of April 24th, did not in any wise conflict with the statements contained in the letters received from you. It was only upon a fuller consideration of all the facts that I wrote you again.

While township trustees are specifically authorized, under section 4733 R. S., to build foot walks or side walks on either side of any public road in the township, and also public foot bridges over streams of water crossing any such road, yet I am of the opinion that county commissioners may and in fact are required to build the approaches and ways to all public bridges, the cost of which will exceed $50.00. From the facts as I understand them now, this proposed structure is more in the nature of a sidewalk than a foot bridge. True, it is to be elevated, but it is not intended to cross any stream of water, but is only intended to provide a means of approaching a county bridge. I presume that during the greater part of the year no water passes over the depression in the approach. The county commissioners would unquestionably be authorized to build a bridge which would accommodate both vehicles and foot passengers over the depression in the approach, but if, in their judgment, it is only necessary to provide a bridge or walk for foot passengers, I see no reason why they would not have the authority to do so.

I sent you the opinion of April 24th because I wanted the records of this office correct upon the law question, and not because I had any personal interest in the matter whatever. The state is neither a party nor directly interested in the question involved. It pertains solely to county affairs. I have stated to you what, in my judgment, the law is on the subject. You are under no obligation to follow this opinion if you do not agree with it.

Yours very truly,

WADE H. ELLIS,
Attorney General

ROAD IMPROVEMENT—APPORTIONMENT OF COSTS OF TOWNSHIP WORK UNDER STATE HIGHWAY DEPARTMENT ACT.

Township trustees must apportion costs of road improvement under state highway department act in same manner as that provided by said act for county commissioners.

April 30th, 1908.

HON. E. S. MCNAMEE, *Prosecuting Attorney, Cadiz, Ohio.*

DEAR SIR:—Your communication of April 27th is received, in which you submit the following inquiry:

To what extent should township trustees follow the provisions of sections (4637-4), (4637-5), (4637-6) and (4637-7) R. S., in apportioning the share of costs between abutting land owners and the township in a road improvement under the state highway department law?

In reply I beg to say section (4614-22) R. S., being section 12 of the state highway department law, is as follows:

> "In apportioning the 25 per centum that shall be paid by the township, 10 per centum shall be a charge upon the whole township and 15 per centum a charge upon the abutting property. The township trustees shall apportion the amount to be paid by the abutting property according to the benefits accruing to owners of the land so located, according to the best judgment of said trustees upon at least ten days' notice of the time and place of such apportionment to the persons affected thereby and after such persons have had an opportunity to be heard in the manner and form as provided in sections 4637-4, 4637-5, 4637-6 and 4637-7 of the Revised Statutes of Ohio."

These sections referred to provide a method for hearing upon assessments made by the county commissioners in the improvement of county roads, and the provision in section (4614-22) that the hearing by the township trustees for the apportionment of the costs between abutting land owners and the township shall be "in manner and form" as provided in these sections, means that the township trustees shall give the same notice and perform all other duties as are required of county commissioners in improving county roads under said sections.

Yours very truly,

WADE H. ELLIS,
Attorney General.

INFIRMARY DIRECTOR—TERM OF OFFICE—EXTENSION.

Term of office of infirmary director elected in November, 1906, not extended by article XVII of the constitution.

May 1st, 1908.

HON. W. R. GRAHAM, *Prosecuting Attorney, Youngstown, Ohio.*

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

Under the provisions of section 957 of the Revised Statutes may an infirmary

director, who was elected at the November election, 1906, for a term of two years, and took office on the first of January, 1907, hold over for an additional two years after the expiration of his present term?

In reply I beg to say the amendment to section 957, which fixes the term of infirmary directors at two years and provides that the entire board shall be elected and take office at the same time, was passed April 2nd, 1906, and approved April 16th, 1906, and was in effect at the time of the November election, 1906. Therefore an infirmary director elected in November, 1906, was elected for a term of two years, and his term will end on the first Monday in January, 1909.

Inasmuch as the biennial election amendment provides for the election of county officers in the even numbered years, there is no necessity for an extension of the term ending on the first Monday of January, 1909. It follows, therefore, that the present incumbent will not be entitled to serve an additional two years, and his successor will be elected at the coming November election.

Yours very truly,

WADE H. ELLIS,
Attorney General.

COUNTY COMMISSIONERS—POWER TO BUILD BRIDGES.

May 7th, 1908.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you inquire as to the authority of county commissioners to build bridges as provided in section 860 of the Revised Statutes.

In reply I beg to say section 860 R. S. provides that:

> "Commissioners shall construct and keep in repair all necessary bridges over streams and public canals on all state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in such cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property within the same."

Under this provision I am of the opinion that the county commissioners are without authority generally to build bridges on any roads other than the ones herein enumerated. That is, the road or street, whether within or without a municipality, must come within the classification enumerated in this section before the county commissioners are authorized to build a bridge thereon.

Yours very truly,

WADE H. ELLIS,
Attorney General.

TAXATION—PERSONAL PROPERTY—POWER OF ATTORNEY.

May 7th, 1908.

HON. EDWARD B. FOLLETT, *Prosecuting Attorney, Marietta, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you submit the following inquiry:

Isaac Reed, living in the village of Lowell, in your county, has given a power of attorney to his son, Benjamin Reed, whereby the said Benjamin Reed is given full and absolute control of all the personal property of the said Isaac Reed, with power to list the same for taxation; that the said Benjamin Reed lives in Watertown township, your county. Query: Shall the personal property be listed for taxation in the village of Lowell or in Watertown township?

In reply I beg to say section 2734 R. S. provides that:

> "Every person of full age and sound mind shall list the personal property of which he is the owner, and all moneys in his possession, all moneys invested, loaned or otherwise controlled by him, as agent or attorney or on account of any other person or persons, company or corporation whatsoever, etc."

Under this provision, I am of the opinion that the personal property should be listed for taxation by Benjamin Reed in like manner as if it were his own.

Yours very truly,

WADE H. ELLIS,
Attorney General.

JUVENILE JURISDICTION—SELECTION OF JUDGE.

All common pleas judges in judicial district must participate in selection of judge of juvenile jurisdiction of any county therein.

May 7th, 1908.

HON. J. H. PLATT, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you submit the following inquiry:

May a probate judge and the resident judge or judges of a county designate the judge of the juvenile court, or must such designation be made by the probate judge of the county, together with all the common pleas judges of the subdivision of the common pleas judicial district?

In reply I beg to say section 1 of the new juvenile act is as follows:

> "Courts of common pleas, probate courts and insolvency courts and superior courts, where established, shall have and exercise concurrently the powers and jurisdiction hereinafter in this act conferred. Provided, that the judges of said courts, at such time as they determine, shall designate one of their number to transact the business arising under said jurisdiction. Where the term of judge so designated expires, or his office terminates, another designation shall be made in like manner."

This section of the law confers concurrent jurisdiction in juvenile cases upon courts of common pleas and probate courts, and also provides that the judges of said courts, having jurisdiction, shall designate one of their number to act as judge of the juvenile court.

The state is divided into ten common pleas judicial districts, each of which is divided into three subdivisions. The supreme court, however, has held, in the case of Harris v. Gest, 4 O. S. 469, that:

> "The judges of the courts of common pleas are judges of their respective districts, and not of the mere subdivision thereof. The subdivision of the districts is for election purposes merely."

It follows, therefore, that all the common pleas judges in a judicial district have jurisdiction throughout the district, and under section 1 of the new juvenile act have concurrent jurisdiction with the probate court in each county in such district in juvenile cases.

The old juvenile law provided that the juvenile judge should be selected by

> "the judges of the common pleas court, in counties where three or more such judges regularly hold court concurrently, together with the probate judge and the judges of the superior and insolvency court, where such courts, or either of them, exists, and that in all other counties the probate judge should act as the judge of the juvenile court."

But under section 1 of the new law, the selection is to be made by all the judges of the common pleas court, together with the probate judge, and the judges of the superior and insolvency courts, if such courts exist, who have jurisdiction in the particular county for which the judge of the juvenile court is to be selected.

Your county (Seneca) is situated in the first subdivision of the tenth district, and under the decision of Judge Thurman, in the supreme court case above referred to, every common pleas judge in the entire tenth district has concurrent jurisdiction with the resident common pleas judge in Seneca county.

I am, therefore, of the opinion that the juvenile judge for Seneca county may not be designated by the probate and resident common pleas judges of said county; neither may the common pleas judges of the first subdivision of the tenth judicial district, together with the probate judge, make the selection, but that such judge of the juvenile court must be selected by all the common pleas judges of the tenth judicial district, together with the probate judge of Seneca county.

It is unfortunate that the general assembly in the passage of the new act should have produced so awkward a situation by the language used in section 1 thereof. The old law avoided this embarrassment by providing for the designation of a judge of the juvenile court within each county of the state. However, there seems to be no help for the matter except such as may be secured through a correction by the next session of the general assembly. In the meantime the judges of the courts of common pleas throughout each district in the state together with the probate judge of the county in such district in which a judge of the juvenile court is to be designated will have to make such designation.

Yours very truly,

WADE H. ELLIS,
Attorney General.

COUNCIL—VILLAGE—ELECTION TO FILL VACANCY.

Vacancy in council may be filled by concurrence of a majority of the remaining members thereof.

May 12th, 1908.

HON. HARFORD B. WELSH, *Prosecuting Attorney, London, Ohio.*

DEAR SIR:—In yours of the 11th inst. you present the following inquiry:

In a village council, consisting of six members, a vacancy exists, caused by the resignation of two members, leaving four duly elected and qualified. The four members, by a vote of three to one, elected two members thereof to fill out the unexpired terms caused by the resignation of such members. The question presented is, whether the election of the four members is legal.

Section 119 of the municipal code provides that:

> "A majority of all the members elected shall be a quorum to do business."

Section 120 of the municipal code provides:

> "Whenever the office of councilman becomes vacant the same shall be filled by election by council for the unexpired term, and in case the council fail within thirty days to fill such vacancy, the mayor shall fill the same by appointment."

For the transaction of ordinary business, when all the members are qualified to act it would require a majority of all the members elected to constitute a quorum, and where there is a vacancy, such as exists in the facts before me, a quorum will consist of a majority of all the members elected and remaining qualified. Only four being qualified to act, and three being a majority of those qualified, it follows that the election of the two members was in every respect legal. (State of Ohio ex rel. v. Orr. 61 O. S. 384; State v. Delesseline, 1 McCord (S. C.) 52; State v. Huggins, Harper (S. C.) Law, 94.)

Yours very truly,

WADE H. ELLIS,
Attorney General.

TAXATION—EXEMPTION—DEVISE IN TRUST FOR REPAIR OF MAUSOLEUM.

May 18th, 1908.

HON. H. L. YOUNT, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR:—In your letter of the 16th inst. you present the following question for determination by this department:

> Mrs. K. of your county erected a mausoleum. At her death she ordered that certain shares of bank stock be set aside and the profits thereof used for the purpose of keeping the mausoleum in repair. Is the bank stock so used taxable?

Your letter does not advise in whom the trust is vested. I therefore assume that the proceeds of the bank stock shall be used for the purposes set forth by the cemetery trustees. If so, the same might be considered a gift or devise in trust for such purpose, and the same would be exempt under section 3571 Revised Statutes.

Very truly yours,

WADE H. ELLIS,
Attorney General.

RECORDER—COUNTY—COMPENSATION FOR EXTRA WORK.

May 19th, 1908.

HON. E. P. CHAMBERLAIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Your communication is received, in which you inquire as to the right of a county recorder to enter into a contract with the county commissioners, in his own name or in the name of one of his clerks, for the transcription of certain records and indexes in the county recorder's office. In reply I beg to say the county commissioners may enter into such contracts with the county recorder as the statutes authorize for the transcription of records and indexes in the county treasurer's office. The passage of the county officers' salary law has not repealed the statutes under which said contracts may be made. But the provisions of the salary law will not permit the county recorder to receive the compensation provided in such contracts for his own use. Such compensation must be turned into the fee fund of the office.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

COUNTY INFIRMARY—DESTRUCTION—REBUILDING.

County commissioners may, without submitting to vote of people, rebuild, on another site, infirmary destroyed by fire.

May 21st, 1908.

HON. C. L. SMITH, *Prosecuting Attorney, Wapakoneta, Ohio.*

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

> "The county infirmary in Auglaize county was recently destroyed by fire. The county commissioners contemplate the building of a new infirmary, and to that end have instituted condemnation proceedings to procure a proper site. There are sufficient funds on hand to purchase a site, but it will require the issuance of bonds in a sum not exceeding $50,000 to build a new infirmary. Query: Are the county commissioners authorized to issue and sell said bonds for the purpose of rebuilding the county infirmary upon a site other than the one upon which the old building was situated without first submitting the policy of rebuilding such infirmary and issuing and selling said bonds to a vote of the qualified electors of the county?

In reply I beg to say section (871-1) of the Revised Statutes, as amended, is as follows:

> "That in any county in which a county infirmary has been destroyed by fire, and not rebuilt, or has been condemned as unsafe and uninhabitable by the chief inspector of workshops and factories at the time of the passage of this act, or shall hereafter be destroyed by fire or other casualty, the county commissioners of said county shall have authority to appropriate money, levy tax, and to issue and sell the bonds of said county in anticipation of such levy, in an amount not to exceed ninety thousand ($90,000.00) dollars, for the purpose of rebuilding such infirmary without first submitting to the voters of said county the question as to the policy of rebuilding such infirmary, appropriating such money, levying such tax, and issuing and selling such bonds."

This section expressly provides that in a county in which a county infirmary has been destroyed by fire, the county commissioners of said county shall have authority to issue and sell the bonds of said county in anticipation of a levy in an amount not to exceed $90,000, for the purpose of rebuilding such infirmary, without first submitting the question to a vote of the qualified electors of the county. The only question then is may the county commissioners use the money realized from the sale of said bonds to build a new infirmary upon another and different site than the one upon which the old infirmary was situated?

There is nothing in section (871-1) that would preclude the county commissioners from constructing the new infirmary upon a different site other than the use of the word "rebuilding" therein. Rebuilding simply means to build again; that is, when an infirmary burns down, to build a new one without any regard as to its location.

I am, therefore, of the opinion that the county commissioners are not limited to the old site in rebuilding said county infirmary out of the funds realized from said bond sale, if, in their judgment, it is to the best interests of the county that a new and different site be selected.

Yours very truly,

WADE H. ELLIS,
Attorney General.

COUNTY COMMISSIONERS MAY NOT PAY FOR SCHOOLING OF CHILDREN PLACED IN PRIVATE HOMES UNDER SECTION 931*a* R. S.

June 5th, 1908.

HON. W. H. SMITH, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—Your communication of June 2nd is received, in which you submit the following inquiry:

> Noble county has no children's home, but contracts with private parties for their care and maintenance. At the present time there are ten children of school age living with one Homer Gibson, in district No. 8, Seneca township.
>
> Query: Must Seneca township school such children at its own expense or must Noble county provide a school for them?

In reply I beg to say that section 4010 of the Revised Statutes provides for the establishment of schools in children's homes at the expense of the county, but I am unable to find a statute expressly authorizing the county commissioners to pay for the schooling of children who are placed in private homes under section 931c of the Revised Statutes of Ohio.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

TAXATION—EXEMPTIONS.

Bank deposit consisting of payments of pension is not exempt from taxation.

June 23rd, 1908.

HON. E. N. WARDEN, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—In yours of the 21st ult. you propose the following question, upon which you ask an opinion from this department:

> If a widow has a certain sum of money in bank, which she has accumulated from payments of pension to her as widow of a soldier of the War of the Rebellion, is such money taxable in Ohio?

The exemptions from taxation, so far as the same are contained in the constitution, are those to be found in section 2 of article XII thereof. The statute, section 2732 R. S. *et seq.*, further specifies the property that shall be exempt from taxation, and I regret to say that I do not find that moneys arising from payments of pension are exempted, if exceeding $100.00 in value.

Very truly yours,

WADE H. ELLIS,
Attorney General.

LOCAL OPTION—COUNTY—CONFLICT WITH MUNICIPAL OPTION.

Vote of "dry" in county local option election determines status of territory within municipal corporation previously, and within two years, having voted "wet," but opposite result does not affect status of territory within municipal corporation previously having voted "dry."

June 23rd, 1908.

HON. EUGENE CARLIN, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of your letter containing a request for an opinion of this department in answer to the following question:

> "What effect would the Rose county local option law have in a city that would be voted wet and afterwards the county voted dry, as to whether the city voting wet would be voted dry by the county being voted dry, or whether the city would remain wet for two years, as provided in the Beal law?"

The Rose county local option law, so called, was enacted by the 77th general assembly at its second regular session, and approved by the governor March 5th, 1908. It is found in Vol. 99 O. L. pages 35 to 38, inclusive.

In brief, it provides a method of procedure for submitting to the electors of any county the question whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such county. It provides that if a majority of the votes cast at the election had pursuant to the provisions of such act shall be in favor of prohibiting the sale of intoxicating liquors as a beverage, then, from and after thirty days from the date of such election, it shall be unlawful for any person *within the limits of such county* to sell, furnish or give away intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished for beverage purposes.

It is unnecessary to consider in detail the provisions of such act in determining the question presented. It does not purport to repeal, alter or amend any existing legislation. Its title is "An act further to provide against the evils resulting from the traffic in intoxicating liquors by providing for local option in counties."

In section 9 thereof the following language is used:

> "But nothing contained in the provisions of this act shall affect, amend, repeal or alter in any way any other law or ordinance *which prohibits* throughout any municipality, township or residence district the selling, furnishing or giving away of intoxicating liquor as a beverage, or the keeping of a place where intoxicating liquor is sold, furnished or given away as a beverage."

There are the following existing laws providing for local option in the various subdivisions of the state:

Township local option, limited to territory outside of any municipal corporation. (Sections (4364-24) *et seq.*, R. S.)

Residence district of any municipal corporation, local option. (Sections (4364-30*a*) *et seq.*, R. S.)

Municipal local option, confined to the limits of any municipal corporation. (Sections (4364-20*a*) *et seq.*, R. S.)

These several laws each provide methods separately for determining the will of the qualified electors of any of such subdivisions of the state upon such question and each of such laws will be recognized as having been referred to by the general assembly in the above quoted portion of section 8 of the act under consideration.

For the purpose of analyzing the question under consideration, all of the foregoing laws, together with the Rose law (99 O. L. 35), may be considered as one act. By such consideration it is evident that the effect of the enactment of all such local option legislation, "to provide against the evils resulting from the traffic in intoxicating liquors," is to make the county the utmost limit, and the residence district of a municipality the smallest territory, in which local option may be put into operation. As the greater necessarily includes the lesser, a majority vote in the entire county in favor of prohibition therein, when carried into effect, prohibits the sale of intoxicating liquors as a beverage in any municipality, township or other subdivision within such county, although a majority of the qualified electors in one or more such minor subdivisions may have, under some one of the other existing laws applicable to municipalities, townships, etc., voted against prohibition in such subdivisions. The natural

conclusion, seemingly freed from all doubt, would be that a majority of the electors of the county could thus override the wish, will or option of any subdivision of the same county.

As it takes the vote of the people of a given territory, such as a county, to put prohibition into operation, likewise it takes the vote of the people of the same territory to end its operation. (Ex Parte Elliott, 72 S. W. 837; Ex Parte Fields, 86 S. W. 1022.)

And when local option is once adopted in a county it remains the law of that county and the lesser subdivisions thereof until it is repealed by the voters of the same territory. (Cantwell v. State, 85 S. W. Rep., 18; Ex Parte Rippy, 44 Tex. Cr. R. 72; Ex Parte Fields, 39 Tex. Cr. R. 50; Ex Parte Heyman, 38 S. W. 349.)

This proposition would seem to be self evident were it not for the construction contended for to be applied to that portion of section 8 of the Rose law herein above quoted. As it would be generally conceded that the foregoing law providing for local option in residence districts of municipalities, in municipalities and in townships, were in the contemplation of the general assembly at the time of the enactment of the law in question, and as the presumption cannot be indulged from the language employed in section 8, that the general assembly intended to affect, amend, repeal or alter any of the laws upon this subject throughout municipalities, townships or residence districts, it becomes important to determine, in the light of your question, what construction should be given to that portion of the act.

One view contended for is that as the Rose law does not affect, amend, alter or repeal the Brannock law, the Beal law, etc., that a vote could be taken under the township law or residence district law or the municipal law, and thus alter the result obtained by an election under the county law. To use an illustration; it has been claimed that if an election in a given county has been held and a majority of the qualified electors has declared in favor of prohibition in that county, that a petition might be prepared in any municipality or township of any such county, and an election ordered thereunder, and perchance a majority in such municipality or township would not be in favor of prohibition in such township or municipality, and thus undo what has been done under the Rose law. But this view is superficial.

If an election is ordered under the county law (the Rose law) and a majority of the electors of the county have voted in favor of prohibition, can it be contended that prohibition is not in force in every part of the county, notwithstanding the opposition thereto has been sufficiently strong in certain townships or municipalities to cast a majority of votes in such township or municipality against prohibition. If such contention is correct, no county election should ever be held. The election should be had by townships and municipalities if that were true, and if all are in favor of prohibition, then prohibition would be in force in the entire county, otherwise not.

I do not so construe the Rose law in connection with other existing laws on the subject. The electors of the county, under the Rose law, have the same right to declare prohibition as the electors of the township, municipality or municipal residence district have under their respective laws. Such subdivisions under each respective law applying to them stand exactly upon the same footing with reference to the power *to declare for* prohibition, but not upon the same footing with reference to the power to *repeal it.* Hence the language in section 8 of this act, as to such law not repealing or altering any other law, is limited to such laws or ordinances *as prohibit* throughout any minor subdivision such traffic in intoxicating liquors.

So long as the effect of any such law is to prohibit the traffic, it is, in effect, not amended or repealed by the Rose law. If a municipality or township can repeal or defeat the result of the county election, so far as that municipality or township is concerned, the county has no right by an election to declare prohibition. All of the acts cited are acts by which to provide for the prohibition of such traffic. If prohibition is defeated in a county, a municipality, a municipal residence district, or a township, can assert their respective rights, under the laws applicable to such subdivisions, and hold an election. But the rights of the municipalities, municipal residence districts and townships do not depend at all upon when the county votes and rejects prohibition.

The case of Baxter v. State, decided by the supreme court of Oregon, March 26th, 1907, 89 Pac. Rep. 369, is in point. The court uses the following language:

> "Under the local option laws of 1905, page 45, section 8, prescribing the form of a ballot at a local option election for a county as a whole, and for subdivisions thereof, so that the voters may vote for or against prohibition in the county, and in the subdivisions thereof, and page 47, section 10, providing that when a majority of the votes in the county as a whole, or in any subdivision thereof, are for prohibition, the court shall make an order prohibiting the sale of liquors therein, prohibition, if adopted by a county as a whole, must be applied to the entire county, though a precinct therein voted against prohibition; and prohibition, if rejected by a county as a whole, must be applied to a precinct therein adopting prohibition.
>
> "When prohibition is adopted by the county as a whole, it is the adoption of a policy of county government, and as such must be applied to the entire county, even though a precinct therein votes against it, *but when a county as a whole votes against prohibition, it has thereby adopted no measure or policy for the county by its vote; it has duly said it will not adopt prohibition for the county as a whole, and if a precinct in such case does adopt prohibition it will not be in conflict or inconsistent with the county vote.*"

In the case of Hancock et al. v. Bingham Co., decided by the court of appeals of Kentucky May 30th, 1907 (102 S. W. Rep. 341), this identical question was determined in the following language:

> "The county being the unit, with reference to elections, to determine the question whether liquor shall be sold or not, as provided by the Carmack act of 1906, the fact that certain precincts in a county had voted on the question could not operate to deprive the entire county of the right to vote thereon, and the county having voted against the sale of liquor, no subsequent vote could be taken in the county or in any precinct thereof within three years from the date of the county vote provided by such act."

The constitution of Ohio and the legislative enactments pursuant thereto, heretofore cited, do not vest in the electors of residence districts, or of municipalities, townships or counties, any authority to permit or to confer the power to sell intoxicating liquors as a beverage. It needed no constitutional or statutory declaration of such import. The business of selling intoxicating liquors is not a right in any constitutional sense and is not conferred by that instrument, but, on the contrary, it forbids licensing the same. The power of the general assembly over such traffic is found in section 18 of the schedule to the constitu-

tion, and that is, it (the general assembly) may provide against the evils resulting from the traffic. Under such grant of power, if considered necessary, the general assembly may provide for state-wide prohibition. This is recognized in providing for local prohibition by the enactment of the various local option laws. As anti-prohibition is nominally in force in every subdivision of the state where no local option election has been held, so all legislation on this subject of a local option character is intended to prohibit the traffic and not to install or create it.

This statute, as well as the others cited, are police regulations enacted in the interest of good order in municipalities and should receive a reasonable construction, and such as not to make them jarring and discordant. No reason exists for a construction that would invalidate a result favoring prohibition in the county, under this law, by a municipality or township in such county voting wet under another law, and being thereby construed as exempted from the results of the election held under the Rose law; and, again, no reason exists for a construction that would forbid a municipality or township from voting dry, even if the result of the county election under the Rose law should have been against prohibition.

I therefore conclude that if the result of an election under the Rose law should be that a majority of the electors of the county had voted in favor of prohibition, it would, under section 2 of such act, within 30 days thereafter, prohibit the sale of intoxicating liquors in every part of the county, but if the result of such election was that a majority of the electors of the county had voted against prohibition, such result would not change, alter or in any way affect the results of an election or elections held in municipalities, townships or residence districts of municipalities under the various laws applicable to such subdivisions.

Very truly yours,

WADE H. ELLIS,
Attorney General.

OFFICER—INTEREST IN PUBLIC EXPENDITURE—WHAT IS.

Contract for construction of county infirmary building not affected by fact that contractor purchases material from firm in which superintendent of infirmary is interested, nor is such purchase in any way illegal.

June 22nd, 1908.

HON. R. R. NEVIN, *Prosecuting Attorney, Dayton, Ohio.*

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

The county commissioners of Montgomery county are about to construct a new infirmary building. It is probable that the contractor who receives the contract for the stone work will desire to use stone from what is known as the Cold Springs stone quarry, located in this county, for the reasons that said stone is well adapted to said purpose and the quarry is much nearer to the proposed building than any other in the county. Mr. A. C. Berst, who is the superintendent of the infirmary, is the president and a stockholder of the Cold Springs Stone Quarry Company. Will the sale of stone to the contractor, to be used in the construction of the infirmary, by the Cold Springs Stone Quarry Company, be in violation of law by reason of the fact that Mr. Berst, who is the superintendent of the infirmary, is president of said company?

In reply I beg to say that some time ago I took this question up with Mr. Berst in person. I was of the opinion, under the facts as given me by Mr. Berst, that it would not be a violation of the law for the Cold Springs Stone Quarry Company to sell stone to the contractor, even though said stone was to be afterwards used in the construction of a new infirmary.

From a consideration of the facts as stated in your letter, I am still of the same opinion. Section 628 of the Revised Statutes forbids trustees, commissioners, managers, directors, etc., to be either directly or indirectly interested in any purchase for or contract on behalf of any institution with which they may be connected. But the facts in your case, as I understand them, are that the purchase of the stone by the contractor from the Cold Springs Stone Quarry Company is a separate and distinct contract from the contract made for the stone work of the infirmary, and that the sale of the stone by the Cold Springs Stone Quarry Company to the contractor will be made in the usual course of its business, and as all other sales are made, without regard to the use made of the stone by the purchaser thereof This being true, I am of the opinion that Mr. Berst is neither directly nor indirectly interested in the contract for the construction of the infirmary building. The contract for the sale of the stone to the contractor has no connection whatever with the contract made by the county commissioners for the construction of the infirmary building.

I am, therefore, of the opinion that the sale of the stone by the Cold Springs Stone Quarry Company to the contractor who is to do the stone work in the construction of the new infirmary, under the facts as given me in your letter, will not be a violation of law.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

FISH AND GAME LAWS —COSTS.

County not liable for costs when fish and game case is dismissed because of failure of warden to obtain approval of prosecution for offense not committed in his presence.

June 22nd, 1908.

HON. CHARLES C. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you submit the following inquiry:

Is the county required to pay the costs in a prosecution for a violation of the fish and game laws of the state in a case where the defendant is discharged because the arresting officer did not, prior to the arrest, secure the approval of the prosecuting attorney or of the attorney general, as provided in section 11 of the fish and game laws, as amended by the last legislature?

In reply I beg to say that, under the fish and game laws as now amended, no officer is authorized to institute prosecutions for violations of the law not committed in his presence without first obtaining the approval of the prosecuting attorney of the county or of the attorney general. In the case submitted by you the officer was without authority to make the arrest, and the prosecution was illegal, because the offense was not committed in the presence of the arresting

officer. The county is only liable for costs in cases in which the provisions of the fish and game law have been complied with. I am therefore of the opinion that no liability exists against the county for the costs in this case.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

JUVENILE CASES—STYLE OF PROCESS IN.

Process in juvenile cases should bear the caption of the court of which the judge exercising the jurisdiction is regularly an officer.

July 2nd, 1908.

HON. C. H. HENKEL, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—I beg leave to reply to your letters as to the act of April 24th, 1908, "to regulate the treatment and control of dependent, neglected or delinquent children, etc.," in which you inquire as to certain matters of procedure before the probate judge of your county, who has been designated to exercise jurisdiction under this act.

While it may be cause for regret, this act drops the distinctive terms, "juvenile court" and "judge of the juvenile court," as contained in 97 O. L. 561, and 98 O. L. 314. It is true that section 19 of the present law employs the words "juvenile judge," and section 22 the words "judge of the juvenile court." That such use of these words is rather an abbreviation than a designation of an official title is shown by the fact that section 19 refers to "the judge exercising the jurisdiction provided for in this act," and section 22, "the judge designated to exercise said jurisdiction." Further than this, section 2 of the present act provides that:

> "The seal of the court, the judge of which is designated to transact the business of the jurisdiction herein provided, shall be attached to all writs and processes."

For the above reasons I am of the opinion that papers filed under this act should read, "In the probate court, Crawford county, Ohio," and that the writs issued from this court should be signed by Charles F. Schaber, as probate judge.

I believe, however, that it will assist the court in its work if such additional words as "juvenile court," or "designated as juvenile court judge" are employed, and I see no objection to such use of these words.

Since the proceedings as to children under this act do not constitute a criminal action, they may be styled, "in the matter of ....., a delinquent child," or "in the matter of....., a dependent child."

On the other hand, proceedings against parents or other persons contributing to delinquency are criminal actions, as is shown by the language, "in other criminal cases," in sections 11 and 28, and should therefore be styled accordingly.

Respectfully submitted,

WADE H. ELLIS,
Attorney General.

SHERIFF—ALLOWANCE FOR LOST COSTS.

County commissioners should require sheriff to file cost bills before making an allowance for lost costs under section 1231, and if the aggregate amount of such bills so submitted is less than $300, should allow such amount only.

July 2nd, 1908.

HON. D. F. OPENLANDER, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—Your communication of recent date is received, in which you submit the following inquiry:

Is a county sheriff entitled to retain the allowance for lost costs under section 1231 of the Revised Statutes, in addition to his compensation as fixed by the county officers' salary law?

In reply I beg to say it has been held by two or three common pleas courts, since the passage of the county officers' salary law, that a county sheriff is entitled to retain for his own use the allowance for lost costs provided in section 1231 Revised Statutes.

I gather from your letter, however, that it has been the practice in your county for the court to allow the sheriff $100 in lieu of lost costs at the end of each of the three terms of court held during the year, without regard to the amount of costs actually lost.

Under section 1231 Revised Statutes, a sheriff is only entitled to receive the costs actually lost by him as sheriff during the year, provided he shall not receive more than $300. The county commissioners should require the sheriff to submit cost bills before allowances are made, and the same should be referred to the prosecuting attorney as to whether or not they may be properly allowed under the provision for lost costs.

You further inquire as to whether or not the last legislature has made any change in the law governing county boards of equalization. The laws passed by the last legislature are now in the hands of the printer and it will be some days before we receive a copy of the session laws. For this reason I am unable to advise you as to any changes made in the law relative to county boards of equalization.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

ELECTIONS—JUSTICE OF THE PEACE—EFFECT OF DECISION OF SUPREME COURT IN STATE EX REL. V. BROWN.

Justice of the peace, elected in November, 1904, and surrendering office on January 1st, 1908, to person unlawfully elected in November, 1907, may, under decision of supreme court in State ex rel. v. Brown, resume such office, no vacancy having been created by such surrender.

July 6th, 1908.

HON. JOHN H. CLARK, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—In your letter of June 29th, you inquire as to the status of a justice of the peace who surrendered his office on the first day of January, 1908, to a person elected in November, 1907, at an election which was void under the

recent decision of the supreme court in the case of State ex rel. James E. Votava v. John Brown, affirming the decision of the circuit court, for the reasons given in the opinion of the latter court. See State ex rel. v. Brown, 11 C. C. N. S. 107.

In this case, John Brown was elected in November, 1904, for a term of three years, to succeed H. A. Cummings, who had been elected in April, 1902, to serve for a term of three years. Brown took office in April, 1905. The court held that the legislature had no power to shorten the terms of either Cummings or Brown; that Cummings' term extended to April, 1905, and that Brown's term of three years, therefore, extended to April, 1908; that section 1442, as amended in 98 O. L. 171, authorized an election only when the justice elected could take office the following January; that in order to conform to article XVII of the constitution, and section 1442 R. S., Brown's term was extended to the first day of January, 1910; that Brown was not estopped by his defeat at the November election, 1907; that such election was "premature and void;" and that John Brown was entitled to such office until January 1, 1910.

This decision refers only to a case where a justice was elected in November, 1904, to succeed a justice elected April, 1902, and I doubt whether it can be applied to any other justices elected in 1907. The opinion of the court is to the effect that the election of the justice of the peace in November, 1907, was valid if his predecessor was elected in November, 1904, to succeed a justice whose term expired prior to January 1st, 1905. That, prior to the amendment of section 1442, 97 O. L. 39, the term of a justice dated from the date of election, and not from the date of his commission, was held by the supreme court in 7 Ohio, part I, page 7, and in 71 O. S. 521, which latter case affirms the journal entry and not the reported opinion of the circuit court.

I take it, therefore, that in the case you present, A is a justice of the peace elected in November, 1904, to succeed B, a justice elected in April, 1902, and that A gave up his position on January 1, 1908, to C, who was elected to the position in November, 1907, such election being held void under the decision of the supreme court in the case of State ex rel. v. Brown. Under the circumstances, and the opinion of the court in this case, C is merely a *de facto* justice of the peace whose acts, however, have been valid because he held under color of title by reason of such election. C is, however, without right to this office and may retire from it voluntarily or be ousted therefrom and compelled to give up possession of the dockets, etc., by proceedings in quo warranto. (See Throop on "Public Officers.")

A is entitled, under the decision, to exercise the jurisdiction of the justice of the peace at once, unless a vacancy in the office has occurred under section 567 R. S. by reason of A's absence therefrom for the space of six months.

Although I find no specific authority upon this particular question, and although the decisions of the courts are very contradictory as to what constitutes a vacancy in cases of this kind, yet, from a reading of the case of Turnipseed v. Hudson, 50 Miss., 425, and a consideration of the circumstances presented, I believe that A's yielding up his office to C on January 1st, and his absence therefrom since that time, involuntarily, under a mistake of law, will hardly justify the trustees in this case in declaring a vacancy under section 567 of the Revised Statutes. Since this question is so close and so important, involving, as it does, the offices of a number of the justices of the peace throughout the state, I hope that we shall have an early judicial opinion upon this question through quo warranto proceedings or otherwise.

Respectfully submitted,

W. H. MILLER,
Assistant Attorney General.

BLIND—RELIEF OF.

County blind commission may not extend relief to blind person who has a son able financially to care for him.

July 15th, 1908.

HON. W. H. SMITH, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR SIR:—Your communication of July 13th is received, in which you submit the following inquiry:

> "James Hancher is about 75 years of age, blind, and at present in a hospital at Columbus, suffering from a fractured leg. His son, H. F. Hancher, owns a farm and has also some city property, the value of which I do not know. Said son is now, and has been for some time, keeping his father and paying all expenses for his nursing at said hospital, which amounts to about $12 per week. The son claims that the payment of this expense is a hardship upon him. The blind commission of this county refused aid to the said James Hancher solely upon the grounds that the son above mentioned is able financially to care for his father. Under those conditions, is the ruling of the commission in accordance with the law?"

In reply I beg to say the ruling of the commission is, in this instance, in my judgment, correct.

The new blind law provides that only those persons are entitled to relief thereunder who are without the means of support and who would, if not relieved under said law, become public charges. The applicant in this instance is not a public charge, and will not become so by the failure of the commission to grant him relief, for the reason that he has a son who is amply able to provide for him, *and, furthermore*, section (7017-3) of the Revised Statutes makes it a crime for an adult person, who has sufficient means, to neglect to provide for a destitute parent, whether such destitution is the result of old age, infirmity or illness.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

CITY SOLICITOR—ALLOWANCE FOR SERVICES IN STATE CRIMINAL CASES.

County commissioners have discretion as to amount of allowance to city solicitor for services in police court in state criminal cases, and time of payment thereof.

July 15th, 1908.

HON. E. P. CHAMBERLAIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:- Your communication of July 11th is received, in which you inquire as to the duty of the county commissioners to make an allowance to the city solicitor of Bellefontaine for services rendered by him in prosecuting state cases in the mayor's court.

In reply I beg to say section (1536-663) of the Revised Statutes contains the following provision:

"The solicitor shall also be prosecuting attorney of the police court and shall receive for this service such compensation as council may prescribe and *such additional compensation as the county commissioners* shall allow."

Under this provision this department has heretofore advised the bureau of inspection and supervision of public offices that the allowance to be made solicitors under said provision rests in the sound discretion of the board of county commissioners. This discretion not only includes the fixing of the amount, but also the time of payment.

The duties of the solicitor, as prosecuting attorney of the police court, are provided in section (1536-844) Revised Statutes of Ohio.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

SCHOOL BUILDINGS—CONSTRUCTION OF—EXTENT OF POWERS OF BOARD OF EDUCATION UNDER SECTION 3994 R. S.

July 16th, 1908.

HON. IRVIN MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

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

The board of education of Dodson township contemplates the building of a new schoolhouse by reason of the fact that the present building has been condemned by the department of inspection of workshops and factories.

The new building will cost about $2,300. The tax duplicate is about $140,000. The full levy of twelve mills for three years will pay for the new building, in addition to the running expenses of the school.

Query: May the board of education issue bonds under section 3994 of the Revised Statutes for the purpose of erecting said building, or will the question have to be submitted to the electors of the district, as provided by section 3991 R. S.?

In reply I beg to say the board of education may, under section 3994 of the Revised Statutes, without first submitting the question to a vote, issue bonds for the building of said schoolhouse in anticipation of the income from taxes levied for such purpose. Such bond issue, however, will be limited to two mills on the dollar of the tax duplicate and may run not to exceed forty years. The tax duplicate being about $140,000, it will require the issuance of bonds for about ten years to pay for the building, provided no other funds are available. However, if the board desires to raise a greater sum of money annually than is provided for in section 3994, the question of issuing such bonds must first be submitted to the qualified electors of the district. I am of the opinion that your statement relative to the time required to build the schoolhouse and the necessity for its construction before the first of September, will not warrant the board of education in dispensing with the legal advertisement for bids.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

TREASURER—COUNTY—FEES.

July 17th, 1908.

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Your communication of July 15th is received, in which you submit the following inquiry:

The fees collected by the county recorder and paid into the fee fund for said office are insufficient to pay the full salary of the county recorder, as fixed by the county officers' salary law. You inquire whether or not the county treasurer is entitled to any fees under section 1117 of the Revised Statutes, upon the money collected and paid into the county treasury by the county recorder.

In reply I beg to say that this department has heretofore advised the bureau of inspection and supervision of public offices that a county treasurer is entitled to fees upon all money paid into the county treasury by county officers and placed by him in the respective fee funds.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

LOCAL OPTION—COUNTY—ELECTION.

County local option election may be held on regular election day.

July 22nd, 1908.

HON. JONATHAN E. LADD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—I beg leave to reply to your letter, in which you inquire whether an election under the act of March 5, 1908, known as the Rose county local option law, may be held this year upon the same day as the general election.

Section 1 of this act provides for

> "a special election to be held in not less than twenty nor more than thirty days from the filing of such petition with the county commissioners or common pleas judge, or from the presentation of such petition to said commissioners or common pleas judge, * * * and such election shall be held at the usual place or places for holding regular elections, and notice shall be given and the election conducted in all respects as provided by law for the election of county officers so far as said law may be applicable."

It is to be noted that the election shall be ordered "not less than twenty nor more than thirty days from the filing of such petition," and that no exception is made of the general election day or any other day. The election is to be "conducted in all respects as provided by law for the election of county officers," that is to say, in the same manner as the election of county officers will be conducted at the next regular November election.

Since it is the policy of our law, as exemplified in section (2996-2) R. S., and in the decisions of our courts, to favor, rather than to oppose, a submission of a question at a regular election when there is a doubt as to the proper time for the submission of such question, and since no exception has been made, I am unable to say that a special election under this act may not be held upon

the regular election day this year. Such an election would still be a special election, conducted in the same manner as other county local option elections on other days. The matter, it seems to me, is one of policy to be determined by the county commissioners, or the common pleas judge, as provided for in the county local option law.

In view of the doubt as to the meaning of the term "special election," the past policy of the state in holding local option elections on days other than the regular election day, and possible conflicts in conducting elections which might cause the courts to declare the holding of a general and a special election upon the same day to be incompatible, I should advise that all questions of this kind be avoided by holding county local option elections upon a day other than the general election.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

SCHOOLS—CENTRALIZATION—POWER OF TOWNSHIP BOARD OF EDUCATION TO SUSPEND SUB-DISTRICT SCHOOLS WITHOUT ELECTION.

July 31st, 1908.

HON. EDWARD GAUDERN, *Prosecuting Attorney, Bryan, Ohio.*

DEAR SIR:—I beg leave to reply to your letter of July 27th, inquiring as to the suspension of sub-district schools under section 3922 of the Revised Statutes, as amended April 24th, 1908.

Unless a petition for an election upon the question of centralization is pending, or unless a proposition for centralization has been defeated within the past two years, the board of education may, under the present section 3922 R. S., "suspend the schools of any or all sub-districts in the township district." However, the board of education is without power to suspend or abolish a "sub-district school where the daily attendance is 12 or more," either in case the proposition for an election upon the question of centralization is pending, or in case such a proposition submitted under (3927-2) has been defeated within a period of two years.

The words "majority of the votes cast thereon," in present section 3922 R. S., refer to the entire vote cast in the township school district, and the separate vote of a sub-district upon the question of centralization cannot be considered in construing this section.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

DEPOSITORY—COUNTY—SECURITY MUST ACCOMPANY PROPOSAL.

August 7th, 1908.

HON GEORGE E. YOUNG, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter, in which you inquire whether or not county commissioners should consider a proposal for the deposit of county funds, which does not contain the security or securities

to be offered by the bank making the bid. It is my opinion that the county commissioners are not authorized to accept the bid, but should award the money to the bank that offers the highest rate of interest and tenders, with its proposal, the proper security.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

ELECTIONS—COUNTY COMMISSIONERS—VACANCIES IN OFFICE.

Successor to county commissioner serving under appointment to fill vacancy caused by death, before assuming office, of person elected in November, 1906, should be elected in November, 1908, for unexpired term.

Successor to county commissioner elected in 1905 should be elected in November, 1908.

August 15th, 1908.

HON. MICHAEL CAHILL, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—In your letter of August 12th you cite the following facts: Josiah Flory was elected county commissioner in 1903, for a three-year term ending the third Monday of September, 1907, as provided in section 839 R. S., as found in act of 91 O. L. 338. In November, 1906, Scott Clayton was elected as his successor in office for a term of two years, as provided in section 839 R. S., as amended by the act of 98 O. L. 272. Clayton died before beginning his term, and Flory was appointed to fill the vacancy.

You state the apparent conflict between the provision of section 839, that the term of office of county commissioners shall commence on the first day of December, and the provision of section 414 that such term shall begin upon the third Monday in September, and ask whether Clayton was properly and legally elected in 1906, and whether Flory holds under his appointment until September, 1909, or whether a successor to Flory should be elected in November, 1908, to fill the unexpired time of the term for which Clayton was elected?

It was decided in the case of State v. Mulhern, 74 O. S. 363, that county commissioners should take office upon the third Monday in September following their election, rather than on the first day of December, next after their election, and that the provision of section 839, as to the time of taking office is inoperative.

Clayton's election in November, 1906, was legal, and his term of office began upon the third Monday in September, 1907, and ended upon the third Monday in September, 1909. Flory was appointed to fill the vacancy created by his death, under section 842, which provides that:

> "When a vacancy occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat; and when a vacancy happens, whether more than thirty days before such election, or within that time, and the interest of the county requires that the vacancy shall 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 the successor is elected and qualified."

Section 841 provides that:

> "When it becomes necessary to elect a commissioner to fill a vacancy occasioned by death, resignation or removal, the person elected shall hold his office for the unexpired time for which his predecessor was elected."

Section 11 provides:

> "When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified, and such successor shall be elected at the first proper election that is held more than thirty days after the occurrence of the vacancy."

Reading together the provisions of sections 11, 841 and 842, I am of the opinion that there should be an election next November of a county commissioner, to take office immediately upon his election, for the unexpired term of Clayton, ending the third Monday in September, 1909, as well as the election of a commissioner for the full term beginning the third Monday in September, 1909.

You also state the case of James Carroll, who was elected county commissioner in November, 1905, for a term of three years ending the third Monday in September, 1909. You ask whether his successor should be elected this year or whether Carroll's term is extended to the first day of December, 1910. Under the decision above quoted, 74 O. S. 363, Carroll's successor should be elected in November, 1908, for a term of two years, beginning on the third Monday in September, 1909.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

WEAK SCHOOL DISTRICTS—STATE AID FOR—APPLICATION OF APPROPRIATION MADE IN 1908.

Appropriation made in 1908, *in aid of weak school districts, should be applied, first, to deficiencies created under contracts entered into in compliance with law before enactment of appropriation.*

August 17th, 1908.

HON. IRVIN MCD. SMITH, *Prosecuting Attorney, Hillsboro, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of August 4th, in which you ask the opinion of this department as to the application of the appropriation made by the general assembly on May 9th, 1908 (99 O. L. 523), for the maintenance of "weak school districts," as defined by the act of April 2nd, 1906 (98 O. L. 226).

The appropriation act specifically provides that the fund thereby created "shall be distributed by the auditor of state in accordance with the provisions of the act passed April 2nd, 1906." The former act provided, in effect, that no contract of employment to teach in the public schools of the state could be made for a compensation of less than $40.00 per month, and that districts wherein

the maximum levy for school purposes, properly distributed, would not provide a fund sufficient to comply with the law, should receive money from the state treasury sufficient to make up the deficiency. The procedure for procuring the money from the state treasury was set forth in the same section.

Inasmuch as the evident legislative intent related to the contract of employment, the attorney general, in response to a former inquiry, held that boards of education were without power to enter into contracts stipulating for compensation of less than $40.00. The board of education, concerning which you inquire, has evidently been governed by this opinion and has made contracts at the statutory rate. It has thus created a liability against the district for a deficiency in the case of each contract. It has thereby acted in accordance with the provisions of the act of April 2nd, 1906, and, in my opinion, may lawfully make these deficiencies the basis of a claim for reinbursement out of the fund appropriated by the act of May 9th, 1908. That act, in my judgment, contains authority sufficient to authorize the auditor of state to pay any and all deficiencies occurring under the prior act.

The constitutional prohibition against drawing money from the treasury except in pursuance of a specific appropriation made by law, etc., does not apply where an appropriation is made to meet a liability authorized by law. (State v. Medbery, 7 O. S. 522, 530.)

Accordingly, I am of the opinion that boards of education ought to include in their affidavits of deficiency, under the act of April 2nd, 1906, those deficiencies created under contracts entered into before the enactment of the act of May 9th, 1908, as well as those arising under contracts entered into thereafter. It would seem, also, that such old claims should be paid first, if the fund should prove insufficient to pay both.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

BOARD OF EDUCATION—EMPLOYMENT OF TEACHER—FAMILY RELATIONSHIP.

August 20th, 1908.

HON. CHARLES C. KEARNS, *Prosecuting Attorney, Clermont County, Batavia, Ohio.*

DEAR SIR:—In your communication of August 18th you inquire as to whether a school board has a legal right to employ as a teacher in its schools the daughter of one of the members of its board, the daughter being unmarried and residing as a member of her father's family.

Section 3794 R. S. provides that:

> "No member of the board shall have any pecuniary interest, either direct or indirect, in any contract of the board."

Section 6975*a* R. S. provides that:

> "It shall also be unlawful for any local director or member of a board of education to vote for or participate in the making of any contract with any person as a teacher or instructor in any of the public schools of this state, to whom he is related as father or brother, or to act in any manner in which he is pecuniarily interested, or to receive, or offer to accept or receive, any reward or gain for any official act."

Under these sections of the statutes, the board of education may employ the daughter of one of its members, provided her father does not vote or participate in the contract, and provided, also, that the father does not receive any part of her salary as teacher. The fact that the daughter lives at home and pays a reasonable amount to her parents for board, lodging, etc., does not invalidate her contract for services as teacher.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

JUSTICE OF THE PEACE—TERM OF OFFICE.

Justice of the peace elected in November, 1905, may serve until end of regular term only; at that time a vacancy in his office will occur, to be filled by appointment by the township trustees.

August 19th, 1908.

HON. EDWARD S. STEVENS, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—In your letter of August 10th you inquire as to the tenure of office of a justice of the peace elected at the November election, 1905 (by which election article 17 of the constitution was adopted), for a term of three years, ending November, 1908. You ask whether a vacancy will occur in his office in November, 1908, or whether he will serve until his successor is elected and qualified. In the case of State ex rel. v. Pattison, 73 O. S. 305, the supreme court say:

> "There were only two classes of offices, not elected under the provisions of the amendment, to be provided for. One class is made up of the elective officers who were in possession of their offices and actually serving when the amendment should be adopted, and it was provided in section 3 that every officer in that class should continue in office for the full term for which he was elected, and until his successor should be elected and qualified as provided by law. The other class, including the relator, is composed of those who were chosen under and by virtue of the constitution as it existed before the amendment, but whose terms of office, although defined by the constitution, had not yet begun when the amendment was adopted. This class is provided for in section 2 of the amendment, as follows: 'And the General Assembly shall have power to so extend existing terms of office as to effect the purposes of section 1 of this article.' "

Justices of the peace in office on the day of November 7th, 1905, come under the first class, and it was decided in the case of State ex rel. v. John Brown, 11 C. C. N. S. 107, that a justice of the peace, elected in November, 1904, and taking office in April, 1905, for a term of three years ending April, 1908, would continue in office until January 1, 1910.

Justices of the peace elected at the November election, 1905, come under the second class and would have no right to continue in office unless the general assembly extended their terms under section 2 of article 17. Since the general assembly failed to extend terms of such justices of the peace, a vacancy will occur

in the offices of such justices three years after the date of the election, November 7, 1905, since their terms began with the date of their election and not with the date of their commission. The provision of article 10, section 4, that

> "township officers * * * shall hold their offices until their successors are elected and qualified,"

is not applicable, since justices of the peace are not township officers. That justices of the peace are neither county nor township officers is shown by the fact that they are put in a separate class by article 10, section 6, and article 17, section 2, of the constitution, as well as by provisions of the statute.

The case of State v. Brown, 11 C. C. N. S. 107, by deciding that a justice of the peace could be elected in November, 1904, to take office April, 1905, decided that the words "all township officers hereafter elected shall begin their respective terms on the first Monday in January after their election," as provided in section 1442 R. S., as amended by the act of March 17th, 1904, did not include justices of the peace, who are separately mentioned in the same section.

While the supreme court took a liberal view as to the adjustment of terms of office in complying with article 17, and used the following language in the case of the State ex rel. v. Pontius et al., 78 O. S. 206:

> "The people in providing, in the constitutional amendment, that the general assembly shall have power to so extend existing terms of office as to effect biennial elections, and the general assembly, in extending existing terms, did not intend to hand the incumbents of some of the offices an apple of Sodom, or, if the use of current vernacular is permissible, a lemon,"

nevertheless, the general assembly, by failing to extend the terms of justices of the peace, has accomplished this result with respect to those justices elected in November, 1905, and a vacancy will occur in their offices in November, 1908, which shall be filled as provided in section 567 R. S.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

COMPENSATION OF MEMBERS OF BOARD OF EDUCATION OF SPECIAL SCHOOL DISTRICT.

August 26th, 1908.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your letter of August 24th, inquiring whether the provisions of section 3920, as amended by the act approved April 15th, 1908 (99 O. L. 105), authorizes compensation for members of a board of education of a special school district, is received:

This section, as amended, is entitled, "An act to amend section 3920 of the Revised Statutes of Ohio, as amended April 25th, 1904, relative to the organization of township boards of education," and provides only for compensation of members of "boards of education of township school districts."

Since section 3885 R. S. makes a separate classification of special school districts, and since section 3891 R. S. defines a special school district as "any

school district, now existing, other than a city, village or township school district, and any school district organized under the provisions of chapter 5 of this title," the provisions of section 3920 apply only to township boards of education and cannot be made to apply to special school districts.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

TREASURER OF SCHOOL DISTRICT—ABOLITION OF OFFICE.

Board of education of school district for which a depository has been provided may at any time dispense with the office of treasurer of the district moneys, without regard to the term of office of the incumbent thereof.

September 5th, 1908.

HON. A. B. CAMPBELL, *Prosecuting Attorney, Troy, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 1st, in which you request the opinion of this department upon the question whether, under section 4042*a* R. S., as enacted by the last general assembly (99 O. L. 205), a board of education may, at any time, by resolution, dispense with the treasurer of a school district without regard to the expiration of the term of office of such treasurer.

Authorities are numerous to the effect that an office may be abolished by the authority creating it, and the power of the officer therein may be terminated in this manner at any time. Of township and municipal school districts the township and municipal treasurers are, ex-officio, custodians of the district funds. As to the incumbents of these offices, the action suggested would not work a deprivation of office, although it would terminate their salaries, or, rather, the salaries fixed under section 4056 R. S. These salaries, however, are not in the nature of contracts. As to treasurers of special districts, these are offices created under authority of law by the boards of education of the districts, and it follows that they might be abolished at any time by the authority thus creating them.

Section 4042*a* R. S. imposes no limitation as to the time when the action therein authorized may be taken by the board of education. The authority to dispense with a treasurer of the school moneys arises whenever the depository has been provided, and, as is clear from the last clause of the section, the effect of such action is lost whenever the depository ceases to act as custodian of school money. Indeed, it is apparent from said last clause that township and municipal treasurers are required by law to assume the duties of treasurer of the school district whenever the depository ceases to act, and, in my judgment, it is also clear that they are required to relinquish such duties as soon as the school funds have again been awarded.

It is my opinion, then, that section 4042*a* R. S. contains ample authority for a board of education to dispense at any time with the treasurer of a school district, regardless of the term of the incumbent of that office.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

DEPOSITORY—COUNTY—BOND—DUTY OF PROSECUTING ATTORNEY AS TO APPROVAL OF.

September 8th, 1908.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—Your communication of September 5th is received, in which you inquire as to the duty of the prosecuting attorney in certifying the bond under the county depository act, as provided in section (1136-5) R. S. Said section is, in part, as follows:

> "Such undertaking shall not be accepted by the commissioners until it shall have been submitted to the prosecuting attorney and certified by him to be in due and legal form and conformable to the provisions of this act, which certificate shall be endorsed thereon."

Under this provision it is not only the duty of the prosecuting attorney to certify that the bond is in legal form, but he is further required to certify that the bond conforms to the provisions of the act.

Section (1136-4) sets out the requirements of the bond. These requirements are that the bonds shall not be less than the sum that shall be deposited in the depository or depositories at any one time; that the bond shall be signed by at least six resident free-holders as sureties, or by a fidelity and indemnity insurance company authorized to do such business within the state and having not less than $250 capital. Other than these provisions the bond shall be to the satisfaction of the county commissioners and in such sum as they shall direct.

In my judgment, the prosecuting attorney is not required to pass upon the sufficiency of the undertaking. He is only to see that the bond is in due legal form and that the requirements of section (1136-4) have been complied with.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

PENITENTIARY—PAROLE—PUBLICITY OF PROCEEDINGS.

September 14th, 1908.

HON. I. N. FOSTER, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—Your communication of this date is received, in which you submit the following inquiry:

What papers, if any, received by the board of managers of the Ohio penitentiary under the provisions of section (7388-10) R. S. are to be regarded by said members of said board as confidential?

In reply I beg to say section (7388-10) is in part as follows:

> "No petition or other form of application for the release of any prisoner shall be entertained by the managers, and no attorneys or other outside persons of any kind, shall be allowed to appear before the board of managers as applicants for the parole of a prisoner, but these requirements shall not prevent the board of managers from making such inquiries as they may deem desirable in regard to the previous history or environment of such prisoner, or as to his probable surrounding if

paroled, *but such inquiries shall be instituted by the prison managers themselves, and all information thus received shall be considered and treated as confidential.*"

Under the concluding clause of the above provision, I am of the opinion that only such information, whether oral or written, as is received by the members of the board of managers in response to inquiries instituted by themselves, is to be regarded as confidential.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

JUVENILE JURISDICTION—EXERCISE OF.

Prior to designation of judge to transact the business of the juvenile jurisdiction, such jurisdiction exists concurrently in the several courts named in section 1 of the act in 99 O. L. 192, and must be exercised by one of them in the case of juvenile offenders; probation officer may be appointed only by judge so designated.

September 17th, 1908.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of September 15th in which you inquire as to the procedure to be followed in your county in the case of a youth under the age of seventeen years who has been arrested upon a criminal charge. You inform me that the judges of the courts of common pleas, probate courts and insolvency courts in the judicial district in which your county is situated have not designated one of their number to transact the business pertaining to the juvenile jurisdiction in Lorain county.

Replying thereto, I am of the opinion that section 1, wherein it is provided that "courts of common pleas, probate courts and insolvency courts * * * shall have and exercise concurrently the powers and jurisdiction hereinafter in this act conferred," operates to confer upon all of said courts, in the absence of a designation of a particular judge to transact such business, the jurisdiction defined by the act in 99 O. L. 192, and that, therefore, prior to such designation, a minor under the age of seventeen years who is arrested may, under section 19 of the act, be taken before the judge of either the common pleas court or the probate court; or the magistrate before whom the minor may be taken must transfer the case to the judge of one of these two courts,

My conclusion is based upon section 19, which, in my judgment, makes exclusive the jurisdiction granted under section 1 and defined in section 4. I find nothing in the act providing, by inference or otherwise, that the juvenile jurisdiction shall not exist until the judges have designated one of their number to transact the business arising under it. On the contrary, from the fact that the act went into effect immediately upon its passage, I believe that thereupon it became the right of every child accused of crime to be tried in accordance with the procedure outlined therein.

It is also clear to me, however, that the appointment of a probation officer may be made only by the judge designated to transact the business arising

under the juvenile jurisdiction by the judges of the district. However, the provisions of section 12, and similar sections of the act, may be carried out without the aid of a probation officer.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

BOARD OF EDUCATION—CLERK—REMEDIES IN CASE OF UNLAWFUL ISSUE OF WARRANT FOR TEACHER'S SALARY.

September 28th, 1908.

HON. H. E. HOGE, *Prosecuting Attorney, Hardin county, Kenton, Ohio.*

DEAR SIR:—I am of the opinion that where a clerk of the board of education draws an order for the salary of a teacher without having filed the legal certificate of qualification required under section 4051 of the Revised Statutes to be filed with him, his action is unlawful and he and his bondsmen are responsible for the refunding of the amount paid on such order.

The board of education may sue and recover under the powers conferred upon them in section 3971 R. S. See Board of Education v. Milligan, 51 O. S. 115. Should the board of education refuse to act, it seems, from the decision in State ex rel. v. Board of Education, 11 O. C. C. 41, that a resident taxpayer may maintain suit, and, while this case denies the authority of the prosecuting attorney in injunction cases, I believe that you may bring suit regardless of the board, under section 366.

I would suggest, as a way out of the difficulty, that the teacher return the money received, and file his certificate, and that a new voucher then be issued to such teacher for the time taught this year since the issuance of such certificate to the teacher.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

TOWNSHIP CLERK—ANNUAL STATEMENT—POSTING OF.

October 8th, 1908.

HON. J. A. SCHAEFFER, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—I have received your letter of the 2nd inst., in which you submit the following inquiry:

> "Are township clerks required to post the statements required by section 1504 R. S. at the November election when no township officers are to be elected thereat?"

In reply thereto I desire to say that section 1504 provides that the township clerk shall

> "make out and enter in the record in which the proceedings of the trustees are recorded a detailed statement of all the receipts and expendi-

tures of the township for the preceding year, if any, and also the receipts and expenditures of the township board of education, stating from what source the moneys were received, and to whom paid, and for what expended, and a detailed statement of all liabilities, if any, a copy of which statement he shall post up on the morning of the first Tuesday after the first Monday in November, annually, at each place of holding township elections in such township."

and a penalty is provided for his neglect and refusal.

The provision is not that the statement should be posted at the time of holding township elections, but at the "place" of holding township elections, and it seems that the legislature thus provided for the publishing of the statement at a definite time and place in the manner provided by the section. It is my opinion, therefore, that such statement should be posted annually on the morning of the first Tuesday after the first Monday in November.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BOARD OF EDUCATION—MEMBER MAY RECEIVE COMPENSATION FOR ATTENDING MEETINGS DURING 1908.

October 16th, 1908.

HON. B. F. WELTY, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR:—In your letter of October 9th you ask from what date a member of a township board of education is entitled to receive the two dollars per meeting actually attended, as provided in section 3920 R. S., as amended by the act approved April 15th, 1908 (99 O. L. 105).

This act provides that "each member of the board shall receive, as compensation, two dollars for each meeting actually attended, for not more than ten meetings in any year."

I am of the opinion that a member of a township board of education may receive two dollars "for each meeting actually attended," since April 15th, 1908, that he is entitled to be paid from time to time as soon as his attendance has been regularly noted by the clerk, that the "year" mentioned in the sentence above quoted begins with the first Monday in January of each year, and that a member who actually attends ten meetings between April 15th, 1908, and the first Monday in January, 1909, may be paid two dollars for each of such meetings.

I believe, however, that a resolution for such payments should be adopted in each case, in the manner prescribed in section 3982 R. S., and that reasonable rules as to the time of such payment, etc., may be adopted by the board under section 3985 R. S.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

CRIMINAL INSANE—ACT PROVIDING FOR CONFINEMENT OF, NOT EFFECTIVE UNTIL LIMA STATE HOSPITAL IS READY FOR USE.

October 16th, 1908.

HON. A. C. DENBOW, *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—In your letter of October 10th you say that the State Hospital for the Criminal Insane, at Lima, Ohio, has not been completed as yet, and is not ready for receiving patients. You ask what should be done in the case of a person who is indicted for an offense and is acquitted on the sole ground that he is insane.

Section 14 of the act "to provide for the erection, organization and management of the Lima state hospital for insane," 98 O. L. 236, provides that:

> "All persons acquitted as provided in section 7242 of the Revised Statutes of Ohio shall be committed to the Lima state hospital."

Section 25 of the same act provides that:

> "This act shall go into effect on and after its passage, except that the provisions of sections twelve (12) to fifteen (15), inclusive, shall not have the force of law until the Lima state hospital is ready for the reception of inmates, which fact shall then be certified to the courts by the governor and secretary of state."

Section 8 of the same act provides that:

> "Inmates may be admitted to the Lima state hospital after the work of construction has progressed to such an extent that they may be safely and properly kept. Said inmates are to be admitted as hereinafter provided, but preference shall first be given to insane criminals."

Section 7242 R. S., referred to in section 14 of the above act, provides that:

> "When a person tried upon an indictment for an offense is acquitted on the sole ground that he was insane, that fact shall be found by the jury in the verdict, and it shall be certified by the clerk to the probate judge; and the defendant shall not be discharged, but forthwith delivered to the probate judge, to be proceeded against upon the charge of lunacy, and the verdict shall be prima facie evidence of his insanity."

I am of the opinion that, until the Lima state hospital is "ready for the reception of inmates," the probate judge should proceed under section 7242 and that he may commit such criminal insane person to the same institution to which he commits other insane persons. I take it that, until the Lima state hospital is ready for inmates, the procedure for committing criminal insane persons should be practically the same as it would be if the act in 98 O. L. 236 were not in existence.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

ELECTIONS—OFFICERS OF—QUALIFICATIONS.

There must be four judges and two clerks of elections in each township precinct; these must be divided numerically among the political parties, but all need not be residents of the precinct.

October 20th, 1908.

HON. CHARLES C. MARSHALL, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—In your letter of October 16th you state that there is an election precinct in your county in which all of the electors are of one party. You ask what the deputy supervisors of elections of your county shall do as to the appointment of judges and clerks of election in this precinct, under section (2966-6) R. S. Sec. 6.

This section provides that:

> "The deputy supervisors of each county shall appoint, in all precincts in which the voters are not registered, four judges and two clerks of elections, residents of the precinct, who shall constitute the election officers of such precinct,"

and that

> "not more than two judges and not more than one clerk shall belong to the same political party."

In the case presented by you exact compliance with the statute is impossible, whether the election officers of such precinct are made to consist of (1) six persons of one party, residents of the precinct; (2) three persons of such party, residents of the precinct; or (3) three persons of one party, residents of the precinct, and three persons of other parties not residents of such precinct.

In cases of this kind the deputy supervisors of elections should adopt that course which most nearly complies with the statute and the spirit of our election laws. Since the general assembly has fixed six as the number of election officers necessary to each precinct, the electors of a precinct should not be discriminated against by the employment of a less number. It has also been specifically provided in the interest of fairness that no more than three such officers shall belong to the same political party. These two provisions I take to be mandatory. It cannot be said that section (2966-6) is just as emphatic as to the requirement that the election officers shall be residents of the precinct, for the reason that this requirement is dispensed with in all registration cities, and the law, as found in section 2926*e*, requires only that "such registrars, judges and clerks of elections * * * must be electors of any such city."

I am, therefore, of the opinion that while it is the duty of the deputy supervisors of elections, under section (2966-6), to choose election officers who are residents of the precinct in which they act, nevertheless this requirement is directory in case four judges and two clerks cannot be selected from such precinct without choosing more than two judges and one clerk of the same political party. In choosing the two additional judges and the one additional clerk under such circumstances, I see no objection to selecting electors of other precincts, who are qualified to vote for the same men and upon the same propositions at the same election, and I regard such a proceeding as a substantial compliance with the statute.

Very truly yours,

JOHN A. ALBURN,
Assistant Attorney General.

SCHOOLS—SEGREGATION OF COLORED CHILDREN.

Board of education may not assign all colored children of certain grades to a separate room.

Prosecuting attorney may not proceed against board of education to prevent such segregation; action may be brought by taxpayer whose children are affected thereby.

October 20th, 1908.

HON. LOUIS W. WICKHAM, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—In your letter of October 13th you state that complaint has been filed with you to the effect that a board of education in your county is maintaining a separate school for colored pupils, in which there are sixteen children, ranging in years from six to fifteen, and belonging to several grades, although the white children of the village are placed in separate graded schools. You state that the colored children in this school district are forbidden to attend a room in which white children are taught, and that no white children are permitted in the room where the colored children are taught. You ask whether the board has a right to maintain such a school, or to prevent colored children from attending the regular graded schools of the village, and also inquire as to your duty in this matter.

A review of the legislation of this state shows a steady growth toward giving to colored children the full benefit of the public schools and doing away with distinctions on account of color. Prior to 1848 only white children were entitled to the privileges of the public schools. The acts of 1848 and 1849 provided for the levy of a tax upon the property of colored persons for the education of colored children, but did not permit the application of taxes levied upon the property of white persons to such purposes. The act of 1853 required boards of education to organize separate schools for colored children, and to give them their support, out of the common school fund, that proportion which the number of colored children bore to the whole number of children in the district.

By the act of 75 O. L. 513, known as section 4008 R. S., boards of education were no longer bound to organize separate schools for colored children, but could do so at their discretion. Finally the act of 84 O. L. 34 repealed section 4008 R. S. and placed colored children in the schools upon the same basis as white children.

Each of the above acts, prior to the repealing act, was sustained as being in accord with the constitution of Ohio, and the 14th amendment to the United States constitution, although the later decisions emphasized the requirement that the educational opportunities and facilities afforded to colored children should be substantially equal to those afforded to white children.

State ex rel. v. City of Cincinnati, 19 Ohio 178
Van Camp v. The Board of Education, 9 O. S. 406.
State ex rel. v. McCann, 21 O. S. 198.
United States v. Bunton, 5 O. F. D. 166.

In the latest case upon this subject (Board of Education v. The State, 45 O. S. 555), an action in mandamus was brought by the relator to compel the board of education of the village of Oxford to admit his (colored) children to a common school within the district in which he resided. The court say:

"The power to establish and maintain separate schools for colored children was conferred on boards of education by section 4008, and not

by section 4013 of the Revised Statutes. Whilst under the latter section power is conferred on boards of education to make such assignments of the youth of their respective districts to the schools established by them as will, in their opinion, best promote the interest of education in their districts, such power cannot be exercised with reference to the race or color of the youth; and section 4008 having been repealed by the act of the general assembly passed February 22nd, 1887 (84 Ohio L. 34), separate schools for colored children have been abolished, and no regulation can be made under section 4013 that does not apply to all children, irrespective of race or color."

Since the language of present section 4013 R. S.,

"boards of education are authorized to make such an assignment of the youth of their respective districts to the schools established by them as will, in their opinion, best promote the interests of education in their districts,"

is the same as that of section 4013, as in effect at the date of the above decision, I am of the opinion that a board of education is without power to make assignments of children to schools with reference to their race or color.

Since section 3977 R. S. makes it your duty to act as counsel for boards of education, and since there is no law authorizing you to proceed against a board of education in such a case as this, I question your right as prosecuting attorney to bring any proceedings against the board in this manner. I am also lead to this conclusion by State ex rel. v. Board of Education (11 O. C. C. 41), and Youmens v. Board of Education (13 O. C. C. 207).

It is, however, your duty to advise the board as to the law in this matter. A taxpayer who is the father of a colored child of school age may proceed against this board of education as was done in Weir v. Day (35 O. S. 143), and Board of Education v. State (45 O. S. 555).

Very truly yours,

WADE H. ELLIS,
Attorney General.

SCHOOLS—SEGREGATION OF COLORED CHILDREN.

Supplementary to opinion of October 20th.

October 21st, 1908.

HON. LOUIS W. WICKHAM, *Prosecuting Attorney, Norwalk, Ohio.*

DEAR SIR:—Since writing you yesterday as to the board of education of New London, Ohio, I note that the board is not maintaining what is popularly known as a separate school for colored children, but is maintaining a separate room exclusively for colored children, in a graded school building. In this room the colored children of the district are segregated and taught by themselves, and they are denied the right to attend the graded school provided for the white children. Whether this room is called a separate school or not makes no difference whatever. The action of the board of education is clearly a discrimination and contrary to law.

Even prior to 1887, when separate schools were authorized under section 4008 R. S., it was required that the separate schools must be reasonably located, that the colored child should not be "placed at a material disadvantage with his white neighbors," and that the school for colored children should "offer substantially the same facilities and educational advantages that were offered in the school established for the white children." U. S. v. Bunton, 5 O. F. D. 166,

On the other hand, ever since 1887, when section 4008 was repealed, any maintenance of separate schools or any separation or segregation of colored children as such has been forbidden under the laws of this state, even though the facilities and educational opportunities provided for colored children are equal in all respects to those offered for others.

While I advise that proceedings against the board of education be brought by a taxpayer who is the parent of one of the colored children, such proceedings may be brought by other residents of the school district who are beneficially interested.

Very truly yours,

WADE H. ELLIS,
Attorney General.

BUREAU OF INSPECTION AND SUPERVISION OF PUBLIC OFFICES—TOWNSHIP OFFICES—DUTY OF PROSECUTING ATTORNEY AS TO PROCEEDING UNDER REPORT ON.

October 27th, 1908.

HON. SCOTT STAHL, *Prosecuting Attorney, Port Clinton, Ohio.*

DEAR SIR:—In your letter of October 16th you ask whether it is the duty of a prosecuting attorney to prosecute actions against township trustees upon receipt by you of a report of the state bureau of inspection and supervision of public offices, showing such trustees to have illegally drawn money from the township treasury.

Section (181a-8) R. S. provides that:

> "If any such examination discloses malfeasance, misfeasance or nonfeasance in office on the part of any public officer or employe, an additional copy of such report shall be made and forwarded to the proper legal authority of the taxing district for such legal action as is proper in the premises. Refusal, neglect or failure on the part of the proper legal authority of the taxing district to take prompt and efficient legal action by civil process to carry into effect the findings of such examination or to prosecute the same to a final conclusion, shall give to the auditor of state, through the attorney general's department of state, the right to institute the necessary civil proceedings or to participate therein, and to prosecute the same in any of the courts of the state to a final conclusion.

While it is the duty of the prosecuting attorney to act under authority of this section, he is, of course, to exercise his own judgment and discretion in taking "such legal action as is proper in the premises," provided that such action is "prompt and efficient."

I have asked the state bureau of inspection to send you a copy of the last report of their special examination of Salem township.

Very truly yours,

WADE H. ELLIS,
Attorney General.

MEMBER OF BOARD OF EDUCATION MAY NOT RECEIVE COMPENSATION FOR DELIVERING COMMENCEMENT ADDRESS.

October 27th, 1908.

HON. E. P. CHAMBERLIN, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—In your letter of October 22nd you state that the president of the board of education in your county was paid twenty dollars out of the treasury of such board for delivering the class address to the graduating class of 1908. You ask whether this is a violation of section 6975 R. S.

Since section 6975 R. S. provides that

> "a member of a board of education organized under any law of this state, who accepts or receives any compensation for his services as such member, except as clerk or treasurer of such board, shall be deemed guilty of embezzlement of the amount so received, and punished accordingly,

and since, in this case, the president of the board of education was not paid for services as a member of the board, there was no violation of this statute. There was, however, a violation of section 3974 R. S., which provides that:

> "No member of a board shall have any pecuniary interest, either direct or indirect, 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."

Very truly yours,

WADE H. ELLIS,
Attorney General.

"ANTITOXIN LAW" CONSTITUTIONAL.

October 28th, 1908.

HON. ROBERT W. MCCOY, *Assistant Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—In a letter to this office you inquire as to the constitutionality of the act approved February 26th, 1908, entitled "An act to provide for furnishing antitoxin to persons in indigent circumstances." No specific objection to this act are suggested and I know of no reason for questioning its constitutionality.

The general assembly has the right to pass laws in the interest of health, and in aid of the unfortunate who are unable to help themselves, and may also prescribe the duties of county commissioners in such matters. Therefore, in the absence of some judicial determination of the question, I should regard this law as constitutional.

Very truly yours,

WADE H. ELLIS,
Attorney General.

JURORS—MILEAGE.

October 29th, 1908.

HON. KARL T. WEBBER, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR:—A member of your department has submitted to this office the inquiry as to whether jurors are entitled, under section 5182, to mileage for one attendance only, or for each day's attendance, or for each trip actually made between the residence of the juror and the place of holding court.

The statute is not perfectly clear and is possibly susceptible to more than one interpretation. However, I ascertain that the bureau of inspection and supervision of public offices, in the case of Hamilton county, has ruled that jurors are entitled only to mileage traveled in answering the subpoena and are not entitled to such mileage for trips to and from their homes during the period of their service as jurors.

The court of common pleas of Hamilton county sustained this ruling, I am informed, but I am unable to cite any reported decision on the subject.

In view of the ruling of the bureau and the decision of the court I incline to the opinion that jurors should be allowed mileage for one trip to and from their homes to the county seat. The statute does not specifically allow mileage for the return trip, but its import in this respect is, I think, clear. While it is lawful for the jurors to return to their homes over night during the sessions of the court, still the evident intention of the statute is that such trips shall be made at their own expense, it being contemplated by the law that they should remain continuously in attendance upon the court. Therefore I do not believe that jurors under this section are entitled to mileage for trips made to and from their homes during the period of their services.

Yours very truly,

WADE H. ELLIS,
Attorney General.

ELECTIONS—DEPUTY STATE SUPERVISORS, ETC.—COMPENSATION AND EXPENSES IN CASE OF PRIMARY AND SPECIAL ELECTIONS.

November 12th, 1908.

HON. E. E. EUBANKS, *Prosecuting Attorney, Jackson, Ohio.*

DEAR SIR:—Upon an examination of the statutes I find, in section 2919 R. S., the following provision for additional compensation of election officers in the case of primary elections:

> "Deputy state supervisors of elections and deputy state supervisors and inspectors of elections shall each receive fifty cents per precinct and clerks of such board seventy-five cents per precinct for such elections; provided, however, that the total compensation of such officers shall not exceed the maximum of compensation otherwise provided by law."

The only provision for maximum compensation which I find is contained in section 2926*t* R. S., where a maximum is fixed for counties containing registration cities.

The members of such boards of election are not entitled to extra compensa-

tion for special elections. The compensation provided for in section (2966-4) R. S. (97 O. L. 221), is a yearly compensation including special as well as general elections.

The question of employing clerks to assist the board of elections in canvassing and tabulating returns, is, I think, one for the deputy state supervisors and the county commissioners to determine, since section (2966-4) R. S. provides that "all proper and necessary expenses of such board of deputy state supervisors shall be defrayed out of the county treasury, as other county expenses," and since section 894 R. S. provides that "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."

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

COUNTY OFFICERS—EXPENSES.

County commissioners may make but one allowance annually for expenses of county officers.

November 14th, 1908.

HON. HARRY W. MILLER, *Prosecuting Attorney, Portsmouth, Ohio.*

DEAR SIR:—In your letter to this office you state that the amount fixed by the county commissioners for the expenses of the probate judge for the year beginning January 1st, 1908, is insufficient, and that he has requested of the county commissioners an additional amount of $25.00 a month. You ask what right, if any, the commissioners have to grant such allowance.

The law as to salaries for county officials sets out that all county officers shall, on the 20th of November, file a "statement showing in detail the requirements of their offices for the year beginning January 1st thereafter," and that "the county commissioners shall, not later than five days after the filing of such statement, take up and consider the same, and shall determine and fix an aggregate sum to be expended for the period covered by said statement * * and shall enter upon their journal a finding of said action."

The law further provides that the compensation paid for "deputies, assistants, clerks, bookkeepers or other employes," "shall not exceed, in the aggregate for each office, the amount so fixed for that office by the commissioners, as herein provided."

I am unable to find any authority in the statutes for such an increase as is desired in this case, since it seems to be the intention of this law that the county commissioners should take action but once for the entire year, and that such action should be final. The probate judge can, of course, request a larger amount for the year beginning January 1st, 1909, and the county commissioners may make such allowance for the expenses of this office for next year.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

TOWNSHIP TRUSTEES—EXPENDITURE OF TOWNSHIP FUND.

Township trustees may not advance money to persons having claims against township, and secure reimbursement from township treasury.

November 14th, 1908.

HON. MICHAEL CAHILL, *Prosecuting Attorney, Eaton, Ohio.*

DEAR SIR:—Replying to your letter relating to a report of the state bureau of inspection and supervision of public offices, as to a township in your county, I agree with you that it is better to give the township trustees an opportunity to pay back into the township treasury the money illegally drawn than to bring a civil action against them for the same amounts without notice. Section (181*a*-8) R. S. provides that you shall take "such legal action as is proper in the premises," so that you should decide such matters as your best judgment dictates in view of the best interests of the township and the circumstances of the case.

You state that certain township trustees have advanced different sums of money to various persons who did work for the township, and, later, such sums have been paid by the township treasurer to such trustees instead of to the persons who performed the work for the township. While the action of these trustees may be perfectly honest in every respect, the fact still remains that these sums of money have been drawn from the township treasury contrary to law and contrary to a wise public policy. Other trustees not so honest might use the same method for collecting personal debts or making a collecting agency out of their office or might constitute themselves, instead of the township treasurer, the disbursing agents of the township.

While the township might be fully protected if each of the individuals to whom this money was due should file with the township a receipt in full for all services, material, etc., furnished to the township for which payment was made to the trustees, I believe that the only strictly legal way of adjusting this matter will be for the township trustees to pay these sums back into the township treasury. Payment may then be made to the individuals to whom these sums were due and they may in turn repay to the township trustees the individual loans which have been made to them.

Although I have not all the facts before me, it appears that, as matters now stand, the township may be liable to a suit brought by any one of these persons for whom the trustees have drawn money, if the claim is made that there was no consent to such transaction.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

COUNTY COMMISSIONERS ELECTED IN 1908 TAKE OFFICE ON THE THIRD MONDAY IN SEPTEMBER, 1909.

November 14th, 1908.

HON. GEORGE E. YOUNG, *Prosecuting Attorney, Lebanon, Ohio.*

DEAR SIR:—Your communication of November 10th is received, in which you submit an inquiry, together with a letter addressed to you from B. D. Welton, relative to the notice required in section 4022*a* R. S. You also inquire as to

the beginning of the terms of office of the newly elected county commissioners. In reply, I beg to say that I have referred the enclosed letter from Mr. Welton to the state school commissioner. I am informed that his department has ruled upon the question submitted.

In reply to your inquiry as to the beginning of the terms of the newly elected county commissioners, the supreme court has decided in the Mulhern case (74 O. S. 363) that:

> "The provision in the second section of the act passed April 2nd, 1906, entitled 'An act to conform the terms of various state and county offices to the constitutional provisions for biennial elections, which requires that the term of office of county commissioners shall commence on the first day of December next after their election, is in irreconcilable conflict with the provision of the first section, which extends the terms of certain county commissioners to the third Monday in September of the odd numbered years next succeeding the time when they would otherwise expire, and * * the provision of section 2, fixing December 1st after election for commencement of terms is inoperative."

The terms of office of the newly elected county commissioners will, therefore, begin on the third Monday of September, 1909, and the present incumbents will hold over until that date.

Very truly yours,

W. H. MILLER.
Assistant Attorney General.

TOWNSHIP DEPOSITORY—EXCESSIVE DEPOSIT—INTEREST.

Township treasurer, not township trustees, must sue to recover deposit made in township depository in excess of contract and bond of deposit. Interest at 6% from time of demand recoverable in such action.

November 30th, 1908.

HON. E. N. WARDEN, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—I beg to acknowledge receipt of your letter of November 11th, in which you submit the following inquiry:

> "A bank is made the depository for township funds, and the treasurer of the township deposits with said bank a sum in excess of the amount provided for in the contract and in the bond. The bank refuses to pay interest on the excess deposit above the maximum provided for in the contract and in the bond. Can the township enforce the collection of the interest on the excess of the deposit made by its treasurer in said bank above the maximum amount provided in said contract to be deposited in said bank?"

Section 1513 R. S., being the section which requires the deposit of township funds, contains the following provisions:

> "No bank or depository shall receive a larger deposit of said funds than the amount of the bond, as hereinafter provided, and in no event to exceed three hundred thousand dollars."

"It shall be the duty of the treasurer of said township to see that a greater sum than that contained in the bond is not deposited in such bank or banks, and said treasurer and his bondsmen shall be liable for any loss occasioned by deposits in excess of such bonds."

"When a depository is provided as authorized herein * * the treasurer of the township and his bondsmen shall be relieved of any liability occasioned by the failure of the bank * * * or by the failure of the guaranty company * * except as herein provided in cases of excessive deposits."

It is evident from a consideration of the foregoing provisions, together with the remainder of section 1513, that the deposit described in your letter was entirely unauthorized by law and that the liability of the bank or the ultimate liability to the township for interest cannot be determined thereby. The act of the treasurer violated the law. His bond would certainly be liable under the section from which I have quoted, as well as by clear implication from sections 1509 and 1514, R. S., should the bank refuse to return the excessive deposit.

State v. Harper, 6 O. S. 608.
State v. Buttles, 3 O. S. 311.
Eshelby v. Board of Education, 66 O. S. 571.

The present possession by the bank of the excessive deposit is unlawful. The treasurer, in making the deposit, did not relieve the bank from responsibility for its act in accepting the same. This proposition is self-evident.

The township trustees cannot sue to recover the funds unlawfully held. They are themselves forbidden by section 1513 to make or authorize to be made any such excessive deposit. They have no legislative power and they cannot alter the law in this respect. What they cannot do in the first instance they cannot ratify. State v. Buttles, *Supra.*

The funds, however, belong to the township, and it is entitled to the increment thereof. Eshelby v. Board of Education, *Supra.*

As custodian of the public moneys belonging to the township the township treasurer has, I believe, the legal right to sue the bank for the principal sum deposited in excess of the amount authorized to be deposited by the contract and bond. His suit would be in conversion for the unlawful detention of the funds to which he, as lawful custodian thereof, has a qualified interest and right of possession. Pollock, Treasurer, v. Hatch, 2nd Disney, 181.

Interest at the rate of 6% could be recovered by the treasurer in such suit. It would be computed from the time of demand, but not necessarily from the time of deposit. It seems clear to me that interest under the contract of deposit may not be recovered for this unauthorized excess.

The treasurer and his bondsmen, in turn, are liable to the township trustees for such principal sum and interest.

Yours very truly,

U. G. DENMAN,
Attorney General.

TOWNSHIP DITCH—COSTS. TOWNSHIP TRUSTEES—COMPENSATION.

Expense of employing surveyor in apportioning cost of township ditch improvement must be paid out of township ditch funds.

Township trustees not entitled to additional compensation for services in construction of new roads.

December 3rd, 1908.

HON. F. M. STEVENS, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—In your letter of November 23rd you ask as to the method of procuring from property owners the amounts expended under the acts of 98 O. L. 280 and 99 O. L. 237, for surveying and repairing ditches, etc.

Section 6 of the first act provides for certifying

> "the cost of said work to the county auditor, who shall place the same upon the tax duplicate against the land so assessed, pro rota, and the same shall become a lien upon the land and collected as other ditch taxes."

Section 12 of the same act provides in the case of removing obstructions from ditches, for certifying

> "such expense to the auditor, who must place the same upon the tax duplicate as an assessment upon the lands of such person or corporation, etc."

Section 7 of the later act provides, in the case of cleaning ditches or water courses, for certifying

> "the cost thereof to the county auditor, as provided in section 6 of this act."

Section 8 of the first act provides that:

> "All costs certified to the county auditor under the provisions of this act shall be collected by the county treasurer and be paid over to the treasurer of the township whence the certificate came, as township ditch funds."

Section 3 of the later act provides that:

> "With the consent of the township board of trustees, said supervisor may secure the services of a surveyor in making the apportionment and constructing the work."

Since the law makes no provision for certifying to the county auditor the expense incurred for a surveyor under section 3, in case the property owners do not perform the work, and since there is no provision for imposing such expense upon the property owners in case they perform the work required in these acts, I believe that such expense must be paid out of the township ditch funds under authority of section 9 of the act of 98 O. L. 280. Where the property owners do not perform the work the expense of performing such work should be certified to the county auditor and collected by the county treasurer. In the latter case I take it that the services of the surveyor are not used in constructing the work, but only in making the apportionment. I do not believe, therefore, that payments under this act may be made direct to the township trustees by the property owners.

I believe that the township trustees should give notice of their apportionment so as to give the owners an opportunity to perform the work themselves,

but that where contracts are let for the work upon a refusal or neglect of the land owners, no assessment notice is required, since the assessment of expenses will be upon the basis of the original apportionment.

You also state that certain township trustees claim to be entitled to compensation in excess of the one and one-half dollar per day fixed by section 1530 R. S., in all new road work which has been laid out by the county, and that they cite section 4667 R. S. as authority.

This section is section 28 of the act of January 27, 1853, and provides for the compensation of township trustees only in case they have served as viewers where state or county roads have been "injured or destroyed" by the washing of any lake, river or creek. Township trustees did not then and do not now act as viewers in the case of new construction, and section 4667 still applies only to sections 4665 and 4666 R. S.

I am unable to find any provision for additional compensation in the case of new construction of county roads, and am, therefore, of the opinion that township trustees should be paid, as provided in section 1530, for the work which they are authorized or required by law to perform as trustees in such new construction.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

TRADEMARK—TIMBER DEALER—REGISTRATION.

December 19th, 1908.

HON. GEORGE C. BARNES, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—Replying to your letter of December 12th, the words of section (4364-56), Bates' Revised Statutes,

> "in the office of the clerk of the court of common pleas of the county in which the principal office or place of business of such timber dealers may be, and also in the office of the secretary of state,"

provide for the recording of a trade mark of a timber dealer in the office of the clerk of the court of common pleas of the county in which the principal office or place of business in this state of such timber dealer may be, and also in the office of the secretary of state of Ohio.

In the absence of an express provision of the statute to the contrary, it is presumed that the general assembly, in designating the names or titles of offices or officers, intended to indicate offices or officers within this state.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

EXPENSES OF FUNERAL OF INDIGENT WIDOW OF SOLDIER MUST BE PAID BY COUNTY.

December 19th, 1908.

HON. GEORGE H. BAYLISS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—In your letter of December 12th you inquire whether the county

can be compelled to pay the burial expenses of a widow of a soldier who has died, not having the means to defray the necessary funeral expenses, as provided in section (3107-45) Bates' Revised Statutes, in case she left children living in the county who had ample means to defray all such expenses.

Section (7017-3), to which you refer me, makes it the duty of the children "to provide such parent with necessary shelter, food, care and clothing." I have some doubt whether this section includes burial expenses, for the reason that it is a criminal section and must therefore be strictly construed, and also because of the provision for suspending sentence in case of conviction. Regardless of this question, however, I am of the opinion that it is the duty of the county to defray the necessary funeral expenses under section (3107-45) in the case of a soldier's widow who has died not having herself the necessary means to defray such expenses.

Very truly yours,

W. H. MILLER,
Assistant Attorney General.

COUNTY OPTION—CIDER AND NATIVE WINE.

Cider fermented so that it is intoxicating may not be sold in territory "dry" under county option law. Condition of such cider a question of fact

Native wine may not be sold in territory "dry" under county local option law.

December 21st, 1908.

HON. JONATHAN E. LADD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—In your letter of December 12th you state that your county has voted dry under the Rose county local option law, and inquire whether persons in your county have a right to sell cider and wine made from their own product, either by the gallon, keg or barrel.

The Rose county local option law provides that in dry counties:

> "It shall be unlawful for any person, personally or by agent, within the limits of such county, to sell, furnish, or give away intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished for beverage purposes."

The law also provides that:

> "The phrase 'intoxicating liquor,' as used in this act, shall be construed to mean any distilled, malt, vinous or any intoxicating liquor whatever."

The provision of section (4364-25) R. S., exempting the manufacture and sale of cider and native wine, under township local option, is not contained in the Rose county local option law, and therefore cider and native wine cannot be considered an exception under this law in a dry county.

Since cider is not a distilled, malt or vinous liquor according to Black and other authorties, it may be sold in dry counties provided it is not intoxicating. While there is considerable authority inclining to the position that cider is

intoxicating after fermenation, but not before, I can set out no fixed rule, but simply say that this is a question which must be decided in each case by the jury according to the facts presented.

With the above exception as to cider which is not intoxicating, persons making cider or wine from their own product may not sell it in dry counties to be used as a beverage This holds true where liquor is sold at the place of manufacture to be used as a beverage, since no exception has been made in the Rose law in the case of such sales. Section (4364-16), as to manufacturers, applies only to the Dow tax law.

Very truly yours,

U. G. DENMAN,
Attorney General.

METER RENT—NATURE OF ACTION AGAINST GAS COMPANY FOR MAKING CHARGES.

December 22nd, 1908.

HON. HAMILTON E. HOGE, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter of December 15th relative to the construction of section 3556, as amended May 9th, 1908 (99 O. L. 471).

This section provides for the recovery of a penalty of from $25.00 to $100.00 for the violation of the act which forbids gas companies charging meter rent.

You ask my opinion as to the following questions:

1. Has a justice of the peace jurisdiction in the case to collect the penalty referred to?
2. Is the suit brought in the name of the State of Ohio on the complaint of "A," or simply in the name of the State of Ohio?
3. Who pays the costs in the case the state is unsuccessful?
4. If the state recovers the penalty how is the money covered into the state treasury?

In reply thereto permit me to say that it is my opinion:

First. The action should be brought before a justice of the peace or mayor.

Second. The suit should be brought in the name of the State of Ohio.

Third. If the action is unsuccessful the costs should be paid by the county.

Fourth. If the penalty is recovered the money should be covered into the state treasury by the justice of the peace or mayor through a pay-in warrant, issued by the auditor of state.

Very truly yours,

U. G. DENMAN,
Attorney General.

WATER COURSE—AUTHORITY OF COUNTY COMMISSIONERS IN STRAIGHTENING.

County commissioners, in straightening water course in limits of municipality, may leave the same open.

December 28th, 1908.

HON. JOE T. DOAN, *Prosecuting Attorney, Wilmington, Ohio.*

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

Are the provisions of section 4447*a* R. S. (99 O. L. 391) broad enough to authorize the county commissioners in the straightening of a natural water course within the limits of a municipality to maintain the same as an open ditch by the placing of a concrete bottom and sides therein?

In reply I beg to say that section 4447*a* R. S. is in part as follows:

> "The commissioners of any county, at any regular or called session, whenever it is necessary to drain any low, wet, marshy or swampy lots or lands lying and being within the limits of a municipal corporation in such county and along or near the channel of any river, living stream or natural water course, and the drainage of such lots or lands will, in the opinion of such commissioners, be conducive to the public health, convenience or welfare, may, in the manner provided in this chapter, cause to be located and constructed a new artificial channel, in whole or in part, over, along or near the natural channel of any such river, living stream or natural water course within such municipal corporation and for a distance of not more than four miles in each direction from the corporate limits of such municipal corporation, or for any part of such distances and within such limits and distances, box or tile, in whole or in part, such natural channel or such artificial channel, or both of such channels."

Under this provision the county commissioners are, in my judgment, vested with such discretion in the drainage therein contemplated as will best serve the public health and welfare. If an open ditch with a concrete bottom and sides is more convenient and will better serve the purposes for which it is constructed than an enclosed ditch, either boxed or tiled, then I am of the opinion that the above provision gives the county commissioners sufficient authority to construct the open ditch. To hold otherwise would, in your instance, defeat the very purpose contemplated by the legislature in the enactment of the statute.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

TOWNSHIP TRUSTEES—EMPLOYMENT OF COUNSEL BY MUST BE ENTERED ON JOURNAL.

December 30th, 1908.

HON. D. B. WOLCOTT, *Prosecuting Attorney, Ravenna, Ohio.*

DEAR SIR:—Your communication is received, in which you submit the following statement of fact and request an opinion thereon:

Upon an examination of the township offices in Ravenna township, Portage county, the examiner made a finding against A. S. Cole of $72.00 for legal services rendered the board of trustees of said township on the ground that the employment of said Cole was illegal under the provisions of section 1274 of the

Revised Statutes; that said section provides that the prosecuting attorney shall be the legal adviser of county and township officers and that no county or township officer shall have any authority to employ any other counsel or attorney-at-law at the expense of the county except on the order of the county commissioners or township trustees, according as the services engaged are to be rendered for a county or township *board* or officer, duly entered upon its journal, in which order the compensation to be paid for legal services shall be fixed.

You inquire whether or not such entry is to be placed upon the journal of the board of township trustees when the employment is made by the board and not by an individual member of the board.

In reply, I beg to say that the provision of section 1274 R. S. above referred to requires that the order of the township trustees shall be entered upon its journal according "as the services engaged are to be rendered for * * * a township *board* or officer." I am, therefore, of the opinion that an order entered upon the journal of the board of trustees is essential to the employment of counsel other than the prosecuting attorney by either the board of trustees itself or a member thereof.

Yours very truly,

W. H. MILLER,
Assistant Attorney General.

COUNTY COMMISSIONERS—COMPROMISE OF DAMAGE CLAIMS.

December 29th, 1908.

HON. ISRAEL M. FOSTER, *Prosecuting Attorney, Athens, Ohio.*

DEAR SIR:—I have received your letter, in which you submit the following inquiry:

> "Has the board of county commissioners authority to compromise and adjust claims for damages growing out of a road improvement?"

In reply thereto I desire to say that, in my opinion, if the county is liable to respond in damages, the board of county commissioners can compromise such claim if it is done in good faith, without fraud, and with a full understanding of all the facts.

The circumstances in each case will determine whether or not a valid claim for damages exists. Generally speaking, a county is not liable for damages to private interests by the construction of public works and improvements unless there is express statutory authority therefor.

Trusting this will answer your inquiry, I am,

Very truly yours,

U. G. DENMAN,
Attorney General.

COUNTY OPTION—MAIL ORDER SALES.

December 31st, 1908.

HON. EDWIN E. POWER, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—In your communication to this office you ask:

> "First. Can a distiller of alcoholic beverages located in a dry county fill mail orders received from parties located in other dry coun-

ties and make shipments of goods by express direct from one such dry county to the other?

"Second. Can a distiller located in a dry county make such shipments upon such orders to parties by express in wet counties?"

The Rose county local option law provides that in dry counties:

> "It shall be unlawful for any person, personally or by agent, within the limits of said county, to sell, furnish or give away intoxicating liquors to be used as a beverage."

Where the sale is completed in the dry county in which the seller is located, the distiller is violating the provisions of the Rose county local option law if he is selling intoxicating liquors to be used as a beverage, whether the purchaser resides within the county or elsewhere.

Where the sale of intoxicating liquors to be used as a beverage is completed outside of the dry county in which the distiller is located, the sale is lawful in wet counties, but not in counties which are dry under the Rose county local option law.

While it is often difficult to determine just where a sale is made, the general assembly has provided, in the act approved May 9, 1908 (99 O. L. 475), that:

> "All sales of intoxicating liquor to be paid for on delivery, commonly called C. O. D. shipments, shall be held to be made at the place of destination, or where the money is paid or goods delivered."

Very truly yours,

U. G. DENMAN,
Attorney General.

(Miscellaneous).

ABSTRACT OF TITLE TO FORT ANCIENT SITE.

June 23rd, 1908.

HON. E. O. RANDALL, *Secretary Ohio State Archaeological and Historical Society, Columbus, Ohio.*

DEAR SIR:—You have submitted to this department the deed of Eliza Ridge to the state of Ohio, for lots numbers 1 to 38, inclusive, and 43 to 79, inclusive, of the Ft. Ancient Heights subdivision, and the remainder of a tract of 20.07 acres as conveyed by George and Eliza Ridge to William H. Carney, said premises being situated in Washington township, Warren county, Ohio, and being a part of original survey No. 1505; also an abstract of title to the above described property and certain other documents and letters bearing upon the same.

Upon examination of all the papers submitted, I am of the opinion that the above mentioned deed may safely be accepted as conveying perfect title to all of the 20-acre tract excepting the hotel site and lots numbers 39 to 42, inclusive, of the Ft. Ancient Heights subdivision, together with the streets and alleys thereof.

The statements heretofore made to you by a member of this department are approved.

Yours very truly,

WADE H. ELLIS,
Attorney General.

SOLDIERS' CLAIMS—FEES OF OFFICERS TAKING ACKNOWLEDGMENTS, ETC.

June 25th, 1908.

HON. W. L. CURRY, *Department of Soldiers' Claims, Columbus, Ohio.*

DEAR SIR:—In your letter of June 10th, enclosing a letter from Mr. P. W. Stumm, you inquire as to fees for making certificates as to death, marriage and birth records and administering oaths in pension and bounty cases.

Section 548 R. S. provides that the probate judge "shall administer oaths and make certificates in pension and bounty cases, without compensation."

Section 1264 R. S. provides that the clerk of the court of common pleas "shall not make any charge whatever for certificates made for pensioners of the United States government, or any oath administered on pension vouchers, applications or affidavits."

Section 621 R. S. provides that:

> "All justices of the peace and notary publics shall, upon request, administer and certify to all oaths required in the procurement of bounties and pensions and payment of pensions, and they shall be entitled to charge and receive for each oath so administered and certified, the sum of ten cents."

I believe that these provisions apply to all oaths and certificates which are required under the laws of the United States in the procurement of bounties and pensions.

Very truly yours,

WADE H. ELLIS,
Attorney General.

ELECTIONS—SPECIAL MUNICIPAL—DETERMINATION OF LEGALITY OF BALLOTS.

Neither board of deputy state supervisors and inspectors of elections nor municipal board of canvassers may challenge the correctness of tally sheets certified to them by officers of municipal election.

October 26th, 1908.

HON. A. N. RODWAY, *Secretary Canvassing Board, Cleveland, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter, in which you state that the board of deputy state supervisors of elections of Cuyahoga county, and the city auditor of the city of Cleveland, comprising the canvassing board, have met for the purpose of canvassing the returns of a special election held in the city of Cleveland. You request the opinion of this office as to the power and authority of the board of elections and the canvassing board to go behind the returns for the purpose of investigating the legality of the election in certain precincts.

In reply thereto, permit me to say that, in my opinion, neither the board of elections nor the canvassing board has any authority under the law to do anything more than make an abstract and canvass the vote as returned by the officers of the various election precincts. Their duties are purely ministerial and are limited to compiling the votes shown by the tally sheets so returned. They have no authority to hear any evidence to contradict or explain those tally sheets or to act upon information not appearing upon their face. If there is any question as to the legality of the election, these tribunals have no authority to inquire into the validity or regularity of the same. That is a matter which may be determined in the courts in the proper way. This question seems so well settled in Ohio that it appears unnecessary to cite authorities.

Yours very truly,

O. E. HARRISON,
Special Counsel.

ELECTIONS—JUDGES AND CLERKS OF, IN REGISTRATION VILLAGES, NOT ENTITLED TO ADDITIONAL COMPENSATION.

November 18th, 1908.

Deputy State Supervisors of Elections, Jefferson County, Steubenville, Ohio.

GENTLEMEN:—I beg to acknowledge the receipt of yours of the 12th inst., requesting an opinion upon the facts presented in your letter, which are, in substance, as follows: Certain villages in your county, by ordinance, have pro-

vided for registration of electors. You desire to know whether the judges and clerks should receive $5.00 per day as their compensation, as provided in the statutes governing registration cities.

The law under which the councils of your villages have provided for general registration of electors is that found in 98 O. L., page 270; the law governing the compensation of judges and clerks in registration cities is that known as section 2926*t*, being the act of May 9th, 1908 (99 O. L. 512, 513), also section (2966-52). As these sections, providing for an increased compensation, are not made applicable to villages, it is my opinion that such judges and clerks are not entitled to the compensation of $5.00 per day.

Very truly yours,

U. G. DENMAN,
Attorney General.

ELECTION—SPECIAL—SALOONS MUST BE CLOSED.

December 7th, 1908.

HON. J. V. MURPHY, *Clerk, Deputy State Supervisors of Elections, Youngstown, Ohio.*

DEAR SIR:—I desire to acknowledge the receipt of your letter, in which you state that a special election is to be held in Struthers village school district, on December 12th, at which the question of the issuance of bonds is to be submitted to the electors of said school district. You inquire whether or not the law requires the saloons in said village to be closed on said election day.

In reply thereto permit me to say that section 6948 of the Revised Statutes of Ohio provides:

> "Whoever sells, or gives away, any spiritous, vinous, or malt liquors on any election day, or, being the keeper of a place where such liquors are habitually sold and drank, fails on election day to keep the same closed, shall be fined not more than one hundred dollars and imprisoned not more than ten days."

It is my opinion that the above section applies to any election held under the general election laws of the state, and that saloons in any district or political subdivision where such election is being held are required to be kept closed on such election day.

Very truly yours,

U. G. DENMAN,
Attorney General.

INSURANCE—MUTUAL LIVE STOCK PROTECTIVE ASSOCIATION—LIABILITY OF MEMBER.

Liability of member of mutual live stock protective association fixed by by-laws thereof, which may make it dependent upon membership and not upon ownership of insured property.

December 17th, 1908.

MR. JULIUS FRIEDLY, *Secretary, The Mutual Live Stock Protective Association, Convoy, Ohio.*

DEAR SIR:—Upon the subject of your inquiry concerning the powers of your association, I submit the following. The liability of an individual, a member of your association, is dependent upon the constitution and by-laws adopted by such association and by the act under which it was created. Mutual live stock protective associations are formed pursuant to the provisions of sections (3691-1) to (3691-12) of the Revised Statutes, being the act of April 15th, 1899 (86 O. L. 377).

With regard to the constitution and by-laws to be adopted, the following provision is contained in section 5 thereof:

> "Every such company shall adopt such constitution and by-laws, not inconsistent with the constitution and laws of this state and the United States, as will, in the judgment of its members, best subserve the interests and purposes of the company; and all persons who obtain insurance in such company shall thereby become members thereof, with power to vote at all regular meetings of such members, upon all subjects, and shall be held, in law, to comply with all the provisions and requirements of the company."

Among the provisions contained in article XII and article XV of the constitution and by-laws adopted by the company are the following:

> "Any person in the discretion of the board of officers of this association may become a member by paying into the treasury one dollar ($1.00), which will entitle him to membership as long as he carries insurance, and *one year thereafter.*"

Article XV:

> "All policies of insurance shall be in force for *one year*, commencing at noon of day issued and ending at noon of same day of month the following year. No policy of insurance shall be surrendered before date of expiration unless *owner of animal insured sell the same.*"

Among the other provisions contained in the sample policy submitted with your inquiry is the following:

> "I will pay my just and equal proportion of each (loss) according to the rules in the manner specified in the constitution and by-laws governing such asociation."

From your statement of facts submitted I am advised that the association does not make an assessment upon each of its members immediately after the loss occurs, for the purpose of paying that loss, but it borrows the money and pays the various losses during the year, and then at the end of the year an assessment is made upon each of the persons who hold policies in the association in the amount sufficient to meet all the losses which have occurred during the previous year. The practice of borrowing money for such purposes has been sustained by this department in associations similar in character to yours, organized pursuant to the provisions of section 3686 R. S., and therefore no exception is taken to that practice. The constitution and by-laws have been made to constitute the contract of the various members.

Referring to the provisions above quoted, a member, by paying the fee, is entitled to membership as long as he carries insurance, *and one year thereafter.*

Every member agrees, according to the foregoing quoted matter, that he will pay his just and equal proportion of all assessments according to the rules and the manner specified in the constitution and by-laws. The right to assess him is not predicated upon whether he has stock insured *during the entire year* in which he was a member, but as provided in article XII, which is: "As long as he carries insurance and one year thereafter." In my opinion, such clause as to membership determines the liability of the member for assessments for losses, because section 1 of the act in question (86 O. L. 377) says that each member shall be assessed "from time to time," as may be necessary to pay losses which occur from death of animals, etc.

The liability of a member cannot be limited. He can be assessed to the extent that it may be necessary to pay losses and incidental expenses. (Attorney general's opinion, February 26th, 1895.) I am therefore of the opinion that under the circumstances which you have stated a member is liable for assessments during the entire year of his membership, irrespective of whether he has property insured or not during all of said period.

Very truly yours,

U. G. DENMAN,
Attorney General.

INCOMPATIBILITY OF OFFICES.

Mayor of municipality may not be member of general assembly.

December 5th, 1908.

HON. JOHN D. HOLLINGER, *Lowell, Ohio.*

DEAR SIR:—I beg to acknowledge the receipt of yours of the 24th ult., relative to your qualifications to hold the office of mayor of your municipality and at the same time a member of the general assembly of the state of Ohio.

Section 2 of article II of the constitution of the state provides that

> "no person holding office under authority of the United States, or any lucrative office under the authority of this state, shall be eligible to or have a seat in the general assembly; but this provision shall not extend to township officers, justices of the peace, notaries public or officers of the militia."

The question is thus presented, whether you are eligible to take your seat at the coming session of the general assembly.

At various times this department has been called upon to construe the foregoing provision of the constitution with reference to the qualification of members of the general assembly. The following are some of the opinions expressed by this department relative to various officers:

A member of the general assembly may also hold the office of constable. (Opinions Attorneys General, Vol. 3, p. 433.)

A member of the general assembly may also be a member of the constitutional convention. (Opinions Attorneys General, Vol. 1, p. 221.)

An attorney connected with a state department, not holding an office, but merely under employment, may also be a member of the general assembly. (Opinions Attorneys General, Vol. 4, p. 892.) He may not be insolvency judge. (Opinions Attorneys General, Vol. 4, 748.) He may not be judge of territorial

federal court. (Vol. 4, 378.) He may not be an officer of the United States army. (Vol. 4, p. 813.) He may not be a member of the board of managers of the Ohio penitentiary. (Vol. 2, p. 408.) He may not be postmaster. (Vol. 2, p. 1012.) He may not be prosecuting attorney or his assistant. (Vol. 4, 746.) He may not be school examiner. (Vol 3. p. 1061.)

In my opinion, the mayor's office in a municipality located within the state of Ohio should be construed to be a "lucrative office" under authority of the state. The disqualification does not extend to the time of your being voted upon, but rather to the time when you will attempt to take your seat in such body. The incompatibility is created by the constitution and not by the duties of the two positions and it clearly appears that you will be compelled to resign the position of mayor before taking the oath of office as member of the general assembly.

I beg to remain,

Yours very truly,

U. G. DENMAN,
Attorney General.