the connection therewith is not so remote, so as to make such a construction of the act necessary as would defeat the obvious purpose thereof.

It is therefore my opinion that when proceedings in foreclosure are instituted on delinquent lands, a mortgagee or other lienholder may, at any time prior to September 1, 1935, under the provisions of Amended Senate Bill No. 105 of the second special session of the 90th General Assembly, redeem such lands at any time before the confirmation of the sale thereof.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3960.

LEGISLATURE—MAY NOT PROHIBIT ELECTORS FROM VOTING ON BOND ISSUES OR TAX LEVIES OUTSIDE 10 MILL LIMITATION WHEN.

SYLLABUS:

The legislature has no power to prohibit electors from voting on bond issues or special tax levies outside of the limitation of section 2 of Article XII of the Constitution if they are not tax payers on the kind of property against which taxes are levied to meet the obligations created by such bonds or special tax levies.

COLUMBUS, OHIO, February 23, 1935.

HON. J. FREER BITTINGER, *Speaker of House of Representatives, Columbus, Ohio.*

DEAR SIR:—Amended House Resolution No. 31, recently adopted by the 91st General Assembly, reads as follows:

> "Be it Resolved, That the attorney general of Ohio is hereby requested to render an opinion as to the constitutionality of a proposed bill, prohibiting electors from voting on bond issues or special tax levies, if they are not taxpayers, *on the kind of property against which taxes are levied to meet the obligations created by such bonds or special tax levies,* either at a general election, or at a special election called for the purpose of voting on bond issues or special tax levies."

I assume that the inquiry contained in this resolution is confined to the levy of taxes and the issuance of bonds by subdivisions of the state as they are defined in section 2293-1, General Code, and that it does not refer to levies or issues by the state or by any special districts such as conservancy districts.

It is well settled that the right to vote is dependent upon constitutional or statutory grant. Subject to the limitations of the Federal Constitution, such right is under the control of the sovereign power of the state. Where this right is granted and the qualifications of electors are prescribed by the constitution of a state, the legislature cannot change or add to them, but when the constitution does not prescribe the qualifications then the legislature may do so.

In Volume 20 of Corpus Juris, at page 62, the following rule is stated:

"While the elective franchise is a privilege rather than a right, and may be taken away by the power which conferred it, yet when it has been granted by the constitution of the state it cannot be denied or abridged by the legislature. * * * Where the constitution of a state fixes the qualifications of voters in direct, positive terms, these qualifications cannot be added to or changed by legislative enactment."

And on page 76 of the same volume, the following is stated:

"The right of suffrage being a mere franchise or privilege, the state may, by its constitution or by statute, if the power of the legislature is not limited in this respect by the constitution, confer the right only upon those who contribute to the support of the government by the payment of taxes. Where, however, a statutory requirement to this effect adds a qualification to those prescribed by the constitution it is void as to all elections coming within the constitutional provision."

Article V, section 1, of the Constitution of Ohio, reads as follows:

"Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections."

The question to be considered, therefore, is whether this constitutional provision is applicable to elections in which the question of the issuance of bonds or the levy of taxes by a subdivision is voted upon. While there is a conflict of opinion, the weight of authority is to the effect that such a constitutional provision which fixes the qualifications of electors and provides that all persons having such qualifications shall be entitled to vote at all elections does not apply to offices or the submission of questions which are not provided for in the constitution itself. To this effect are the following cases: *State, ex rel.,* vs. *Monahan,* 72 Kan. 492; *Menton* vs. *Cook,* 147 Mich. 540; *People* vs. *Drainage Dist.,* 155 Cal. 373; *Buckner* vs. *Gordon,* 81 Ky. 665; *Mayor* vs. *Shattuck,* 19 Colo. 104; *Leflore County* vs. *State,* 70 Miss. 769; *Hannah* vs. *Young,* 84 Md. 179; *State, ex rel.,* vs. *Hanson,* 80 Nebr. 724; *State* vs. *Cones,* 15 Nebr. 444; *State, ex rel.,* vs. *Dillon,* 32 Fla. 545; *Plummer* vs. *Yost,* 144 Ill. 68; *Scown* vs. *Czarnecki,* 264 Ill. 305; *Spitzer* vs. *Fulton,* 172 N. Y. 285; *Harris* vs. *Burr,* 32 Ore. 348. The following cases are contra: *Black* vs. *Trower,* 79 Va. 125; *State, ex rel.,* vs. *Blake,* 57 N. J. L. 6; *Indiana* vs. *Shanks,* 178 Ind. 330; *Sears* vs. *Maquoketa,* 183 Ia. 1104. To these later cases may be added the case of *State, ex rel.,* vs. *Constantine,* 42 O. S. 437, which will be referred to later.

In the case of *State, ex rel.,* vs. *Monahan,* supra, which follows the earlier case of *Wheeler* vs. *Brady,* 15 Kan. 26, the syllabus reads as follows:

"The provision of the Kansas bill of rights that no property qualification shall be required for any office of public trust or for any vote at any election applies only to those offices and elections contemplated by the constitution, and does not prevent the legislature from authorizing the creation of drainage districts, the powers of which are to be exercised by directors who are required to be freeholders elected by the resident taxpayers."

The court says in the opinion:

> "The elections referred to in the act under consideration were not provided for by the constitution, nor did the constitution impose upon the legislature any duty to make provision for them. They were not required to be held by reason of anything contained in the fundamental law of the state. The drainage district in question is wholly the creation of the legislature, which had practically unlimited discretion in the matter. The statute might have made the office of director appointive instead of elective, and might have made the issuance of bonds dependent upon the will of taxpayers as indicated by petition instead of by vote. That the selection of the officers who act for the corporation is decided by the usual electoral machinery, but by a restricted electorate, and that the concurrence of the taxpayers in a binding proposition is expressed by means of an election, rather than by some other method, do not bring the case within the reason or within the true meaning of the clause of the constitution relied upon by the plaintiff."

Construing a constitutional provision similar to section 1 of Article V, the court in the case of *Menton* vs. *Cook,* supra, held:

> "The submission by the City of Flint to its electors of a proposition to borrow money and issue bonds therefor is not an election within the meaning of section 1, Article 7 of the Constitution, and therefore Act No. 536, Local Acts 1905, providing that only taxpaying electors shall vote on such proposition, is not unconstitutional as adding to the qualifications of electors."

So far as tax levies inside the one per cent limitation of section 2 of Article XII of the Constitution, and bond issues, the taxes for the payment of which are to be levied inside of said limitation, are concerned, the legislature has full power to authorize subdivisions to levy such taxes and to issue such bonds without any election, or it may require an election for such purposes, as there is no constitutional restriction to such matters; and when the legislature does require an election therefor it is not an election which is provided for by the Constitution. Consequently, so far as the question raised by said Amended House Resolution relates to tax levies and bond issues within the limitation of section 2, Article XII, it is necessary to consider how section 1, Article V, together with other provisions of our Constitution bearing on the subject, has been construed in this state.

The case of *State, ex rel.,* vs. *Cincinnati,* 19 Ohio 178, which upheld the validity of an act which provided for colored schools in Cincinnati and the election of colored directors by colored voters, seems to be in line with the weight of authority in other states. In this case, the Constitution provided that "in all elections, all white male inhabitants above the age of 21 years, having resided in the state one year next preceding the election, and who have paid or are charged with a state or county tax, shall enjoy the right of an elector." The court said:

> "So far as the elective officers of the state, county, or townships are concerned, they must be white men. They can be elected only by white men. White men are legal voters at state, county, and township elections. Beyond this the constitution does not prescribe."

The case of *State, ex rel.,* vs. *Constantine,* supra, is to the contrary. The syllabus of this case reads as follows:

"1. The election and the appointment of an officer, as authorized by section 27, article 2 of the constitution, are different and distinct modes of filling an office.

2. Where an office is filled by an election, the election must conform to the requirements of the constitution, and each elector of the district is entitled to vote for a candidate for each office to be filled at the election.

3. A statute authorizing the election of four members of the police board at the same election, but which denies to an elector the right to vote for more than two members is in conflict with article 5 of the constitution."

The court says in the opinion:

"We have no doubt the filling of an office, not provided for under the constitution of the state or the United States, may be referred to a body or class of persons who may or may not have the qualifications of electors, and the manner of ascertaining the sense of such body or class may be by taking a vote; but such mode of filling the office is not by an election as authorized by section 27, article 2, but by an appointment as therein authorized. Indeed the manner of filling an office by appointment is unrestricted, save only that it can not be by 'an election,' which is pointed out by the constitution as a different mode of filling an office.

The constitution does not provide in detail the manner of holding elections, leaving that to legislative discretion, but it does provide that all elections shall be by ballot, and, having prescribed the qualifications of an elector, provides that each elector 'shall be entitled to vote at all elections.' See constitution, article 5. By this article we have no doubt that each elector is entitled to vote for each officer, whose election is submitted to the electors, as well as on each question that is submitted. * * * "

This case has not been entirely overruled but has been limited in its application, if not modified, by later decisions.

In the case of *State, ex rel.,* vs. *Board of Elections,* 9 C. C. 134, the following was held:

"The act of April 24, 1894, conferring upon women the right to vote and be voted for at any election held for the purpose of choosing any school director, member of the board of education or school council under the general or special laws of the state is valid, it being within the power to provide for the establishment and maintenance of common schools which the constitution confers upon the general assembly, and not within the limitation contained in section one of article five."

The opinion, which was rendered by Shauch, J., reads in part as follows:

"There seems to be no occasion to doubt that only those who have the constitutional qualifications of electors can participate in elections held to fill the offices which the constitution itself has created. This is, in some states,

held to be the extent of the constitutional restriction. But it is contended that in this state the legislature cannot authorize persons not having the constitutional qualifications of electors to participate in the selection of any officer who is to be chosen by the forms of a popular election. This claim, counsel for the relator think, is consistent with their admission that the legislature might authorize women to participate in the choice of these school officers if a different mode of choosing were adopted—that is, women may be authorized to *choose,* but not to *elect.* These terms are English and Latin equivalents; but the distinction made is said to be recognized in *State, ex rel.,* vs. *Constantine,* 42 Ohio St. 437, where it is held that 'a statute authorizing the election of four members of the police board at the same election, but which denies to an elector the right to vote for more than two members, is in conflict with article five of the constitution,' although the offices to be filled were not created by the constitution. That act did not attempt to extend the right to vote to any who had not the constitutional qualifications of electors. The vice of the act, in the opinion of the court, was that in the election of municipal officers it denied the right of constitutionally qualified electors to vote for the whole number of officers to be chosen. It is clear that the act now under consideration is not within the terms of that decision, whether within its principles or not.

In the determination of that case no consideration appears to have been given to the *State ex rel.* vs. *Cincinnati,* 19 Ohio 178, which arose under our former constitution. * * *

It must be admitted that the rule that persons not having the constitutional qualifications of electors may be authorized to vote at any election that is not held to fill an office created by the constitution does not obtain everywhere. In view of *State ex rel.* vs. *Constantine,* it cannot be said to obtain in this jurisdiction. But it is believed that all the reported cases in which this limitation has been considered are consistent with the view that the ample powers for the establishment and maintenance of public schools which are conferred upon the legislatures by the constitutions of most of the states carry with them power to extend the right to vote for school officers to persons not within the constitutional definition of electors, unless such officers are designated by the constitution, or are officers of municipal or political divisions recognized by the constitution.

In none of the state constitutions to which our attention has been called is there a broader grant of power to provide for public schools than in ours. Section one, article two, contains a grant of all legislative power. Section seven, article one, provides that 'it shall be the duty of the general assembly to pass suitable laws * * * to encourage schools and the means of instruction.' Section two, article six, enjoins upon the general assembly the duty of making such provisions as 'will secure a thorough and efficient system of common schools throughout the state.' In the provisions relating to the subject of schools, there is neither limitation upon the power conferred, nor direction as to the modes of its exercise. * * * "

This case was affirmed without opinion by an evenly divided court in 54 O. S. 63, and Shauck, J., who had in the meanwhile been elected to the Supreme Court, voted for affirmance. This case recognizes the rule of the Constantine case but holds that it is not applicable to school districts by reason of other constitutional provisions which gave to the legislature ample powers for establishment and maintenance of public schools.

The case of *State, ex rel.,* vs. *French,* 96 O. S. 172, held valid a provision in a

municipal charter which, among other things, conferred upon women the right to vote for all municipal officers. The syllabus of that case reads as follows:

> "1. The provisions of Section 1, Article V of the Constitution, which prescribe the qualifications of electors, control in all elections held to fill offices which the Constitution itself has provided for, and in all elections upon questions submitted to a vote pursuant to provisions of the Constitution; and such qualifications can be altered only by amendment to the Constitution.
>
> 2. The Constitution itself having by Article XVIII committed to any municipality the power to frame and adopt a charter for its government and to exercise thereunder all powers of local selfgovernment, subject to the limitations expressed in that article, a provision in the charter of a municipality, adopted in full compliance with the article referred to, which confers upon women the right to vote for all municipal elective officers and to be appointed or elected to and hold any municipal office provided for in such charter, is valid. (*Mills* vs. *City Board of Elections et al.,* 54 Ohio St., 631, and *State, ex rel.,* vs. *City of Cincinnati et al.,* 19 Ohio, 178, approved and followed.)"

One might infer from the first branch of the syllabus that the constitutional provision in question applies only to elections provided for by the constitution. This, however, is not a proper inference. This portion of the syllabus does not say that the provision controls only in such elections, and in view of what is said in the opinion the court did not so limit the application of section 1 of Article V. In fact the court expressly refrained from passing upon that question. In the opinion the court, after setting forth the authorities which were cited by counsel in support of the proposition that as to offices not contemplated or provided for in the Constitution the legislature in creating such offices may prescribe the qualifications of the voters who are to participate in filling them, said:

> " * * * So far as the present case is concerned, in the view we take, it is not necessary for us to approve the proposition stated nor to hold that Section 1, Article V of the Constitution of Ohio, is limited in its application to elections of officers enumerated in the constitution.
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> * * * * * * * * *
>
> But it is insisted by the defendants that the Mills case should not be extended beyond its own limits; that the statute involved in that case was held valid as being within the power to provide for the establishment and maintenance of common schools, which the constitution confers on the general assembly. To this it is replied that in this case it is not necessary to do so—that the provisions of Article XVIII of the Constitution, as amended in 1912, contain an equally comprehensive authority to municipalities to adopt charters for their government and to exercise all powers of local self-government.
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> * * * * * * * * *
>
> As above stated, in this case it is not necessary, in the conclusion we have arrived at, to hold that Section 1, Article V of the Constitution, is limited in its application to the election of officers enumerated in the constitution.
>
> It is equally clear in the case we have here that the offices for which the relatrix seeks to vote were not created by the constitution, and it is also equally clear that the subject-matter, to-wit, municipal government, is one as to which the constitution confers power upon the municipality to adopt its own provisions. The charter of a city, which has been adopted in conformity with the

provisions of Article XVIII, finds its validity in the constitution itself, and not in the enactments of the general assembly. The source of authority and the measure of its extent is the constitution."

Like the cases of *State, ex rel.,* vs. *Cincinnati,* and *State, ex rel.,* vs. *Board of Elections,* supra, the court based its judgment on other constitutional provisions, namely, the home rule powers given to municipalities by Article XVIII of the Constitution, and for that reason held that the Constantine case does not apply.

A similar case is that of *Reutener* vs. *Cleveland,* 107 O. S. 117, which held:

"5. The Hare System of Proportional Representation, providing a system of voting at municipal elections, which was submitted to the voters of Cleveland in the election of November, 1921, as a part of the city charter amendment, and adopted, is valid under the home-rule amendment of the Ohio Constitution.

6. Under the home-rule amendment to the Ohio Constitution, the rule that each elector is entitled to vote for every officer whose place is to be filled, is no longer law in this state as regards elections held under home-rule city charters."

In referring to the Constantine case, the opinion says:

"This case is certainly an authority against the position of the defendant in error. The slight circumstance that limited voting was condemned in the Constantine case, while it is proportional representation that is here attacked, does not greatly differentiate the cases.

State, ex rel., vs. *Constantine,* however, extended the plain language of the constitution far beyond the word-meaning of the provision in Section 1, Article V. To the clause, shall 'be entitled to vote at all elections,' the Constantine case added the clause, and 'for a candidate for each office to be filled at the election.' Moreover, that case was decided before the home-rule provision of the Ohio constitution was enacted. Since then a whole new body of law has developed in regard to Ohio city government—a body of law giving to cities the widest possible latitude in the formation of their local governments and in the performance of local governmental functions, limited only by provisions of the state constitution.

* * * * * * * * *

To hold valid this system of voting adopted by the people of Cleveland is merely to carry out the plain meaning of the constitutional provision that municipalities shall have all powers of local self-government, and to give effect to the power which rightly takes precedence over all statutes and court decisions, the will of the people, as expressed in the organic law.

Electoral provisions similar to these have lately been upheld in other states.

In the case of *Commonwealth, ex rel. McCormick, Atty. Genl.,* vs. *Reeder,* 171 Pa. St., 505, the supreme court of Pennsylvania held constitutional an act providing for the election of a given number of judges, notwithstanding the fact that an elector was not allowed to vote for as many persons as there were places to be filled. See also *State* vs. *Monahan,* 72 Kans., 492, 115 Am. St. Rep., 224, wherein the supreme court of Kansas upheld a legislative act which

provided a property qualification for electors desiring to vote for directors of a drainage district, notwithstanding a constitutional provision against such qualification so far as electors generally were concerned."

It is apparent that Allen, J., who wrote the opinion was not in sympathy with the rule laid down in the Constantine case, but the court did not expressly overrule it. The concurring opinion of Jones, J., reads as follows:

"Section 1, Article V, of the Constitution, explicitly pertains to and controls the *qualifications of electors at all elections;* but it does not attempt to control the *mode* of elections, nor the personnel of municipal officials. These are features of 'local self-government' committed to chartered municipalities. As to the other municipalities, *State, ex rel.,* vs. *Constantine,* 42 Ohio St., 437, has not been overruled and its principles still apply."

Robinson, J., in his dissenting opinion said:

"The pronouncement of the majority of the court in this case does not change the interpretation of Section 1, Article V of the Ohio Constitution, enunciated in *State, ex rel.,* vs. *Constantine,* 42 Ohio St., 437, that 'Each elector of the district is entitled to vote for a candidate for each office to be filled at the election,' but declares that section inapplicable to chartered cities by reason of the provision of Section 3, Article XVIII of the Constitution, that 'Municipalities shall have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.'"

Since it has been definitely held in this state that the legislature may change the qualifications of electors prescribed by the Constitution in providing for the election of officers of school districts, the same rule would apply to the submission to a vote of the question of the levy of taxes inside the limitations of section 2 of Article XII of the Constitution and the issue of bonds for the payment of which taxes are to be levied inside said limitation.

As to municipalities, Article XIII, section 6, and Article XVIII, section 13, of the Constitution, read as follows:

"The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

Article XVIII, Section 13.

"Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books, and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

These sections apply to all municipalities whether they operate under a charter or not. *Phillips* vs. *Hume,* 122 O. S. 11.

Construing similar constitutional provisions, the case of *Spitzer* vs. *Fulton,* supra, held valid a statute limiting the voting upon the question of issuing bonds of the Village of Fulton to taxpayers of the village. The court said:

> "The contention of the plaintiffs is that the provisions of chapter 269 contain a restriction upon the provisions of article two as to the right to vote for elective officers and upon all questions which may be submitted to the vote of the people, and, hence, are violative of its provisions. The obvious purpose of that article was to prescribe the general qualifications that voters throughout the state were required to possess to authorize them to vote for public officers or upon public questions relating to general governmental affairs. But we are of the opinion that that article was not intended to define the qualifications of voters upon questions relating to the financial interests or private affairs of the various cities or incorporated villages of the state, especially when, as in this case, it relates to borrowing money or contracting debts. This becomes manifest when we also consider section 1 of article 12 of the Constitution which provides: 'It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations.' Article two must be construed in connection with article twelve. When read together, we have two provisions of the Constitution which relate to this question. The first was intended merely to define the general qualifications of voters for elective officers or upon questions which may be submitted to the vote of the people which affect the public affairs of the state; the second, a provision by which it is made the duty of the legislature to protect the taxpayers of every city and village in the state and to restrict their power of taxation, assessment, borrowing money and contracting debts, so as to prevent any abuse thereby. One is general, relating to the whole state. The other is in effect local relating only to the cities and villages of the state. One relates only to the general governmental affairs of the state. The other relates to the business or private affairs of the municipalities specified. By the latter section the manner of restraining municipal corporations from contracting debts and of preventing abuses in that regard is left to the sound discretion of the legislature, and was to be controlled by such legislation as it should deem proper and which tended to secure that end. * * *
>
> When we consider all the provisions of the Constitution bearing upon this subject, we feel assured that none of the changes or amendments of that instrument was intended to alter or affect the power of the legislature to restrict the right of villages to borrow money or contract debts for unusual or extraordinary expenditures to cases where a majority of the taxpaying electors should, by their votes, consent thereto. It was the obvious intention of its framers to provide that any abuses of that character should be prevented by the legislature, and article twelve so plainly declares."

The reasoning in this case is similar to the reasoning in the Ohio cases with reference to school districts and municipal charters, and I am of the view that the rule in the Constantine case does not apply. The same conclusion must be reached as to counties and townships in view of the following constitutional provisions:

Section 1 of Article X reads in part as follows:

"The General Assembly shall provide by general law for the organization and government of counties, and may provide by general law alternative forms of county government. * * * "

Section 2 of Article X provides as follows:

"The General Assembly shall provide by general law for the election of such township officers as may be necessary. The trustees of townships shall have such powers of local taxation as may be prescribed by law. No money shall be drawn from any township treasury except by authority of law."

As to tax levies and bond issues outside of the one per cent limitation, to which I assume the inquiry mainly relates, section 2 of Article XII provides in part as follows:

"No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. * * * "

In determining the meaning of the word "electors," this provision should be construed together with section 1 of Article V which prescribes the qualifications of electors. Electors, as used in section 2 of Article XII, means constitutional electors, electors having the qualifications set forth in section 1 of Article V.

As stated in the case of *Sears* vs. *Maquoketa,* supra, "the term 'elector,' unqualified and unexplained, means a constitutional elector."

An election upon the question of a bond issue or tax levy outside the one per cent limitation is an election pursuant to a constitutional provision. *Hannah* vs. *Young,* supra.

It has been definitely held in the first branch of the syllabus of the case of *State, ex rel.,* vs. *French,* supra, that the provisions of section 1 of Article V control "in all elections upon questions submitted to a vote pursuant to provisions of the Constitution." Whether such propositions are submitted to a vote at a general election or at a special election would not affect the conclusions reached herein.

I am of the opinion therefore that:

The legislature may, if it sees fit, confine the submission of the question of tax levies inside the limitation of section 2 of Article XII of the Constitution, and bond issues for the payment of which taxes are to be levied within said limitation by subdivisions of the state to a vote of the taxpayers of such subdivisions on the kind of property against which taxes are levied to meet the obligations created by such bonds or special tax levies.

The legislature has no power to prohibit electors from voting on bond issues or special tax levies outside of the limitation of section 2 of Article XII of the Constitution if they are not taxpayers on the kind of property against which taxes are levied to meet the obligations created by such bonds or special tax levies.

Respectfully,
JOHN W. BRICKER,
Attorney General.