the commissioner may not finally accept the work until the contractor restores all property, public and private, which he or his employes or agents may have injured during the course of the work, which limitation must be understood as meaning that the final estimate may not be paid over to the contractor until he shall have made such property restoration, since it has been seen from a further provision above quoted from the contract that before allowing the final estimate the commissioner must find the work completed according to plans and specifications.

You will have observed that the references to statutes herein are to such satutes as amended, 107 O. L. 69, commonly known as the White-Mulcahy act, effective June 28, 1917. The contract in question is dated December 27, 1917. If the application for state aid as to the work covered by the contract was granted prior to June 28, 1917, the question might arise whether the provisions of the Cass law, in force prior to June 28, 1917, govern as to the matter of estimates rather than the provisions of the White-Mulcahy act. However, the only substantial difference between the two sets of statutes, so far as your inquiry is concerned, is that the Cass act did not contain the optional feature of section 1212, permitting the state highway commissioner in certain circumstances to allow estimates in excess of eighty-five per cent. Your letter indicates that you do not intend to exercise that option in respect to the contract now being considered and that current estimates will not be allowed in excess of eighty-five per cent, for which reason it is unnecessary to pass upon the question of applicability as between the Cass act and the White-Mulcahy act. As a matter of caution, it is respectfully suggested that if question arises with you as to the desirability of allowing estimates in excess of eighty-five per cent in respect to the contract under discussion, you refer the matter to this department for opinion before taking action.

Specific answer to your question is that you are not under the duty of withholding estimates prior to the final estimate in an amount sufficient to make up the supposed amount of the alleged damage referred to in the letter sent you by the attorneys for the railroad company.

Respectfully,
JOHN G. PRICE,
Attorney-General.

927.

OHIO AGRICULTURAL EXPERIMENT STATION—CHIEF OF DEPARTMENT OF NUTRITION—FAILURE OF GENERAL ASSEMBLY TO APPROPRIATE FUNDS FOR SALARY OF SAID OFFICER.

The mere failure of the General Assembly to appropriate funds to pay the state's share of the salary of the chief of the department of nutrition at the Ohio Agricultural Experiment Station, does not per se abolish the office or position, nor does it prevent the application of the so-called Adams fund (Act of congress of March 16, 1906), to the payment of that portion of the salary provided for in the plan officially approved by the federal secretary of agriculture.

COLUMBUS, OHIO, January 12, 1920.

Board of Control, Ohio Agricultural Experiment Station, Wooster, Ohio.

GENTLEMEN:—Your letter of recent date relating to the payment of compensation to Dr. E. B. Forbes from the fund appropriated by congress to carry out

the provisions of the act of congress approved March 16, 1906, commonly called the Adams act, was duly received.

The controlling facts, as I understand them, are as follows:

In 1908 Dr. Forbes was appointed and is now performing the duties of chief of the department of nutrition of the Ohio agricultural experiment station, which department since 1909 has been supported from funds appropriated by the state, and also from annual appropriations made by congress to carry out the provisions of the so-called Adams act. On January 15, 1919, the board of control adopted a resolution purporting to abolish the department of nutrition, but the effective date of this resolution has been postponed until August 1, 1920. The force and effect of the resolution referred to is not involved in the present inquiry.

The work of the department of nutrition has been and is now being conducted under plans approved by the federal secretary of agriculture, and that official has approved the continuance of the work and the payment of Dr. Forbes' salary from the Adams fund.

The arrangement concerning the salary is and has been that three-fourths thereof shall be paid from the Adams fund and the balance from funds appropriated by the general assembly. The arrangement referred to was carried out until July 1, 1919, when, on account of the failure of the general assembly to make an appropriation to pay the state's portion of the salary, further payments from the Adams fund were withheld by the board of control, pending a determination of the question whether the failure of the general assembly to make an appropriation to pay the state's share of the salary *per se* terminated the office or position of chief of the department of nutrition, and if not, whether the chief is entitled to receive compensation for his services from the Adams fund.

After careful consideration of the questions involved, I am of the opinion that the office or position of chief of the department of nutrition was not abolished by the failure of the general assembly to make an appropriation to pay the state's share of the salary of the chief, and that there is no legal objection to continuing and carrying out the arrangement above referred to whereunder three-fourths of the salary is payable from the Adams fund, nor would there be any objection to paying the entire amount from the Adams fund with the approval of the federal secretary of agriculture. The result would be the same whether the chief be considered to be either an officer or employe of the station.

In State vs. Kennon, 7 O. S., 547, the court held that

> "Emolument is a usual but not a necessary element to constitute an office."

In the opinion, page 559, the court say:

> "That compensation or emolument is a usual incident to office, is well known; but that it is a necessary element to the constitution of an office, is not true. * * * George Washington not only received no pay as commander-in-chief of the Continental armies during the war of the revolution, but accepted the position on the express condition prescribed by himself, that he should receive none. 7 Bancroft, 401-2. The members of the British parliament do not receive, and for more than a century have not received any pay whatever. 1 Blackstone, 174, note 42."

Judicial authority outside the state also is to the same effect. See Throop, Public Offices, section 8; Mechem, Public Offices and Officers, section 7; 22 Ruling Case law, pp. 531 et seq.

The authorities also support the proposition that while compensation is usually

an incident to the relation of master and servant or employer and employe, it is not necessarily so, for a servant or employe may, the same as an officer, render gratuitious service, or perform services knowing he has no enforcible legal claim but with the hope of being rewarded by an appreciative beneficiary; or cases may arise where the servant or employe receives his compensation from a source other than his master or employer.

In 1 Labatt, Master and Servant, section 19, the law is stated as follows:

> "One person may stand in the relation of master to another, although the former does not compensate the latter for his services."

See also 18 Ruling Case Law, pp. 530 et seq. and cases cited, on the subject of gratuitious service.

The Adams Fund.

In former opinions of the attorney-general, Nos, 101 and 444, addressed to the auditor of state, and dated respectively March 8, 1919, and June 30, 1919, this department considered the scope and purpose of the so-called Adams act, and it was, among other things, held:

> "1. Money appropriated to the state under authority of the act of congress, approved March 16, 1906, commonly called the Adams act, may be applied to the payment of the salaries and compensation, in whole or in part, of officers and employes of the Ohio agricultural experiment station for the portion of their time occupied in conducting such original researches and experiments as have been approved by the federal department of agriculture. But officers or employes who devote none of their time in connection with the conduct of original researches or experiments, such as the bursar and other purely administrative officers of the station, are not entitled to be paid any part of their salary or wages from the fund referred to.
>
> 2. Where the same officer or employe divides his time between researches and experiments, under the Adams act, and other work connected with the station, a fair and equitable division of his salary or wages between the two classes of work should be made, and the Adams fund only charged with the fair and reasonable value of the research and experiment work.
>
> 3. Before any part of the annual appropriations made to the state under authority of the Hatch and Adams acts are applied to the payment of salaries or wages of officials or employes of the state, the safer and proper course will be to submit to the United States secretary of agriculture for his approval the names of the officers and employes and the salaries or wages paid to them by the state, together with a statement of the amounts proposed to be paid to each from the respective funds."

The foregoing quoted conclusions of the attorney-general were submitted to the federal secretary of agriculture, and under date of May 29, 1919, he advised that the opinion interpreted the Adams act "as it has been understood by the United States department of agriculture since its passage."

Applying the doctrine of the foregoing authorities and opinions of the attorney-general to the facts above stated, you are advised that the mere failure of the general assembly to appropriate funds to pay the state's share of the salary or compensation of the chief of the department of nutrition does not *per se* abolish the

office or position, nor terminate the tenure of office or position of the present incumbent, nor does it prevent the application of the Adams fund to the payment of that portion of the salary or compensation provided for in the plan approved by the federal secretary of agriculture.

It is hardly necessary to add that the amount payable from the Adams fund under the present officially approved plan should not be increased without the written approval of the federal secretary of agriculture.

Respectfully,
JOHN G. PRICE,
Attorney-General.

928.

OHIO NATIONAL GUARD—WHEN UNEXPENDED BALANCES OF APPROPRIATIONS MADE BY 82ND GENERAL ASSEMBLY LAPSED—"STATE MILITARY FUND"—SECTIONS 5247 AND 5248 G. C. CONSTRUED.

1. *The unexpended balances of the two appropriations made by the 82nd general assembly for the Ohio national guard* (107 *O. L. p* 232 *and* 308) *lapsed at the close of the respective fiscal years for which the appropriations were made, and became a part of the unappropriated revenues of the state.*

2. *Section* 5248 *G. C., enacted by the* 82*nd general assembly, and providing that the general assembly shall appropriate annually the amount of money authorized by section* 5247 *G. C., and therein designated as the "state military fund", is not binding on the present or subsequent general assemblies.*

COLUMBUS, OHIO, January 12, 1920.

HON. ROY E. LAYTON, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date relating to appropriations made by the 82nd general assembly for the maintenance and support of the Ohio national guard, and asking the advice of this department on certain questions therein propounded, was duly received and, omitting formal parts, reads as follows:

> "I beg leave to ask your opinion relative to the status of the military funds set aside the past few years for the maintenance and support of the Ohio national guard.
>
> Section 5247 of the General Code of Ohio (formerly section 5265) reads as follows:
>
> 'The auditor of state shall credit to the "state military fund" from the general revenues of the state, a sum equal to ten cents for each person who was a resident of the state, as shown by each last preceding federal census. Such fund shall be a continuous fund and available only for the support of the national guard and naval militia. It shall not be diverted to any other fund or used for any other purpose.'
>
> This section was revised March 30, 1917 (107 O. L. 395), and is the same as the old section excepting the second sentence which in the old section read as follows:
>
> 'Such fund shall be a continuous fund and available only for the support of the organized militia.'