"Inasmuch as there has been no specific appropriation made for the indebtedness represented by the vouchers for the salary of relator, the auditor is without authority to issue his warrants on them and this court is without power to compel him so to do."

Now, Section 2915-1, General Code, mentioned in your communication, is somewhat similar to Section 1541, General Code, in that it provides for the appointment of a secret service officer by the prosecuting attorney and states in the last sentence that the compensation fixed by the common pleas judge or judges shall be "payable monthly out of the county fund, upon the warrant of the county auditor." Therefore, the reasoning of the court in the Thomas case, supra, is exactly in point here, for no money has been appropriated by the county commissioners for the secret service officer in your case, just as no money was appropriated for the bailiff's salary in the Thomas case, supra.

As you will note by the language of the court quoted above, the case held that there was no authority for the county auditor to issue a warrant based on the vouchers presented and that the court could not compel said auditor to do so.

In view of the foregoing discussion, I am of the opinion that the salary of the secret service officer appointed under Section 2915-1, General Code, cannot be paid out of the general fund of the county on the warrant of the county auditor when there has been no appropriation made for his salary by the county commissioners. In reaching this conclusion, I assume that you have no money available in your 3004, General Code, fund at the present time.

I desire to call your attention to the fact that in Opinions of the Attorney General for 1927, volume I, page 438, and Opinions of the Attorney General for 1930, volume III, page 1651, are to be found opinions which hold that a prosecuting attorney may pay a secret service officer out of the fund set aside under Section 3004, General Code. This fund is appropriated in a lump sum by the county commissioners for expenses incurred by the prosecutor in the performance of his official duties, and in the furtherance of justice, not otherwise provided for. In other words, no specific appropriation by the county commissioners for any items legally payable from this fund, is necessary. Hence, if you have any unexpended balance in your 3004 fund, it could be used to pay the present secret service officer without any specific appropriation from the county commissioners.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3730.

DISAPPROVAL, NOTES OF CITY OF LIMA, ALLEN COUNTY, OHIO—$500,000, $25,000 and $10,000.

COLUMBUS, OHIO, November 4, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:

Re: Notes of City of Lima, Allen County, Ohio, $500,000, $25,000 and $10,000.

The transcripts relative to the above purchases of notes disclose that these notes have been authorized in anticipation of the issuance of bonds for the pur-

pose of constructing a fireproof city hospital and purchasing a site for the same. The question of issuing bonds for this purpose in the amount of $600,000 was submitted to the electors at the November, 1927, election pursuant to the provisions of Sections 2293-19, et seq. of the Uniform Bond Act. In compliance with Section 2293-19 and upon the submission to him of the resolution declaring the necessity of the issuance of these bonds, the county auditor on September 8, 1927, certified the average annual levy throughout the life of the bonds necessary to meet the interest and principal requirements of the issue as .485 mills. Thereupon notice of election was published for four consecutive weeks prior to the election, which notice purported to comply with the provisions of Section 2293-21, General Code, providing as follows:

> "The election shall be held at the regular places for voting in such subdivision and shall be conducted, canvassed and certified in the same manner as regular elections in such subdivision for the election of county officers. Notice of the election shall be published in one or more newspapers of general circulation in the subdivision once a week for four consecutive weeks prior thereto, stating the amount of the proposed bond issue, the purpose for which such bonds are to be issued, the maximum number of years during which such bonds shall run and the estimated average additional tax rate, outside of the fifteen mill limitation, as certified by the county auditor."

The estimated average additional tax rate outside of the fifteen mill limitation appears to have been published, however, as .0485 mills, being one-tenth of the levy certified by the county auditor as necessary to meet the interest and principal requirements of this issue.

This office has consistently taken the position that the provisions of Section 2293-21, General Code, are mandatory and that the requirement that this notice contain accurate information with respect to the proposed tax levy over and above the limitation provided by law, was passed for the protection of the taxpayer and must be strictly complied with.

In an opinion appearing in Opinions of the Attorney General for 1930, Vol. I, p. 88, a situation was under consideration whereby the county auditor had miscalculated the estimated averge levy required to meet the interest and principal requirements of a bond issue, the actual levy being 26% greater than calculated by the county auditor and authorized by the electors. It was held that the election was invalid. In the instant case, the correct levy appears to have been printed on the ballot but, in my judgment, this is not sufficient to cure the error in the published notice of the election. The case of *City of Barberton* v. *Dutt,* 22 O. A. 200, is dispositive of this point. The pertinent provisions of Section 2293-21, General Code, were heretofore contained in Section 5649-9b, General Code, in force and effect at the time of the rendition of this decision. The syllabus is as follows:

> "The requirement of Section 5649-9b, General Code (111 Ohio Laws, 435), that the notice of an election to authorize the issuance and sale of bonds shall contain the estimate of the average additional rate of tax, outside the limitations, which will be made necessary by the proposed bond issue, is mandatory, and a failure to comply with that requirement of the section invalidates the election."

In that case the correct average levy was printed on the ballot but was not contained in the notice of the election. The court said with respect to the matter at p. 202:

> "We are of the opinion that the law requiring the notice of election to contain the information that it is proposed to levy a tax over and above the limitation provided by law was passed for the protection of the taxpayer, and that it was intended that such important fact should be made known at an early stage of the proceedings, so the taxpayers might consider it and have an opportunity to discuss it if they cared to do so. Such information, if obtained when the ballot was handed to the elector, would afford such elector a very short time in which to consider the matter, but he would be given an opportunity to vote against the proposition if he so desired. Such belated information, however, would be of no avail whatever to electors who did not go to the polls, and who, had they known that it was proposed to vote a bond issue which would necessitate the levying of a tax beyond the limitations, would have opposed such bond issue."

A parallel question arises under Section 2293-21, supra, when the notice of election has been published for four consecutive weeks but the date of first publication was less than twenty-eight days before the election. Under such circumstances this office has followed the doctrine laid down in *State of Ohio* v. *Kuhner and King,* 107 O. S. 406.

Notwithstanding the failure to technically comply with the provisions of Section 2293-21, supra, and notwithstanding the fact that these provisions have been held to be mandatory in the recent case of *State, ex rel* v. *Commissioners,* 122 O. S. 456, it is well established that when it is made to appear to a court of competent jurisdiction that there has been substantial compliance with this section, the election has been upheld. When extraneous evidence is introduced in an action seeking to enjoin the issuance of bonds on the grounds that the provisions of Section 2293-21 have not been strictly complied with, which evidence shows substantial compliance, there is no doubt but that the courts have jurisdiction to establish the validity of the election and in the event of such adjudication, this office has approved bond transcripts, notwithstanding the failure to technically comply with the provisions of this section.

In the instant case, it appears that on October 6, 1930, a petition, styled *Jacob Piper* v. *D. F. Bogart, et al.,* was filed with the Court of Common Pleas of Allen County, seeking to enjoin the issuance of these bonds on account of the notice of the election containing the allegation that the levy necessary to meet the principal and interest requirements of the issue was published as one-tenth of the actual levy required. An answer was filed, admitting the allegations of the petition and setting forth the following allegations as defense:

> "Further answering, these defendants say that during the time said notice of election was being published, the voters of the City of Lima were further notified of said election by circulars, newspaper advertisements and articles which were distributed among the voters, advising them of the proper tax levy outside of the fifteen mill limitation that was necessary to retire said bonds, as well as public speeches being made for and against said bond issue; that all acts that were done were done

in good faith and without any collusion, deceit or fraud being practiced upon any voter."

Thereafter, an agreed statement of facts was filed, which is as follows:

"It is stipulated and agreed that the facts herein are as follows: The allegations contained in the petition are true; The allegations contained in the answer are true; There was a strict compliance, in all particulars, with the Statute in such cases made and provided in and about the matter of the bonds referred to in the petition, their authorization and issuance, except as indicated in the petition; There was an active, vigorous campaign conducted prior to the election, by means of circulars, newspaper advertisements, house to house canvassing, and speeches, and in the campaign, the circulars, newspaper advertisements and the oral presentation of the matter to the voters, it was represented that the additional tax levy would not amount to more than fifty cents per thousand dollars on taxable property, in round figures; The date upon which the election of the bond issue was held was also the date of the general election at which the voters attended."

Judgment was rendered for the defendants October 13, 1930, as disclosed in the journal entry, which is as follows:

"This 13th day of October, 1930, this cause came on to be heard upon the petition of plaintiff, the answer of the defendant, agreed statement of facts and the statements of counsel.

And the Court, upon consideration finds the allegations contained in plaintiff's petition insufficient to constitute a cause of action, and finds upon the issues joined, against the plaintiff and in favor of the defendants.

It is therefore ordered, adjudged and decreed that the injunction prayed for in plaintiff's petition be and the same hereby is denied and the petition of plaintiff dismissed at the cost of plaintiff."

The question then becomes one of whether or not there has been an adjudication of the matter of the electors having been notified as to the required levy outside of the fifteen mill limitation, to meet the interest and principal requirements of these bonds. It is alleged in the petition that during the time the notice of election was published, the voters were notified as to the correct levy by circulars, newspaper advertisements and articles which were distributed among the electorate as well as by public speeches which were made for and against the bond issue. These specific allegations which should have been at issue to properly determine the validity of the election, were not in fact at issue. They were all agreed to by the defendants in the agreed statement of facts. Had these vital questions of fact been put in issue, the doctrine of *res judicata* would apply. The Supreme Court in the case of *Quinn* v. *State, ex rel.,* 118 O. S. 48, quoted from the case of *So. Pac. Rd. Co.* v. *U. S.,* 168 U. S. 1, as follows:

" 'The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as gound of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be

taken as conclusively established, so long as the judgment in the first suit remains unmodified.' "

As hereinabove indicated, however, the questions of fact, which it was necessary to adjudicate in order to establish the validity of the election, were not "distinctly put in issue and directly determined by a court of competent jurisdiction."

This judgment may very properly be said, therefore, to constitute no bar to another taxpayer's suit predicated upon lack of notice as to the levy necessary to pay the bonds. In the case of *Hughes* v. *U. S.*, 4 Wall. 232, 18 L. Ed. 303, the second and third paragraphs of the headnotes are as follows:

> "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits.
>
> If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

Also pertinent is the case of *Lawrence Mfg. Co.* v. *Janesville Cotton Mills*, 138 U. S. 552, 34 L. Ed. 1005, in which case the court held as disclosed by the first and second branches of the headnotes:

> "1. Where a party comes into a court of equity to obtain its aid in executing a former decree of the court, the court may open up such decree in order to inquire whether circumstances justified the relief granted by it; in such case it devolves upon such party to show that the decree was a right decree.
>
> 2. Where a party returns to a court of chancery to hve the benefit of its former decree and the prior decree was the consequence of the consent of the parties, and not of the judgment of the court, the court may decline to treat it as *res adjudicata.*"

In view of the foregoing, it is my opinion that the action seeking to adjudicate the question of the validity of the election under consideration may not bar a further action by any other taxpayer predicated upon the grounds that there was no notice given other than the published statutory notice. It may well be contended that this question has not been in issue and determined by the court I therefore advise you not to purchase these notes.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3731.

APPROVAL, BONDS OF MONROE COUNTY, OHIO—$28,090.00.

COLUMBUS, OHIO, November 5, 1931.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.