1821.

APPROVAL, BONDS OF BETHEL TOWNSHIP, MONROE COUNTY, OHIO —$10,000.00.

COLUMBUS, OHIO, March 7, 1928.

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

1822.

APPROVAL, BONDS OF ADAMS TOWNSHIP, MONROE COUNTY, OHIO —$7,500.00.

COLUMBUS, OHIO, March 7, 1928.

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

1823.

COUNTY COMMISSIONERS—NO JURISDICTION IN INCREASING LICENSE FEES FOR DOGS AND DOG KENNELS—LAWS FOR FIXING FEES—AUTHORITY TO PURCHASE AUTOMOBILE FOR DOG WARDEN OR DEPUTIES.

SYLLABUS:

1. *A Board of County Commissioners is without jurisdiction to increase license fees for dogs and dog kennels, as provided by Section 5652-7a, General Code, except when, in any year, there is not sufficient money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs during that year.*

2. *Claims allowed in former years but unpaid cannot be considered as a basis for determining whether or not a deficit exists in the dog and kennel fund in any current year. Section 5652-7a, General Code, is applicable only when, in any year, there is not sufficient money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs during that year.*

3. *When a Board of County Commissioners increases the schedule of fees for dog and kennel licenses without lawful authority so to do, any moneys paid for the registration of dogs and dog kennels under such illegal schedule is, in law, an involuntary payment; and persons, who paid the illegal license fee, have a claim against the county for any amount so paid in excess of the legal fee.*

4. *By the terms of Section 2412-1, General Code, a Board of County Commissioners has authority to purchase a motor vehicle or vehicles, with the approval of a judge of the Court of Common Pleas, for their use or for the use of any department under their direct control. Such board has authority to place such a vehicle at the disposal of a county dog warden or deputies upon such regulations as such board may prescribe in order that the dog warden or deputies, if any, may carry out the duties imposed by law. The purchase price of such a vehicle must be appropriated out of the general fund of the county in accordance with law.*

COLUMBUS, OHIO, March 7, 1928.

HON. RAYMOND B. BENNETT, *Prosecuting Attorney, Medina, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads:

"After paying the 1927 animal claims and other proper charges, the Board of County Commissioners of Medina County found that there remained a balance in the Dog and Kennel fund amounting to about $300.00; but that animal claims of the years 1925 and 1926 amounting to $2,500.00 remained unpaid. The board passed a resolution December 5, 1927, raising the fees, a copy of which resolution is hereto attached.

(a) Had the board the right to increase the licenses, and if not,

(b) In what manner should the mistake be corrected?

The County Commissioners are paying the dog warden mileage, for the use of his auto. They contemplate purchasing an auto for the use of the dog warden.

(a) Do they have the right to purchase the auto for the use of the dog warden?"

The resolution of the Board of County Commissioners of Medina County to which you refer, reads:

"DOG AND KENNEL LICENSE FEES DETERMINED.

WHEREAS, The Board of County Commissioners of the County of Medina, Ohio, in Special Session this day, (December 5, 1927), for the purpose of considering animal claims for the year 1927, and also for the purpose of determining and fixing dog and kennel license fees for the year 1928, and

WHEREAS, After a fair and full discussion of the financial aspect of the situation which disclosed the fact that a considerable amount remains unpaid on claims for the years 1925-1926.

THEREFORE, Be It Resolved, By the Board of County Commissioners of the County of Medina, Ohio, that in accordance to the provisions of Section 5652-7a of the General Code of Ohio, that the dog and kennel license fees for the year 1928 be fixed as follows, to-wit: Male Dogs—$1.50; Female Dogs—$4.50; Kennel License—$15.00.

Commissioner Dunn moved the adoption of the resolution which was duly seconded by Commissioner Overholt.

Roll Call—Mr. Ewing, aye; Mr. Dunn, aye; Mr. Overholt, aye.

Nays—None.

PASSED DECEMBER 5, 1928. RECORDED AT PAGE 274, Commissioners Jr. "15.

ATTEST: L. F. GARVER,
CLERK, BOARD COUNTY COMMISSIONERS,
MEDINA COUNTY, OHIO."

With reference to the first question presented, your attention is directed to Section 5652-7a, General Code, which provides:

"If in any year there should not be sufficient money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs, the county commissioners between December 1st and December 15th shall ascertain the number of claims entered and the amount of money allowed for live stock injured and destroyed, and, also the total expense incurred by the administration of the dog law, such commissioners shall also ascertain the amount received for dog and kennel licenses. The license fees for the ensuing year shall then be fixed at such an amount that when multiplied by the number of licenses issued during the previous year the product will equal the aggregate of the claims for injured and destroyed live stock allowed by said county commissioners, plus the balance of said allowed claims remaining unpaid, plus the expense of administration. The increase in said license fee shall always be in the ratio of one dollar for male or spayed female dogs, three dollars for unspayed female dogs and ten dollars for a dog kennel license."

This section was construed in Opinion No. 1351, dated December 12, 1927, addressed to the Prosecuting Attorney of Morgan County, the second and third paragraphs of the syllabus reading:

"2. Section 5652-7a, General Code, is applicable only when, in any year, there is not sufficient money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs during that year.

3. Claims allowed in former years but unpaid cannot be considered as a basis for determining whether or not a deficit exists in the dog and kennel fund in any current year. Such claims can be paid only when a surplus exists in the dog and kennel fund after the expenses of administration and the claims allowed for such current year have been paid."

You will note that the provisions of Section 5652-7a, supra, are applicable only when, in any year, there is not sufficient money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs during *that year*. In other words, the jurisdiction of a board of county commissioners to fix increased license fees for the registration of dogs and dog kennels for any year next ensuing only exists where there is a lack of money in the dog and kennel fund, after paying the expenses of administration, to pay the claims allowed for live stock injured or destroyed by dogs during that cur-

rent year. Claims allowed in former years but unpaid cannot be considered as a basis for determining whether or not a deficit exists in the dog and kennel fund in any current year.

Answering your first question specifically, it is my opinion that, since there was sufficient money in the dog and kennel fund to pay the cost of administration and the claims allowed for live stock injured or destroyed in 1927, the Board of County Commissioners of Medina County was without authority to fix increased license fees for the registration of dogs and dog kennels for the year 1928.

You next inquire in what manner the mistake should be corrected. The obvious course for the board to pursue would be to rescind the resolution of December 5, 1927, which attempts to increase the registration fees provided by Section 5652, General Code.

You inform me that a large number of licenses have been sold, the fees paid therefor being in the amount fixed by the resolution of December 5, 1927, supra.

What, if anything, should be done with the amounts so collected in excess of the proper fees that should have been charged is a question not without difficulty.

Your attention is directed to 17 Ruling Case Law 552, wherein the following language appears:

> "It is a general rule that a license tax exacted by a municipality for the privilege of following a vocation or conducting a business, if voluntarily paid, cannot be recovered back on the ground of the illegality of the tax. If there is no coercion, no mistake of facts, but only ignorance of the law, the case falls within the rule of voluntary payments. Under this rule the illegality of the demand paid constitutes of itself no ground for relief, but there must be, in addition, some compulsion or coercion attending its assertion which controls the conduct of the party making the payment. That a mere protest is made is held insufficient under the general rule to render involuntary a payment of an illegal tax, for, in addition to a protest, to entitle a person to recover back money so paid it must have been exacted under a threat of prosecution or other coercion. Following the general rule, though payment is made under protest, it is not to be deemed compulsory where the only means of enforcing the penalty of fine and imprisonment is by an ordinary judicial proceeding, giving the party opportunity to make his defense. Many jurisdictions refuse to follow the more general rule into its labyrinth of rigid and often unjust technicalities. And so it has been asserted that where a city council exceeds its authority in making a tax assessment, and demands and receives more than the charter permits, which was paid under pressure of the summary remedies prescribed for collection, and of a heavy penalty for nonpayment, it is against good conscience to retain the money, and an action will lie to recover it back. Similarly, a rule is declared that when a tax has been paid under protest, and such tax is illegal, the taxpayer may recover it by action; and in a number of jurisdictions this right is given by statute. A rule is stated to the effect that if at the time the demand is made the collector is armed with authority of law to seize the goods or arrest the party if the tax is not paid, and the party objects to its collection because of its illegality, but pays to prevent a seizure of his goods or the arrest of his person, the payment is compulsory and may be recovered back. But, even under this rule, if no duress of person or of property was threatened, and the payments were voluntarily made, the complainant is not entitled to recover. The legality of a city ordinance requiring payment of money for licenses, and imposing a heavy penalty for a violation, may be tested by the party making payment, in an action to recover back the money. But it

would be most mischievous to bring an action to recover back money so paid, after it has been expended on the assumption that it was lawfully acquired, and particularly after the payment of it may have been acquiesced in for a long period of time. Of course where the tax is not illegal or unauthorized, it is a matter of no consequence as to whether payment is voluntarily or involuntarily made, since under such conditions it may not be recovered back."

Scores of cases might be cited which discuss whether or not a payment of a license fee unlawfully exacted under color or authority was voluntary or involuntary.

Both views are to the effect that in order to render a payment involuntary there must be duress or compulsion.

What constitutes duress or compulsion sufficient to make a payment involuntary is a question often determined in the light of the particular facts of a case.

In the case of *Mays* vs. *City of Cincinnati,* 1 O. S. 268, the eighth and ninth paragraphs of the syllabus read:

"8. Money paid to procure license, when issued upon the petition of the party, without objection or protest, is, in the legal sense, a voluntary payment, and cannot be recovered back.

9. To make the payment of an illegal demand involuntary, it must be made to appear that it was made to release the person or property of the party from detention, or to prevent a seizure of either by the other party having apparent authority to do so without resorting to an action at law."

Judge Ranney, who rendered the opinion of the Court, on page 278, used the following language:

"These ordinances being illegal and void, our remaining inquiry is, can the plaintiff recover the money he paid to obtain the licenses in this action for money had and received? * * * Was the payment, in the legal sense, voluntary or involuntary? * * * This unbroken chain of authority seems to warrant the conclusion, that a payment of money upon an illegal or unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it. But where he can only be reached by a proceeding at law he is bound to make his defense in the first instance; and he cannot postpone the litigation by paying the demand in silence, and afterward suing to recover it back."

In the case of *Baker* vs. *City of Cincinnati,* 11 O. S. 534, the case of *Mays* vs. *Cincinnati,* supra, was explained and qualified. The first paragraph of the syllabus reads as follows:

"1. A payment may be, under circumstances, involuntary, and an action be brought to recover back the money, when the position or interests of the party are such as to require from another the performance of a duty enjoined by law, and he is illegally compelled to pay the money to induce such performance."

In the opinion, it was said as follows at pages 538 and 539:

"The most usual cases of involuntary payment, entitling a party to an action, are those made to redeem or preserve one's person or goods. But are they the only cases? After an examination of the authorities, we think that there are other cases, and that the statement which has been cited from *Mays* vs. *Cincinnati* should be qualified.

In the case of *Parker* vs. *The Great Western Railway Company,* 7 M. and G. 253, the company made extra charges for the carriage of goods, to which they were not entitled, and which, under the act of Parliament, were illegal. An action was brought to recover the amount of such extra charges, and it was argued for the defendants, as stated by the court, 'that the payments were made involuntarily, with full knowledge of the circumstances, and that the plaintiff was not compelled to make those payments; but, in each case, must be considered as having made a contract with the company to pay them a certain sum of money as the consideration for the carriage of his goods; and that having made such contracts, he can not now retract, and recover the money paid in pursuance of them.' 'On the other side, it was urged, that these could not be considered as voluntary payments; that the parties were not on an equal footing; that the defendants would not, until such payments were made, perform that service for the plaintiff which he was entitled by law to receive from them without making such payments; and that, consequently, he was acting under coercion.' And the court said: 'We are of opinion that the payments were not voluntary. They were made in order to induce the company to do that which they were bound to do without them; and for the refusal to do which, an action on the case might have been maintained."

"The case of *Morgan* vs. *Palmer* is very analogous to the present. The money was paid on obtaining a license; and it was held to have been illegally exacted. To the objection that the payment was voluntary, it was said by one of the judges: 'I agree that such a consequence would have followed, had the parties been on equal terms. But if one party has the power of saying to the other, "that which you require shall not be done except upon conditions which I choose to impose," no person can contend that they stand upon anything like an equal footing.' * * * These cases show that money may be properly held to have been paid involuntarily, or under coercion, where the position or interests of a party were such as to require from another the performance of a duty enjoined by law, and he was illegally compelled to pay the money to induce such performance. Undue advantage is not to be taken of the party's situation. There are other cases to which no express reference need be made, which sustain the same view. *Dew* vs. *Parsons,* 18 Eng. Com. L. 87; *Colwell* vs. *Piden,* 3 Watts, 327, 328; *Boston and Sandwich Glass Co.* vs. *City of Boston,* 4 Metc. 181, 188; *County of LaSalle* vs. *Simons,* 5 Gilman, 513."

Sections 5652, 5652-1 and 5652-2, General Code, impose a duty upon every person who owns, keeps or harbors a dog over three months of age, or a kennel of dogs bred or kept for sale, to file an application for registration for such dog or kennel together with the registration fees therein provided. In certain instances a penalty is imposed if such application be not filed on or before a specified date.

Section 5652-7, General Code, authorizes dog wardens and deputies to seize and impound on sight all dogs more than three months of age, found not wearing a valid registration tag. Dogs so seized and impounded, as provided by Section 5652-9, General Code, shall either be sold or humanely destroyed if not redeemed within three days.

Section 5652-10, General Code, provides a schedule of costs assessed against every dog seized and impounded under the provisions of this act, which costs may be re-

covered by the county treasurer in a civil action against the owner, keeper or harborer of such dog.

As provided by Section 5652-11, General Code, such owner, keeper or harborer of any dog seized and impounded under the provisions of this act, at any time prior to the expiration of three days from the time such animal is impounded may redeem the same by paying all the costs assessed against such animal and providing such animal with a valid registration tag.

Section 5652-14, General Code, provides:

> "Whoever, being the owner, keeper or harborer of a dog more than three months of age or being the owner of a dog kennel fails to file the application for registration required by law, or to pay the *legal* fee therefor, shall be fined not less than ten nor more than twenty-five dollars, and the costs of prosecution. Whoever obstructs or interferes with any one lawfully engaged in capturing an unlicensed dog or making examination of a dog wearing a tag shall be fined not less than ten dollars nor more than one hundred dollars."

Under the resolution in question any owner, keeper or harborer of a dog more than three months of age, or owner of a dog kennel, in order to obtain registration for such dog or dog kennel, was required to pay a fee therefor as determined by the board of county commissioners. Upon his failure or refusal so to do any dog owned, kept or harbored by such person was subject to seizure by the county dog warden or deputies.

Unless the application was filed and the fees fixed by the commissioners were paid, the county auditor would refuse to issue a license and to furnish the license tag required by law to be worn by the dog. That is, unless the excessive and unlawful fees were paid, the necessary license and license tag could not be obtained, and the owner was in constant jeopardy of suffering all the penalties above enumerated.

In view of this fact and applying the rules of law laid down in the Mays and Baker cases, supra, it is my opinion that the better view would be that any fees paid for registration of dogs or dog kennels, under the increased rate as provided by the Board of County Commissioners, were paid involuntarily. In other words, any fees paid were paid to secure the required license and license tag so as to avoid the penalties provided by law and to prevent a seizure of the property of the payer by an officer having apparent authority to do so without resorting to an action at law, and the circumstances of the case were such as to come within the rule stated in the Baker case, supra.

In view of the foregoing it is my opinion that inasmuch as the license fees were paid involuntarily the payer thereof is entitled to a return of so much thereof as is in excess of the legal registration fees, and each and every person who paid the illegal license fee has a valid claim against the county for any amount so paid in excess of the legal fee.

Authority exists in boards of county commissioners to entertain and pass upon claims, which, for some amount, may be the subject of legal demand against the county; that is, such boards may properly pass upon the amount which ought to be paid upon a claim against the county, where in law a claim may exist. To this effect see the case of *Jones, Auditor* vs. *Commissioners,* 57 O. S. 189, the first branch of the syllabus of which reads as follows:

> "1. The board of county commissioners represents the county, in respect to its financial affairs, only so far as authority is given to it by statute. It may pass upon and adjudicate claims against the county for services in a matter,

which, under the statutes, may be the subject of a legal claim against the county. But it is without jurisdiction to entertain or adjudicate claims which in themselves are wholly illegal and of such a nature as not to form the subject of a valid claim for any amount. And an attempt by the board to allow a claim of such character will not bind the county."

On page 216 Judge Spear said:

"Giving this construction to the statutes, we conclude that the board, being a creature of statute, an agent whose powers are not general, but special, should be held to represent the county in respect to its financial affairs, only in such matters as are distinctly provided by statute. Authority is thus given to it to entertain and pass upon claims, which, for some amount, may be the subject of legal demand against the county. Its jurisdiction being thus necessarily limited, is not of such a character as to permit a finding of jurisdiction by the board to be conclusive of the fact. Speaking more specifically, the board may properly pass upon a question whether in fact a given service has been rendered, and upon the amount which ought to be paid upon an unliquidated claim, where in law a claim may exist, i. e., where it has a legal basis on which to stand. But it is wholly without authority to sanctify a demand illegal because of being upon a subject which can admit of no claim, and thus give away the people's money. It can no more do so than can any other agent bind his principal by acts unauthorized because without the scope of his authority."

It is my opinion that each person who paid the illegal registration fee may present a claim to the Board of County Commissioners of Medina County for such amount so collected in excess of the proper fees that should have been charged. Such board may take such action as it deems proper in all owing or disallowing such claims as are so presented. In this connection your attention is directed to Section 2460, General Code, which provides:

"No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim. No public money shall be disbursed by the county commissioners, or any of them, but shall be disbursed by the county treasurer, upon the warrant of the county auditor, specifying the name of the party entitled thereto, on what account, and upon whose allowance, if not fixed by law."

The question presented by your third inquiry was recently considered by this office in an opinion addressed to the Bureau of Inspection and Supervision of Public Offices, being Opinion No. 1553, dated January 9, 1928, the syllabus of which reads as follows:

"By the terms of Section 2412-1, General Code, a board of county commissioners has authority to purchase a motor vehicle or vehicles, with the approval of a judge of the Court of Common Pleas, for their use or for the use of any department under their direct control. Such board has authority to place such a vehicle at the disposal of a county dog warden or deputies

upon such regulations as such board may prescribe in order that the dog warden or deputies, if any, may carry out the duties imposed by law. The purchase price of such a vehicle must be appropriated out of the general fund of the county in accordance with law."

I am enclosing herewith a copy of this opinion.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1824.

ESTATE—SETTLEMENT WITH ADMINISTRATOR.

COLUMBUS, OHIO, March 7, 1928.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your recent communication, in which you ask me to advise you whether you have the authority to accept settlement along the lines proposed in a letter which you enclosed. The accompanying letter is from the administrator of an estate and reports the facts pertaining to the estate in question, showing a balance of $1,590.76 remaining after payment of claims entitled to priority. The claims of general creditors are shown to amount to $11,256.75. In view of the situation, the administrator offers to pay fourteen per cent in settlement of claims of general creditors; otherwise he will be compelled to have the estate declared insolvent, which will result in further delay and will reduce the amount available for final distribution to each creditor.

Upon further inquiry from you, you supplemented your letter with the following:

"The matter to which we referred pertains to a finding that one of our examiners made against L. M. S., a justice of the peace, at --------, Ohio, who later suicided with an estate which is insolvent. There is now before us a proposal on the part of his executor for us to join with other claimants including county commissioners and township trustees in accepting a settlement of the above claim on a 14% basis. We are advised that otherwise, the estate being declared insolvent, we would probably realize little or nothing."

I have further learned that the aggregate of the finding made by the Bureau of Inspection and Supervision of Public Offices against the officer in question amounted to $10,551.70, and that the officer had furnished a bond with a surety company as surety in the sum of $1,000.00, no collection upon the bond having as yet been made.

By virtue of the provisions of Section 286 of the General Code, a finding of this character is furnished to the prosecuting attorney and it is his duty to take such steps as may be necessary to effect collection of the amount represented by the finding. I assume that the matter is referred to me in view of the following language in the section:

"No claim for money or property found in any such report to be due to any public treasury or custodian thereof in any such report shall be abated or